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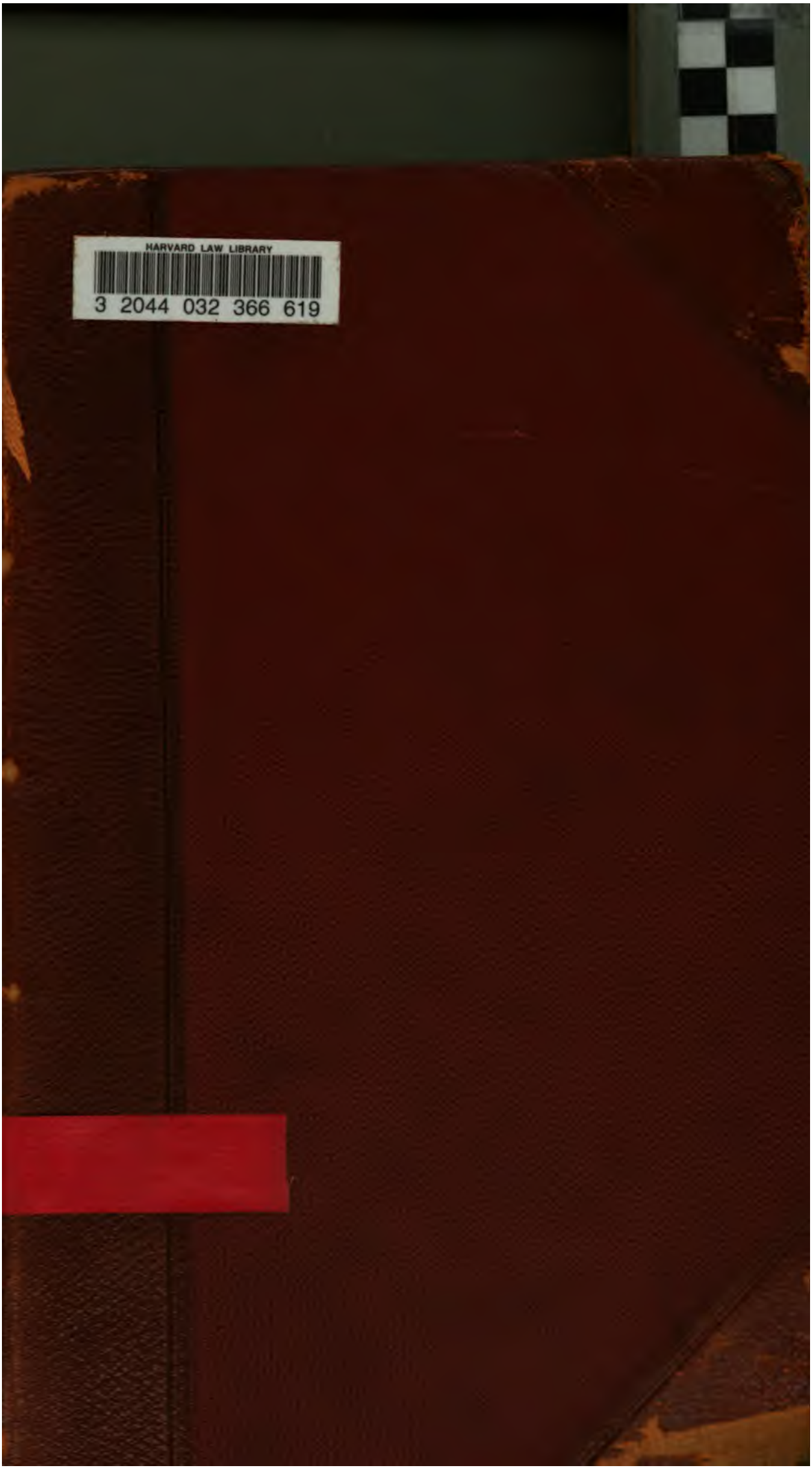
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CARSON'S

REAL PROPERTY STATUTES

COMPRISING, AMONG OTHERS,

THE STATUTES RELATING TO

PRESCRIPTION
LIMITATION OF ACTIONS
MARRIED WOMEN'S PROPERTY
PAYMENT OF DEBTS OUT OF REAL ESTATE
WILLS
JUDGMENTS
CONVEYANCING
SETTLED LAND
PARTITION
TRUSTEES

BEING

A Tenth Edition of

SHELFORD'S REAL PROPERTY STATUTES

BY

THOMAS H. CARSON,
OF LINCOLN'S INN, ONE OF HIS MAJESTY'S COUNSEL,
AND
HAROLD B. BOMPAS,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

THE title-page of the present Edition of the Real Property Statutes has, it will be seen, been altered. The Table of Editions printed at the foot of this Preface shows that the last Edition prepared by the late Mr. Shelford was published in 1863, after which date he took no further part in the work. The alterations made since that date have been such that it has been thought right to alter the title of the book.

As regards the Statutes included in the book, the legislation during the ten years which have elapsed since the publication of the Ninth Edition has necessitated considerable alterations and additions. Thus the sections contained in Part I. of the Land Transfer Act, 1897 (see pp. 417 to 428), have supplemented the previous Statutes dealing with the payment of the debts of a deceased person out of his real estate, and the machinery by which that payment was to be effected (the Debts Recovery Acts, 1830, 1839 and 1848; the Administration of Estates Act, 1833; the Law of Property Amendment Act, 1859, ss. 14 to 18). These important sections have now been inserted, together with references to the few reported cases in which the Courts have been called upon to interpret them.

The Land Charges Act, 1900, has also been inserted. The repeals effected by sect. 5 of that Act have rendered obsolete large portions of the previous Judgments Acts, which have accordingly been omitted. It is believed, however, that all material provisions now in force as to the effect of judgments in relation to land have been retained. An historical note has been added as to the previous legislation (pp. 509, 510).

Again, the Trustee Act, 1893, which has replaced the Trustee Act, 1850, has been inserted in the present Edition; and in view of the important cases decided under sect. 3 of the Judicial Trustees Act, 1896, that Act and a short note of those cases have been added (see pp. 806 to 808).

The subject of settled land has not been further dealt with by the Legislature since the publication of the last Edition; but the body of case law decided upon the existing Statutes has received considerable additions, which have been inserted.

Lastly, it will be seen that the Statutes have been arranged in a somewhat different, and it is hoped a more convenient, order; in addition to the full Table of Contents and Table of Statutes, short Tables of reference have been added giving the subject-matter of these Statutes alphabetically, and also in the order in which they occur in the book (see pp. viii, vii).

As regards the notes on general law appended to the Prescription Act, 1832, it was thought that the matter contained in the earlier notes could be rendered more available for use by re-arrangement. Accordingly the cases as to prescription at common law, as

to customs and usages, as to claims to profits *à prendre*, and as to licences in relation to real estate, have been separated (pp. 22 to 35); while the cases as to the presumption of lost grants (a doctrine which "in recent times has been applied more widely and to a greater variety of cases than formerly," *per* Channell, J., in *East Stonehouse Urban Council* v. *Willoughby Bros., Ltd.*, 1902, 2 K. B. 332) have been placed in separate notes (pp. 24, 25 and 121). A short statement has also been added as to rights of support (p. 92).

Besides the notes appended to the Prescription Act, 1832, the following notes on general law which occur in the book have been revised and developed, viz., the notes on the presumption of death (p. 153); on interest (p. 206); on estoppel (p. 279); on powers (pp. 290, 318); on separate use and restraint on anticipation (p. 320); on the distinction between the position of an executor and administrator (p. 136); and on the administration of assets (p. 399 *et seq.*), including the notes on an executor's right of retainer (p. 408), and on the words which charge debts or legacies on real estate (p. 411). In connection with the above-mentioned sections of the Land Transfer Act, 1897, general notes have been added as to the assent of the representatives of a deceased person to dispositions or devolutions of his estate; and as to appropriations in specie in satisfaction of legacies or shares (pp. 424—428). A collection of cases showing the questions decided under sect. 9 of the Vendor and Purchaser Act, 1874, will be found at p. 548.

By means of the Addenda (which should be noted up) the decided cases have been brought down to

November, 1902. It is believed that references to upwards of 2,000 new cases have been inserted in the present Edition.

In this, as in the previous Edition, I have to express my warm gratitude to Mr. HAROLD B. BOMPAS, of the Inner Temple, for the assistance he has rendered to me, and the ungrudging labour he has bestowed on the book. I have also to acknowledge the assistance which I have received from Mr. H. F. GREENLAND, of Lincoln's Inn.

THOMAS H. CARSON.

6, NEW SQUARE, LINCOLN'S INN,
November, 1902.

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	4th	1842
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c. 62 (Colonial Stock Act, 1900) 749

ADDENDA ET CORRIGENDA.

THE reader is requested to note the following in their proper places in the work:—

Page	Line	
10 25 93	2 34 49	*Union Co.* v. *London Dock Co.* Decision of Cozens-Hardy, J., affirmed in C. A. (Vaughan Williams, L. J., *dissentiente*), 1902, 2 Ch. 557.
12	58	*Add* "An agreement to pay rent for windows overlooking property included a skylight (*Easton* v. *Isted*, 1902, W. N. 68)."
24	35	Compare *Leigh Council* v. *King*, 1901, 1 Q. B. 753.
24	53	*Add* "In *East Stonehouse Council* v. *Willoughby*, 1902, 2 K. B. 332, Channell, J., refers to the doctrine as applying to cases of user and possession not covered by the Statutes of Prescription and Limitation. He suggests that an award might be presumed."
27 31	44 15	*Newcastle* v. *Worksop Council*, now reported 1902, 2 Ch. 145.
28	37	*Dele* "the word toll, &c.," *and substitute* "Payments made to the owner of the soil for stalls on fair days were held to be stallage, not fair tolls (*Newcastle* v. *Worksop Council*, 1902, 2 Ch. 145)."
44	18	*Palmer* v. *Thames Conservators*, now reported 1902, 1 Ch. 163.
56	43	*Add* "Where the fee simple in the whole site of the road was vested in the authority, they could restrain electric wires at any height (*Finchley Co.* v. *Finchley Council*, 1902, 1 Ch. 886)."
58	2	*Add* "Where the site of a road had been originally conveyed to turnpike trustees, the fee simple in the whole vested in the urban authority (*Finchley Co.* v. *Finchley Council*, 1902, 1 Ch. 886)."
64 78 100	10 19 last	*Add* "As to implying the reservation of an easement of necessity, see *Union Co.* v. *London Dock Co.*, 1902, 2 Ch. 557."
66 67	33 51	*Add* "A grant to a grantee, his executors, administrators and assigns, under-tenants and servants, extended to licensees (*Baxendale* v. *North Lambeth Club*, 1902, 2 Ch. 427)."
73	46	*Add* "But there is no right in underground water flowing in a defined but unknown course (*Bradford* v. *Ferrand*, 1902, 2 Ch. 655)."
85	34	*Add* "See *Anderson* v. *Oppenheimer*, 5 Q. B. Div. 602."

Page	Line	
89	23	*Add* "See *Palmer* v. *Thames Conservators*, 1902, 1 Ch. 163."
99	40	*Add* "A hoarding may be erected by a borough council on a metropolitan open space (*Boyce* v. *Paddington*, 1902, W. N. 201)."
100	48	*Add* "See *Quicke* v. *Chapman*, 1902, W. N. 163."
120	10	*Add* "The general doctrine of the immunity of the Crown may apply nowithstanding the insertion in the statute of a clause expressly exempting the Crown as to certain matters (*Hornsey Council* v. *Hennell*, 1902, 2 K. B. 81)."
122	27	As to presuming the inrolment at Quarter Sessions of a certificate of justices, see *Leigh Council* v. *King*, 1901, 1 Q. B. 755.
128	47	*Add* "As to the presumption applicable where a *cestui que trust* encroaches on other land included in the same settlement, see *East Stonehouse Council* v. *Willoughby*, 1902, 2 K. B. 334."
,,	59	After *Dixon* v. *Batey*, *add* "Compare *Smith* v. *Stocks*, 10 B. & S. 701."
131	10	*Smith* v. *Stocks*, also reported 10 B. & S. 701.
141	30	*Add* "As to a *cestui que trust* being tenant at will to his trustee, see further, *East Stonehouse Council* v. *Willoughby*, 1902, 2 K. B. 318."
163	15	*Add* "For the case where trustees by mistake permitted one *cestui que trust* to occupy land belonging to another *cestui que trust*, see *East Stonehouse Council* v. *Willoughby*, 1902, 2 K. B. 318."
170	27	*Add* "Where possession of mortgaged land was taken and held by the mortgagee for three years before his death, and after his death was retained by the tenant for life of his real and personal estate for a period sufficient to bar the mortgagor, the land devolved as personal not real estate (*Re Loveridge*, *Drayton* v. *Loveridge*, 1902, W. N. 165; 87 L. T. 294; see *Re Woodhead*, *Cadman* v. *Carr*, 1884, W. N. 174)."
179	29	
,,	41	*Add* "Where a trespasser acquired title by possession as against a tenant for years, who subsequently executed a surrender to the landlord, no right of entry as against the trespasser accrued to the landlord until the expiration of the term (*Walter* v. *Yalden*, 1902, 2 K. B. 304)."
180	17	*Add* "See *Walter* v. *Yalden*, 1902, 2 K. B. 304."
185	last	
186	24	*Add* "The reversion in fee expectant on a term of years has been held not to be a 'future estate or interest expectant on a particular estate' within the meaning of the proviso (*Walter* v. *Yalden*, 1902, 2 K. B. 304)."
192	4	*For* "1894, 1 Ch. 220," *read* "1894, 3 Ch. 220."
197	51	*For* "1859" *read* "1856."
209	10	*Re Davis*, *Davis* v. *Davis*, now reported 1902, 2 Ch. 314.
,,	35	*After Aylesford* v. *Morris*, *add* "See now Money Lenders Act, 1900."
210	44	*Add* "Interest at four per cent. was allowed on a debt claimed against the insolvent estate of a lunatic under a contract of indemnity given by him (*Re Hunt*, *Harvey's Claim*, 1902, 2 Ch. 318)."

Page	Line	
212	40	*Bradshaw* v. *Widdrington*, now reported 1902, 2 Ch. 430.
213	30	*For* "1871" *read* "1874."
221	42	*For* "1856" *read* "1879."
251	27	*Add* "And as to sub-section 3, see *Re Harrison*, *Allen* v. *Cort*, 1892, W. N. 148."
280	13	*Re Holland*, *Greg* v. *Holland*, now reported, before C. A. 1902, 2 Ch. 360. See p. 387.
,,	48	*Add* "In a lease of freeholds, it seems that operative words may pass by estoppel a subsequently acquired estate (*Goodtitle* v. *Morse*, 3 T. R. 371)."
,,	last	*Add* "See *Rimmer* v. *Webster*, 1902, 2 Ch. 173."
282	20	*Add* "See *Farquharson* v. *King*, 1902, A. C. 325; *Rimmer* v. *Webster*, 1902, 2 Ch. 171."
321	34	*Add* "And see *Re Bankes*, *Reynolds* v. *Ellis*, 1902, 2 Ch. 333."
361	37	*Crickitt* v. *Crickitt*, now reported 1902, P. 177.
401 418	47 31	*Add* "See *Re Harrowby and Paine*, 1902, W. N. 137."
402	15	*For* "8 Ves. 258" *read* "18 Ves. 258."
,,	54	*Re Maddock*, *Llewellyn* v. *Washington*, now reported 1902, 2 Ch. 220.
403	6	*Re Bate* not followed. *Re Roberts*, *R.* v. *R.*, 1902, W. N. 196.
,,	24	*After Re Hartley*, *Williams* v. *Jones*, *add* "See *Re Lawley*, *Zaiser* v. *Perkins*, 1902, 2 Ch. 673; and before C. A. 1902, W. N. 195."
405 422	54 13	*After Re Prince*, *Godwin* v. *Prince*, *add* "See *Brisco* v. *Baillie Hamilton*, 1902, P. 238."
421	17	*Add* "The rights and liabilities, under sub-section 2, of the administratrix of an equitable mortgagor of freeholds were said to include the right to redeem, and the liability to be sued in a foreclosure action; to which action the mortgagor-heir was held not to be a necessary party (*Re Harrowby and Paine*, 1902, W. N. 137)."
427	6	*After Re Walters*, *add* "See *Re Douglas and Powell*, 1902, 2 Ch. 296."
446	1	*After Fulton* v. *Andrew*, *add* "See *Brisco* v. *Baillie Hamilton*, 1902, P. 234."
448	23	*After Re Puddephatt*, *add* "See *Re Peverett*, 1902, P. 205."
449	41	*After Durham* v. *Northen*, *add* "See *Re Smart*, 1902, P. 238."
455	27	*After Re Tenney*, *add* "See *Kent* v. *Kent*, 1902, P. 108."
457	11	*After Treloar* v. *Lean*, *add* "See *Leonard* v. *Leonard*, 1902, P. 243."
465	1	*For* "any" *read* "my."
480	23	*For* "p. 457" *read* "p. 451."
488	57	*For* "8 Anne, c. 14," *read* "8 Anne, c. 18."
493	58	*After Howard* v. *Sadler*, *add* "See *Sutton* v. *English*, &c. *Co.* 1902, 2 Ch. 502."

Page	Line	
518	43	*After Robinson* v. *Kilvert, add* "See *Budd Scott* v. *Daniell*, 1902, 2 K. B. 351."
547 551	37 14	Questions as to the amount of vendor's costs on a sale should not be raised under the Act, the solicitor not being a party (*Re Webster and Jones*, 1902, 2 Ch. 551).
548	16	*After Moggridge* v. *Clapp, add* "See *Re Handman and Wilcox*, 1902, 1 Ch. 599; *Re Douglas and Powell*, 1902, 2 Ch. 296."
559	32	*Add* "See *Quicke* v. *Chapman*, 1902, W. N. 163."
568	22	*Add* "A lessor's covenant did not render assignees of the reversion liable for acts done by them on land adjoining the demised land, and to which adjoining land they had acquired an independent title subsequent to the lease (*Davies* v. *Town Properties Corporation*, 1902, 2 Ch. 635)."
580	45	A receiver appointed under the section by a mortgagee of leaseholds by sub-demise was not liable to pay rent to the head landlord. Sub-section 2 only applies as between mortgagor and mortgagee (*Hand* v. *Blow*, 1901, 2 Ch. 721).
660 688	57 52	*Add* "An appointment by deed of trustees of a compound settlement under a clause contained in one of the instruments constituting such settlement was invalid (*Re Hammond Spencer*, 1902, W. N. 200)."
677 690	13 39	*Re Hotham, Hotham* v. *Doughty.* Order of Cozens-Hardy, J., varied by C. A., 1902, 2 Ch. 575.
688	27	*Add* "See *Re Hammond Spencer*, 1902, W. N. 200."
701	23	*Re Llanover, Herbert* v. *Freshfield*, now reported 1902, 2 Ch. 679.
726	28	*For* "35 Ch. D. 209" *read* "38 Ch. D. 209."
749	31	*For* "1874" *read* "1877."

Statutes relating to Real Property.

PRESCRIPTION.

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I.—The Prescription Act, 1832.

2 & 3 Will. IV. c. 71.

An Act for shortening the Time of Prescription in certain Cases (a).
[1st August, 1832.]

§ 1. *Time limited for establishing rights of common and other profits à prendre*...1.
§ 2. *Ways, easements, and watercourses*...4.
§ 3. *Light*...10.
§ 4. *How periods of limitation are to be computed*...13.
§ 5. *Pleadings*...15.
§ 6. *Period less than that provided by statute not to be allowed*...18.
§ 7. *Saving in favour of persons under disabilities*...18.
§ 8. *Time excluded in computation of period of forty years*...19.

Whereas the expression "Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long

2 & 3 Will. 4, c. 71, s. 1.

2 & 3 Will. 4, c. 71, s. 1.

enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted,

Claim to right of common and other profits *à prendre* not to be defeated after thirty years' enjoyment by showing the commencement.

That no claim which may be lawfully made at the common law, by custom, prescription (*b*), or grant, to any right of common (*c*) or other profit or benefit, to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall (*d*), or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

After sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

(*a*) By 21 & 22 Vict. c. 42, this act was extended to Ireland.

(*b*) The reader is referred to Note II. at the end of this act (pp. 20 *et seq.*) dealing with the nature of prescription at common law; what things may or may not be claimed by prescription; how a right depending upon it may be lost; the difference between prescription and custom; and the modes of claiming profits *à prendre*.

(*c*) As to rights of common, see Note III. at the end of this act.

(*d*) The provisions of this act are not affected by the Act for limiting Actions and Suits by the Duke of Cornwall, in relation to Real Property (23 & 24 Vict. c. 53, s. 2).

(1) *Subject-matter of the Section*...2.
(2) *Enjoyment under the Section*...3.

(1) Subject-matter of the first section.

Prescriptive rights in gross (for instances of which see *Barrington's case*, 8 Rep. 136 b; *Welcome* v. *Upton*, 6 M. & W. 536; *Devonshire* v. *Pattinson*, 20 Q. B. Div. 263) are not within the scope of the statute (*Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687).

The first section relates to such claims as may be lawfully made at common law, by custom, prescription, or grant, to any *right of common or other profit or benefit* to be taken or enjoyed from or upon any land. Tithes, rent and services are excepted from this act. The Tithe Act, 1832, provides the limitation of time with respect to claims of a *modus decimandi*, or exemption from, or discharge of tithes (see Shelford's Tithe Acts, 3rd ed.; Leach's Tithe Acts, 5th ed.). The Real Property Lim. Acts, 1833 & 1874, *post*, limit the time within which actions and suits must be brought respecting tithes not belonging to a spiritual or eleemosynary corporation sole. The limitation of time for the recovery of tithes is not affected by the Tithe Act, 1836 (see s. 49).

The first section of this act includes different subjects from those in the second, and distinguishes between easements and common or profit *à prendre;* a different limitation is established for the former and latter

cases (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 167; *Lawson* v. *Langley*, 4 Ad. & Ell. 890; *Jones* v. *Richard*, 5 Ad. & Ell. 413). The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement, because the property in them remains common; but the right to take "*something out of the soil*" is a profit *à prendre*, and not an easement (*Manning* v. *Wasdale*, 5 Ad. & Ell. 764; *Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554; see *Sutherland* v. *Heathcote*, 1892, 1 Ch. 484). This section applies only to profits *à prendre* in the land of another, and has no application to a copyholder's acts on his copyhold tenement (*Hanmer* v. *Chance*, 4 D. J. & S. 626). **2 & 3 Will. 4, c. 71, s. 1.**

Profits *à prendre.*

The liberty of fowling has been decided to be a profit *à prendre* (*Davies' case*, 3 Mod. 246). The liberty to hunt is one species of *aucupium*, and the taking of birds by hawks seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit, and may carry them away (*Anon.*, Hardr. 407; *Fitzgerald* v. *Firbank*, 1897, 2 Ch. 96; see *Grove* v. *Portal*, 1902, 1 Ch. 727). The liberty of hunting is open to more question, as it does not of itself import the right to the animal when taken; and if it were a licence given to one individual, either on one occasion or for a time, or for his life, it would amount only to a mere personal licence of pleasure, to be exercised by the individual licensee. But in the case of a grant by deed—"of free liberty with servants or otherwise to enter lands and there to hunt, hawk, fish, and fowl"—to persons, "their heirs and assigns," where it is apparent that not merely the particular individual named, but any to whom they or their heirs choose to assign it should exercise the right, it has been considered that an interest or profit *à prendre*, was intended to be granted (*Wickham* v. *Hawker*, 7 M. & W. 78, 79; see *Hooper* v. *Clark*, L. R. 2 Q. B. 200). The property in animals *feræ naturæ*, while they are on the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth, and such a grant is a licence of a profit *à prendre*. Substantially it may be reserved by the owner of the fee simple when he alienates, although it is considered that, technically speaking, in such a case it is a re-grant of the right by the alienee of the fee simple to the alienor (*Ewart* v. *Graham*, 7 H. L. 344, 345; see *Houston* v. *Sligo*, 52 L. T. 870; 55 L. T. 614). A right to cut down and carry away trees growing in a close (*Bailey* v. *Stevens*, 12 C. B. N. S. 91), and a right to take stones and sand from the seashore (*Constable* v. *Nicholson*, 14 C. B. N. S. 230), have been held to be profits *à prendre*. A claim to cut and carry away litter was held established as a claim by prescription to a profit *à prendre* (*De la Warr* v. *Miles*, 17 Ch. Div. 535).

Profit *à prendre* in another's soil cannot be claimed by custom.

Except in the case of common claimed by copyholders a profit *à prendre* in another's soil cannot be claimed by custom, for this among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons like the inhabitants of a parish or other district who could not release the right (*A.-G.* v. *Mathias*, 4 K. & J. 591; *Constable* v. *Nicholson*, 14 C. B. N. S. 230; *Johnson* v. *Barnes*, L. R. 7 C. P. 604; *Bland* v. *Lipscombe*, 4 Ell. & Bl. 713, n. (*c*); *Allgood* v. *Gibson*, 34 L. T. 883; *Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554). Claims by custom on the part of "inhabitants" to profit *à prendre* in another's soil were held bad (*Chilton* v. *London*, 7 Ch. D. 735; *Rivers* v. *Adams*, 3 Ex. D. 361). Nor can such an indefinite class as "owners and occupiers" claim a profit *à prendre* by prescription (*Tilbury* v. *Silva*, 45 Ch. D. 98). But "inhabitants" were allowed to claim by custom a right to take water from a well, which was an easement (*Race* v. *Ward*, 4 E. & B. 702; *Smith* v. *Archibald*, 5 App. Cas. 489; see *Harrop* v. *Hirst*, L. R. 4 Exch. 43; *Dungarvan* v. *Mansfield*, 1897, 1 I. R. 420). See further as to claims to profits *à prendre*, the note, *post*, p. 34.

(2) Enjoyment under the section.

Before the passing of this act, a prescriptive claim was a claim of immemorial right; the evidence in support of it was such as a party might be able to give in such a case; and the jury were to draw their inference from

2 & 3 Will. 4, c. 71, s. 1.

such proof as could be produced. Now in the case of claims under the act, the proof is limited to thirty years. But the party must prove his right for that whole period, and no presumption will be drawn from evidence as to part of that period (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161, and note explanatory of case, *ib.* p. i). It was also held, that proof of his enjoyment of pasture for twenty-eight years did not include proof of the right of turning on cattle for twenty years; the latter right being an easement only, a right of a quite different nature. The enjoyment under this section must be enjoyment as of right (*De la Warr* v. *Miles*, 17 Ch. Div. 591; as to enjoyment as of right, see *post*, p. 9). A tenant accordingly cannot acquire any right under this section in other land belonging to his landlord (*Warburton* v. *Parke*, 2 H. & N. 64). Nor is an enjoyment sufficient which can be referred to an agreement in writing made by the owner of the servient tenement (*Lowry* v. *Crothers*, I. R. 5 C. L. 98); but where the acts were done as of right it was immaterial that they were done under a claim of an invalid custom (*De la Warr* v. *Miles*, 17 Ch. Div. 585). As to the nature of the evidence to be given in claiming a right under this section to common appurtenant, see *Commrs. of Sewers* v. *Glasse*, 19 Eq. 150, 151.

The plaintiff claiming a right of common by prescription in respect of his land, the defendant offered evidence that a person then deceased, while tenant of the plaintiff's land, had declared that he had no such right in respect of the land: but the declaration was held not admissible, inasmuch as it was a declaration by a tenant in derogation of the title of the reversioner (*Papendick* v. *Bridgwater*, 5 Ell. & Bl. 166; distinguish *Blandy Jenkins* v. *Dunraven*, 1899, 2 Ch. 121; and see *Scholes* v. *Chadwick*, 2 Moo. & R. 507; *Reg.* v. *Bliss*, 7 Ad. & Ell. 550).

This section of the act does not prevent a claim to a right of common, &c., from being defeated after thirty years' enjoyment, by showing that such right was first enjoyed at a time when it could not have originated legally. A claim to common over a forest, in respect of a tenement grounded on thirty years' enjoyment may be defeated by showing that the tenement has been inclosed from the waste only forty years, and that a grant of any right over the forest would have been void by statute (*Mill* v. *New Forest*, 18 C. B. 60).

As to the nature of the enjoyment requisite to support a claim under the act, see further the note to sect. 2, *post*.

Period of enjoyment.

The 1st section requires in the case of a right of common or a profit *à prendre* enjoyment "without interruption for the full period of thirty years"; the most undoubted exercise of enjoyment for twenty-nine years and three-quarters will not be sufficient (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 164; see *Flight* v. *Thomas*, 11 Ad. & Ell. 688; and compare *Battersea* v. *Commrs. of Sewers*, 1895, 2 Ch. 708). Taking the first, fourth, and fifth sections together, the period mentioned in the act is thirty years next before some suit or action in which the claim shall be brought into question (*Richards* v. *Fry*, 7 Ad. & Ell. 698; *Wright* v. *Williams*, 1 M. & W. 77). See further the note to sect. 4, *post*.

Pleading.

As to pleading the section, see the note to sect. 5, *post*, and the early cases of *Welcome* v. *Upton* (6 M. & W. 401), and *Jones* v. *Price* (3 Bing. N. C. 52).

In claims of right of way or other easement the periods to be twenty years and forty years.

2. No claim which may be lawfully made at the common law (*e*), by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned

shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

2 & 3 Will. 4, c. 71, s. 2.

(*e*) As to the modes of claiming an easement by prescription at common law, and by non-existing grant, which were used before the passing of this act, see Note II., *post*, p. 20. The act has provided an additional mode of claiming easements, but has not abolished the former modes (see *post*, p. 20). As to the law of ways, see *post*, p. 50; and as to watercourses, see *post*, p. 71. As to the right to a pew, which is an easement, see *post*, p. 94.

Modes of claiming easements.

(1) *Definition and nature of Easements*...5.
(2) *Subject-matter of the Section*...7.
(3) *Enjoyment under the Section*...8.

(1) Definition and nature of easements.

Easement is the general term for several species of liberties which one man may have in the soil of another without obtaining any interest in the land itself (Cro. Car. 419). Rights of accommodation in another's land, as distinguished from those which are directly profitable, are properly called *easements*. An easement (from the French word *aise*, i.e. *commoditas*) is defined to be a privilege that one neighbour hath of another by writing or prescription without profit, as a way, or a sink through his land, or such like (Kitch. 103; *Hewlins* v. *Shippam*, 5 B. & C. 229; see *Mounsey* v. *Ismay*, 3 H. & C. 497). "A servitude is a charge imposed upon one heritage for the use and advantage of a heritage belonging to another proprietor" (Code Civil, Art. 637). Easements are incorporeal rights (*Hewlins* v. *Shippam*, 5 B. & C. 221) imposed upon corporeal property, and not upon the owner of it, so that on the change of the owner of the servient tenement the right to the easement is still retained by the owner of the dominant tenement. There can be no easement, properly so called, unless there be both a servient and a dominant tenement (*Rangeley* v. *Midland R. Co.*, 3 Ch. 310; see *Hawkins* v. *Rutter*, 1892, 1 Q. B. 671). The *servient* tenement is that over which a right claimed by custom, prescription, or grant is exercised, and the *dominant* tenement is that to which such right is attached. An easement must be connected with the enjoyment of the dominant tenement (*Ackroyd* v. *Smith*, 10 C. B. 164); but may benefit other tenements (*Simpson* v. *Godmanchester*, 1897, A. C. 696). It must be an incident of a known and usual kind (*Hill* v. *Tupper*, 2 H. & C. 121; 11 W. R. 784). The public right of passage over a highway was said not to be a dominant tenement in respect of which they could acquire an easement of discharging water from the road on to other land (*A.-G.* v. *Copeland*, 1901, 2 K. B. 101; see *S. C.*, 1902, 1 K. B. 690). On the other hand, it has been said that a right of way may be appendant to a several fishery in gross (*Hanbury* v. *Jenkins*, 1901, 2 Ch. 401; see *Edgar* v. *Fishery Commrs.*, 23 L. T. 732). It is essential that the two tenements should belong to different owners; for upon both becoming absolutely vested in the same person the inferior right of easement is merged in the superior title of ownership (*Holmes* v. *Goring*, 2 Bing. 83). The owner of two tenements can have no easement over one of them in respect of the other (*Roe* v. *Siddons*, 22 Q. B. Div. 236; see *Bolton* v. *Bolton*, 11 Ch. D. 970).

Servient and dominant tenements.

2 & 3 Will. 4, c. 71, s. 2.

Where there is an unity of seisin of the land and of the way over the land in one person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way (*James* v. *Plant*, 4 Ad. & Ell. 761). Rent cannot issue out of a mere easement (*Buzzard* v. *Capel*, 8 B. & C. 141; 2 M. & R. 197; 6 Bing. 150; 3 M. & P. 480; 3 Y. & J. 344; *Re Gerard and Beecham*, 1894, 3 Ch. 315; see *Gardner* v. *Hodgson's Co.*, 1900, 1 Ch. 601; 1901, 2 Ch. 217). But payment of money in respect of an easement may be secured by agreement (see *Hastings* v. *N. E. R.*, 1898, 2 Ch. 674; 1899, 1 Ch. 656; 1900, A. C. 260); and where the easement is granted for a term the reversioner of the land may sue for the money (*Ib.*). See further, p. 117, *post*. A contract to grant a right of way was held to be a contract for the sale of real estate (*Rowe* v. *London School Board*, 36 Ch. D. 619; see *Jones* v. *Watts*, 43 Ch. D. 574). An easement to make a towing path on the soil of another is a real hereditament (*Hastings* v. *N. E. R.*, 1898, 2 Ch. 679).

Instances of easements.

There are an infinite number and variety of easements. The following may be enumerated:—Rights of way. Right to hang clothes on lines passing over the neighbouring soil (*Drewell* v. *Towler*, 3 B. & Ad. 735). The right to place telephone wires over neighbouring soil (*Lancashire Co.* v. *Manchester*, 14 Q. B. Div. 267; see *Wandsworth* v. *United Telephone Co.*, 13 Q. B. Div. 904; *Midland R. Co.* v. *Wright*, 1901, 1 Ch. 783). Right to move a timber traveller through air over neighbouring land (*Harris* v. *De Pinna*, 33 Ch. D. 251). The right to build so as to project over neighbouring land (*Lemmon* v. *Webb*, 1894, 3 Ch. 11, 18; 1895, A. C. 1, distinguishing the case of overhanging trees). The right of landing nets on another man's ground (*Gray* v. *Bond*, 2 Brod. & B. 667). Right to make spoil banks upon the surface in working mines (*Rogers* v. *Taylor*, 1 H. & N. 706; see *Ramsay* v. *Blair*, 1 App. Cas. 701); or quarries (*Middleton* v. *Clarence*, I. R. 11 C. L. 499). The right to use a close for the purpose of mixing muck and preparing manure thereon for an adjoining farm (*Pye* v. *Mumford*, 11 Q. B. 666). A right to place a pile in the soil of a river for the enjoyment of a wharf (*Lancaster* v. *Eve*, 5 C. B. N. S. 717; *Cory* v. *Greenwich*, L. R. 7 C. P. 499). A right to place a signpost on a common (*Hoare* v. *Metropolitan Board*, L. R. 9 Q. B. 296); or to affix a signboard to the walls of another's house (*Moody* v. *Steggles*, 12 Ch. D. 261); or to use a fascia on another's house (*Francis* v. *Hayward*, 22 Ch. Div. 177); or to place an advertisement hoarding on land (*R.* v. *S. Pancras*, 2 Q. B. D. 581). A right in the occupier of a messuage to water cattle at a pond, and to take water for domestic purposes (*Manning* v. *Wasdale*, 5 Ad. & Ell. 758; see *Fitch* v. *Rawling*, 2 H. Bl. 395). The right to go on a neighbour's close and to draw water from a spring there (*Race* v. *Ward*, 4 El. & Bl. 702); or from a pump (*Polden* v. *Bastard*, L. R. 1 Q. B. 156). The right to go on the soil of another to clear a mill stream and repair its banks (*Beeston* v. *Weate*, 5 E. & B. 996); or to fish (*Hanbury* v. *Jenkins*, 1901, 2 Ch. 401). The right to open locks on another's river (*Simpson* v. *Godmanchester*, 1897, A. C. 696). The right to conduct water across a neighbour's close by an artificial watercourse (*Beeston* v. *Weate*, *sup.*). Right to discharge polluted water into another's watercourse (*Wright* v. *Williams*, 1 M. & W. 77). Right to discharge rain-water by spout or projecting eaves (*Harvey* v. *Walters*, L. R. 8 C. P. 162). Right to receive light by ancient windows (*Tapling* v. *Jones*, 11 H. L. C. 290). The right to receive air by a defined channel (*Bass* v. *Gregory*, 25 Q. B. D. 481). Right to pollute air by smoke or otherwise (*Crump* v. *Lambert*, 3 Eq. 413). A right to use the chimney of another's house for the passage of smoke (*Hervey* v. *Smith*, 1 K. & J. 389; 22 Beav. 299; see *Tebb* v. *Cave*, 1900, 1 Ch. 643). A right of support from land (*Dalton* v. *Angus*, 6 App. Cas. 740); or from buildings (*Tone* v. *Preston*, 24 Ch. D. 739; *Waddington* v. *Naylor*, 60 L. T. 480).

A way over the land of another, a gateway, watercourse, or washing-place in another's ground, may be claimed by prescription as easements; but a multitude of persons cannot prescribe, though for an easement they may plead custom (Cro. Jac. 170; 3 Leon. 254; 3 Mod. 294). In *Goodday*

v. *Mitchell*, Cro. Eliz. 441, a way to a common fountain is mentioned as an easement claimable for parishioners by custom. See *Race* v. *Ward*, *sup.* The undertakers of a navigation, in whom the soil of the river is not vested, have a mere easement in the land through which it passes (9 B. & C. 109; *Hollis* v. *Goldfinch*, 1 B. & C. 205). The licence to make a vault in a parish church, and to have the sole and exclusive use of it, is an easement (*Bryan* v. *Whistler*, 8 B. & C. 288). The right to sit in a pew in a church annexed to a house is an easement (*Mainwaring* v. *Giles*, 5 B. & Ald. 361; *Hinde* v. *Chorlton*, L. R. 2 C. P. 104; *Brumfitt* v. *Roberts*, L. R. 5 C. P. 224; see *Crisp* v. *Martin*, 2 P. D. 15; *Halliday* v. *Phillips*, 23 Q. B. Div. 53). The right to a fishing weir in non-tidal waters may be claimed as an easement (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657). **2 & 3 Will. 4, c. 71, s. 2.**

(2) Subject-matter of the second section.

Under the 2nd section of the act, a prescription which was pleaded for a right every year, and at all times of the year, to turn cattle into a certain close, is too vague (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161).

The second section refers to easements properly so called, and to rights which are in some way appurtenant to a dominant tenement (*Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687). Accordingly, a custom for the freemen of a town to enter on another's land, to hold horse-races there, is not within the section (*Mounsey* v. *Ismay*, 3 H. & C. 486). The section extends to other easements besides ways and watercourses (*Dalton* v. *Angus*, 6 App. Cas. 798; *Simpson* v. *Godmanchester*, 1897, A. C. 709). Thus it extends to support for buildings from land (*Dalton* v. *Angus*, 6 App. Cas. 798), or from buildings (*Le Maitre* v. *Davies*, 19 Ch. D. 281); and to a right to open locks (*Simpson* v. *Godmanchester*, 1897, A. C. 696); and to easements of every description (*Ib.* 709); except light (*Perry* v. *Eames*, 1891, 1 Ch. 665; *Wheaton* v. *Maple*, 1893, 3 Ch. 48). A claim to a watercourse within this section includes a claim to send through another's watercourse polluted water (*Wright* v. *Williams*, 1 M. & M. 77); or sand and rubble (*Carlyon* v. *Lovering*, 1 H. & N. 784); also a claim to have water which would otherwise flow down to the plaintiff's land diverted over other land (*Mason* v. *Shrewsbury Co.*, L. R. 6 Q. B. 578; see *Staffordshire Co.* v. *Birmingham Co.*, L. R. 1 H. L. 254).

Easement must be susceptible of interruption.

It has been said that this section includes only such easements as are susceptible of interruption (*Webb* v. *Bird*, 10 C. B. N. S. 283; but see *Dalton* v. *Angus*, 6 App. Cas. 740). The owner of a windmill cannot under this section claim by twenty years' user a free passage of air to his mill (*Webb* v. *Bird*, *sup.*); nor can the right of access of air to chimneys over the unlimited surface of a neighbour be acquired (*Bryant* v. *Lefever*, 4 C. P. Div. 172; see as to the passage of air through a defined channel, *Bass* v. *Gregory*, 25 Q. B. D. 481; *Chastey* v. *Ackland*, 1895, 2 Ch. 389; 1897, A. C. 155). Nor can subterranean water percolating in no known channels be acquired as an easement by user (*Chasemore* v. *Richards*, 7 H. L. C. 349). Nor can the right to annoy neighbours by noise be acquired by user, unless during the user the noise has amounted to an actionable nuisance; the above principle applying to both affirmative and negative easements (*Sturges* v. *Bridgman*, 11 Ch. D. 852; see *Murgatroyd* v. *Robinson*, 7 E. & B. 391).

Right must be capable of being granted.

Where a claim is made under the act, the claimant must prove that the right might at the beginning of or during the user have been granted to him; and where such a grant would have been void the claim cannot be sustained (*Staffordshire Co.* v. *Birmingham Co.*, L. R. 1 H. L. 278). So a company incorporated for making a canal, and having powers under their act to take water for the canal, cannot acquire, under this section, a right to take water for any other purpose (*National Manure Co.* v. *Donald*, 4 H. & N. 8; see *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287; *Mill* v. *New Forest*, 18 C. B. 60, *ante*, p. 4). Compare the case of a grant by a railway company which was held to be *ultra vires* (*Mulliner* v. *Midland R. Co.*, 11 Ch. D. 611; see *Re Gonty and Manchester Co.*, 1896, 2 Q. B. 439; *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623).

2 & 3 Will. 4, c. 71, s. 2.

(3) Enjoyment under section.

Bright v. *Walker*.

Under the Prescription Act, 1832, an enjoyment of twenty years, which cannot give a good title against all having estates in the lands in question, will not confer any title at all, even as between the parties having partial interests under leases. Thus, where for more than twenty years the plaintiff, holding a lease from a bishop of one close, enjoyed without interruption a way over another close occupied by the defendant holding a lease under the same bishop, such enjoyment did not give to the plaintiff a right of way over the defendant's close (*Bright* v. *Walker*, 1 C. M. & R. 211). *Parke*, B., said, "In order to establish a right of way, and to bring the case within section 2 it must be proved that the claimant has enjoyed for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which, by section 5, such a claim must be pleaded, and the like evidence would have been required before this statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done; if he shall have occasionally asked the permission of the occupier of the land; no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed, 'as of right,' the 'easement,' but the soil itself. So it must have been enjoyed 'without interruption.' Again, such a claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and therefore it may be answered by proof of a grant or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. . . . But if the enjoyment take place with the acquiescence or laches of one who is tenant for life only, the question is, what is its effect, according to the true meaning of the statute? . . . Whatever construction is put on the seventh section, it admits of no doubt under the eighth. It is quite certain, that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the bishop, it certainly must from the shorter. Therefore, there is no doubt but that possession of twenty years gives no title as against the bishop, and cannot affect the right of the See. . . . On the fullest consideration we think that no title at all is gained by a user which does not give a valid title against all, and permanently affect the See.

No title gained by user which does not give valid title against all.

"Before the statute this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims. . . . But we think that since the statute such a qualified right is not given by an enjoyment for twenty years. For in the first place, the statute is for the shortening the time of *prescription*, and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. In the next place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute, valid as to some persons and invalid as to others. . . .

"Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss, by secondary evidence; nor prevent the jury from taking this possession into consideration, *with other circumstances*, as evidence of a grant which they may still find to have been made, if they are satisfied that it was made in point of fact" (*Ib.* 223). The act has not created a class of

easements which could not be gained by prescription at common law, or in other words, has not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement. Such easements can only be created since the act, as before the act, by grant or agreement (*Wheaton* v. *Maple*, 1893, 3 Ch. 65). 2 & 3 Will. 4, c. 71, s. 2.

Bright v. *Walker* was a decision on the part of the section relating to twenty years' enjoyment (see *Harris* v. *De Pinna*, 33 Ch. D. 251). And (apart from questions respecting light under section 3; as to which, see p. 12, *post*) it is clear in general that the tenant of one close cannot as such acquire by twenty years' user a prescriptive easement over another close belonging to the same landlord (*Gayford* v. *Moffatt*, 4 Ch. 133; *Russell* v. *Harford*, 2 Eq. 507; *Bayley* v. *G. W. R.*, 26 Ch. D. 441; *Daniel* v. *Anderson*, 31 L. J. Ch. 610; see *per Jessel*, M.R., *Sturges* v. *Bridgman*, 11 Ch. D. 855; as to the presumption of a grant in such a case, see *Timmons* v. *Hewitt*, 22 L. R. Ir. 627). Where, however, the user extended to forty years, it was held under similar circumstances that an easement could be acquired (*Beggan* v. *Macdonald*, 2 L. R. Ir. 560; *Fahey* v. *Dwyer*, 4 L. R. Ir. 271, approved by *Chitty*, J., *Harris* v. *De Pinna*, 33 Ch. D. 252).

Easement must have been enjoyed as such.

The enjoyment of an easement as of right for twenty years next before the commencement of the suit, within this statute, means a *continuous* enjoyment as of right for twenty years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the period of enjoyment, although such unity of possession has its inception after the completion of the twenty or forty years (*Battishill* v. *Reed*, 18 C. B. 696). Where a plaintiff had enjoyed a way as of right and without interruption from 1800 to 1855, when the action was brought, it was held, that his claim under this statute was defeated by an unity of possession from 1843 to 1853 (*Ib.*). And such unity of possession need not be specially replied under the 5th section (*Onley* v. *Gardiner*, 4 M. & W. 496; see *Monmouthshire Co.* v. *Harford*, 1 C. M. & R. 631; *Richards* v. *Fry*, 7 Ad. & Ell. 698). Easements were defeated by showing unity of possession in *Clay* v. *Thackrah*, 9 C. & P. 47, and *Wilson* v. *Stanley*, 12 Ir. C. L. Rep. N. S. 345. **Effect of unity of possession.**

Enjoyment as of right.

The words in section 5, "enjoyment as of right," must have the same sense as the words in section 2, "claiming right thereto" (*Tickle* v. *Brown*, 4 Ad. & Ell. 382). They do not mean rightful apart from the act (*Gardner* v. *Hodgson's Co.*, 1900, 1 Ch. 596). An enjoyment which the owner of the servient tenement cannot stop is not an enjoyment as of right (*Winship* v. *Hudspeth*, 10 Exch. 5; see *Sturges* v. *Bridgman*, 11 Ch. D. 852; *Sanders* v. *Manley*, 1878, W. N. 181). It was said by Lord *Denman* that the words "enjoyment thereof *as of right*," must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it; but an enjoyment had openly and notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea for twenty years (*Tickle* v. *Brown*, 4 Ad. & Ell. 369; see as to this dictum, *Gardner* v. *Hodgson's Co.*, 1900, 1 Ch. 599; 1901, 2 Ch. 217; and see *Beasley* v. *Clarke*, 2 Bing. N. C. 705; *Bright* v. *Walker*, 1 C. M. & R. 219; *ante*, p. 8; *Arkwright* v. *Gell*, 5 M. & W. 333). In the case of prescription, long enjoyments, in order to establish a right, must have been as of right, and therefore neither by violence nor by stealth, nor by leave asked from time to time (*Mills* v. *Colchester*, L. R. 2 C. P. 486; see *De la Warr* v. *Miles*, 17 Ch. Div. 591). The enjoyment must be "*nec per vim, nec clam, nec precario*" (Co. Litt. 113 b). It is not sufficient if it be "*clam*," as where there was

2 & 3 Will. 4, c. 71, s. 2.

no open and visible enjoyment of an unusual support for a dock from underground rods (*Union Co.* v. *London Dock Co.*, 1901, 2 Ch. 300); or if it be "*precario*," as in the case of an artificial watercourse constructed for a temporary purpose (*Burrows* v. *Lang*, 1901, 2 Ch. 502).

Where an easement was enjoyed during part of the period in exercise of a statutory right, and, the statutory right having ceased, the enjoyment was continued for the rest of the period, no easement was acquired (*Kinloch* v. *Neville*, 6 M. & W. 806). Where a watercourse was made and enjoyed by a tenant, the landlord and tenant both believing that this was authorized by the lease, there was no enjoyment as of right (*Chamber* v. *Hopwood*, 32 Ch. Div. 549). The use of waste water from a canal was held not to be an enjoyment as of right (*Staffordshire Co.* v. *Birmingham Co.*, L. R. 1 H. L. 254; compare *Bankart* v. *Tennant*, 10 Eq. 141; *McEvoy* v. *G. N. R.*, 1900, 2 Ir. R. 325). It was said by *Blackburn*, J., that *Wood* v. *Waud* (3 Ex. 748) was in effect a decision that an active enjoyment in fact for more than the statutable period is not an enjoyment as of right, if during the period it is known that it is only permitted so long as some particular purpose is served (*Mason* v. *Shrewsbury, &c. R. Co.*, 6 Q. B. 584; compare *Tone* v. *Preston*, 24 Ch. D. 739; see *Gaved* v. *Martyn*, 19 C. B. N. S. 732).

Where the simple issue is, whether there has been a continued enjoyment of a way for twenty years, any evidence negativing the continuance is admissible. "Every time that the occupiers asked for leave, they admitted that the former licence had expired, and that the continuance of the enjoyment was broken" (*Monmouthshire Co.* v. *Harford*, 1 C. M. & R. 615). In the case of twenty years' enjoyment it was said by *Alderson*, B., that if a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave be given from time to time within the twenty years (*Kinloch* v. *Neville*, 6 M. & W. 795). In the case of forty years' enjoyment, it was said by *Cozens-Hardy*, J., that a parol licence is of no moment unless applied for and granted within the period; in which case it may probably be used to negative the enjoyment as of right (*Gardner* v. *Hodgson's Co.*, 1900, 1 Ch. 600). Where annual payments were made by the plaintiff during the whole forty years, they were treated by the majority of the C. A. as having been made for permission to use the way during each successive year, and accordingly there was no claim as of right (*S. C.*, 1901, 2 Ch. 198).

Effect of interruptions.

No interruption for less than a year breaks the period when once the enjoyment as of right has begun. But interruptions acquiesced in for less than a year may show that the enjoyment never was of right (*Eaton* v. *Swansea Co.*, 17 Q. B. 275; see *Brook* v. *Archer*, 1868, W. N. 5). See further, as to interruptions in the enjoyment, the note to sect. 4, *post*.

Evidence of user.

To support a plea framed on the 2nd section of this statute, of a right of way enjoyed for forty years, evidence may be given of user more than forty years back (*Lawson* v. *Langley*, 4 Ad. & Ell. 890; see *Beeston* v. *Weate*, 5 E. & B. 986). As to pleading licences, see *Tickle* v. *Brown*, 4 Ad. & Ell. 369; *Davies* v. *Williams*, 16 Q. B. 546. See further, as to evidence of user, the note to sect. 4, *post*.

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

3. When the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing.

As to the law of light generally and the modes of claiming it apart from the act, see *post*, p. 99.

2 & 3 Will. 4, c. 71, s. 3.

(1) *Period of Twenty Years*...11.
(2) *Subject-matter of the Section*...11.
(3) *Nature of the Enjoyment*...11.
(4) *Custom of London*...12.

(1) Period of twenty years.

The period of twenty years is, by the 4th section, the period next before any action wherein the claim to the right was brought into question, and is not limited to the period next before the pending action (*Cooper* v. *Hubbuck*, 12 C. B. N. S. 456). If there has been an enjoyment for nineteen years and a fraction, and then an interruption takes place, the right may be established at the end of the twentieth year, inasmuch as the interruption, under the 4th section, in order to defeat the twenty years' user, must have been acquiesced in or submitted to for a whole year (*Flight* v. *Thomas*, 8 Cl. & Fin. 231). But the court will not interfere to protect the inchoate right before the expiration of the full twenty years (*Battersea* v. *Commissioners of Sewers*, 1895, 2 Ch. 708; *Bridewell* v. *Ward*, 62 L. J. Ch. 270). It was said that this right was not an interest in land or easement known to the law (*Greenhalgh* v. *Brindley*, 1901, 2 Ch. 328). Compare, however, the compensation granted in such a case (*Re London and Tilbury R. Co.*, 24 Q. B. Div. 326; *Barlow* v. *Ross*, *Ib.* 381.

(2) Subject-matter of the section.

No right can, under this section, be acquired as against the Crown which is not bound thereby (*Perry* v. *Eames*, 1891, 1 Ch. 658; *Wheaton* v. *Maple*, 1893, 3 Ch. 48). There can be no prescription under the statute for light to open ground forming a garden (*Potts* v. *Smith*, 6 Eq. 311). Compare the case of a timber yard (*Roberts* v. *Macord*, 1 M. & Rob. 230).

"Building."

Under the statute light must be claimed in respect of a "building" (*Scott* v. *Pape*, 31 Ch. Div. 554); and a structure for storing timber is not such a "building" (*Harris* v. *De Pinna*, 33 Ch. Div. 238). Before the act, light was held not acquired where the building was not permanent (*Maberley* v. *Dowson*, 5 L. J. (K. B.) 261). The right may be acquired for a church (*Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. 213; but see *Norfolk* v. *Arbuthnot*, 5 C. P. Div. 392); an unconsecrated chapel (*A. G.* v. *Queen Anne Co.*, 60 L. T. 759); a picture gallery (*Ib.*); a greenhouse (*Clifford* v. *Holt*, 1899, 1 Ch. 698). The building need not be occupied, or fit for occupation, during the period (*Courtauld* v. *Legh*, L. R. 4 Ex. 126; *Collis* v. *Laugher*, 1894, 3 Ch. 659). And even where the building has been pulled down, an injunction may be granted if the right has not been abandoned (*Ecclesiastical Commissioners* v. *Kino*, *sup.*). Structural identity between the building which acquires the right, and the building which, after the period, is to enjoy the right, is not necessary (*Scott* v. *Pape*, *sup.*).

"Access."

"Access," in the section, refers not to access through the aperture of the dominant tenement, but to freedom of passage over the servient tenement. The aperture defines the free area (*Scott* v. *Pape*, 31 Ch. Div. 554). The access must be by one and the same definite channel (*Harris* v. *De Pinna*, 33 Ch. Div. 238).

(3) Nature of the enjoyment.

"Actual enjoyment."

The question whether there has been an "actual enjoyment" of light is a question of fact depending on the circumstances of each case (*Smith* v. *Baxter*, 1900, 2 Ch. 138). Continuous user is not necessary (*Cooper* v. *Straker*, 40 Ch. 26). The owner of a building having windows with moveable shutters acquires the right if, during twenty years, he opens the shutters at any time he pleases (*Ib.*). Boarding over apertures for more than a year was such a discontinuance of user as prevented the acquisition of a right (*Smith* v. *Baxter*, *sup.*). See *Hollins* v. *Verney* (13 Q. B. Div. 314) and other cases, *post*, p. 13.

This section converts into a right such an enjoyment only of access of light over contiguous land as has been had for twenty years *in the character of an easement*, distinct from the enjoyment of the land itself (*Harbidge* v. *Warwick*, 3 Exch. 552). During a period of unity of occupation of the dominant and servient tenements the running of the twenty years is suspended (*Ladyman* v. *Grave*, 6 Ch. 763). There is no such unity of

2 & 3 Will. 4, c. 71, s. 3.

possession of the glebe and the church on the part of the rector as to prevent the acquisition of an easement of light for the church (*Ecclesiastical Commissioners* v. *Kino*, 14 Ch. Div. 213).

The actual enjoyment required by this section need not be as of right (*Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 855; *Frewen* v. *Phillips*, 11 C. B. N. S. 449).

Enjoyment as against tenant for life or years.

Before the act the acquiescence of lessees or tenants for life in the enjoyment of lights did not bind the landlord or reversioner, unless they had knowledge and acquiesced for twenty years (*Daniel* v. *North*, 11 East, 370, case of a tenant; *Barker* v. *Richardson*, 4 B. & Ald. 579, case of a rector; see also *Cross* v. *Lewis*, 2 B. & C. 686). Since the act it has been held that where the right to light is acquired against an owner of a leasehold interest, it is also acquired against the owner of the reversion (*Simper* v. *Foley*, 2 J. & H. 555; see *Harbidge* v. *Warwick*, 3 Exch. 557). *Pollock*, C.B., said it may be, since the Prescription Act, that if a man opens a light towards his neighbour's land, the reversioner may have no means of preventing a right thereto being acquired by a twenty years' enjoyment, unless he can prevail upon his tenant to raise an obstruction, or is able to procure from the other party an acknowledgment that the light is enjoyed only by consent (*Frewen* v. *Phillips*, 11 C. B. N. S. 455; and see *Ladyman* v. *Grave*, 6 Ch. 769).

The right to light cannot, under this section, be acquired for a term of years (*Wheaton* v. *Maple*, 1893, 3 Ch. 65). Where the servient tenement was occupied by a lessee, and the reversion on the lease was vested in the Crown (which was not bound by the section), no right was acquired against the Crown's lessee (*Ib.*).

Enjoyment by lessee for years.

With respect to enjoyment of light by a lessee for years, it is settled that where two tenements are held under several leases from the same landlord, one lessee can, under the section, acquire an indefeasible right to light over the adjoining tenement, not only as against the other lessee, but also against the lessor (*Frewen* v. *Phillips*, 11 C. B. N. S. 449; *Wheaton* v. *Maple*, 1893, 3 Ch. 65; *Robson* v. *Edwards*, 1893, 2 Ch. 146). A lessee was prevented from acquiring a right to light against his landlord by a reservation of the right to obstruct light contained in the lease (*Haynes* v. *King*, 1893, 3 Ch. 439); but not by the exception in the lease which occurred in *Mitchell* v. *Cantrill*, 37 Ch. Div. 56.

Interruption.

"Interruption" in the section bears the same meaning as in sect. 4, and refers to adverse obstruction, not discontinuance of user (*Smith* v. *Baxter*, 1900, 2 Ch. 138). A fluctuating interruption to light is not sufficient (*Presland* v. *Bingham*, 41 Ch. Div. 268). A hoarding for the purpose of an interruption may be erected by a railway company (*Bonner* v. *G. W. R.*, 24 Ch. Div. 1; see *Myers* v. *Catterson*, 43 Ch. Div. 470).

Payment of rent or verbal permission.

Mere payment of rent by the occupier of a house for the use of lights is not an interruption of the enjoyment within this section (*Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630; see *Gardner* v. *Hodgson's Co.*, 1901, 2 Ch. 215). An actual enjoyment of light for twenty years, even under a permission verbally asked for by the occupier of a house, and given by the person having a right to obstruct, is sufficient (*London* v. *Pewterers' Co.*, 2 M. & Rob. 409; see as to a verbal agreement, *Judge* v. *Lowe*, I. R. 7 C. L. 291). A writing signed by A., the owner of the dominant tenement, but not by B., the owner of the servient tenement, declaring that A. would at any time block up windows at B.'s request, and in the meantime would pay B. sixpence a year, was a sufficient "consent or agreement by writing" within this section (*Bewley* v. *Atkinson*, 13 Ch. Div. 283). So, in the case of a lessee claiming the right to light, a reservation in the lease of the right to obstruct was a sufficient "agreement" (*Haynes* v. *King*, 1893, 3 Ch. 439); but an exception in the lease of any right restricting the free use of adjoining land was not sufficient (*Mitchell* v. *Cantrill*, 37 Ch. Div. 56).

"Consent or agreement by writing."

(4) Custom of London.

By the custom of London (which is stated in the case of *Wynstanley* v. *Lee*, 2 Swanst. 339, 340; see *Perry* v. *Eames*, 1891, 1 Ch. 658), an

occupier of a house there had not an absolute property in the enjoyment of his share of light, whatever it might be, but the owner of the adjoining house or site of houses might build to any height, and to the obstruction of his light, unless he was precluded by some writing between them. And the custom was not repealed *merely by the length of time* during which one party enjoyed and the other acquiesced in such enjoyment (2 Swanst. 341; see Privilegia Londini, p. 101, cited Mood. & Malk. 351; and see Godb. 183; Yelv. 215; 1 Bulstr. 115; Com. R. 273; 1 Burr. 248; 3 C. & P. 317; *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97). This section extends to and controls this custom (*Salters' Co.* v. *Jay*, 3 Q. B. 109; *Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 855; see *Perry* v. *Eames*, 1891, 1 Ch. 667). **2 & 3 Will. 4, c. 71, s. 3.**

Before-mentioned periods to be deemed those next before suit for claims to which such periods relate.

4. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

(1) *Enjoyment required by the Section*...13.
(2) *Interruptions*...14.

(1) **Enjoyment required by the section.**

This section is nothing but an exposition of the proof required to establish the right (*Jones* v. *Price*, 3 Bing. N. C. 52). The enjoyment of the occupier which gives right under this statute is enjoyment for thirty, sixty, twenty, or forty years, according to the nature of the case, next before the commencement of some suit, and not before the act complained of (*Ward* v. *Robins*, 15 M. & W. 242; *Richards* v. *Fry*, 7 Ad. & Ell. 707; see *Wright* v. *Williams*, 1 M. & W. 98; *R.* v. *Calow*, 3 M. & S. 22). The period may be the period next before any action wherein the claim to the right is brought into question, and is not limited to the period next before the pending action (*Cooper* v. *Hubbuck*, 12 C. B. N. S. 456).

Where a right of way was claimed by prescription at common law, it was necessary to show user for at least twenty years as of right; but not necessarily for the twenty years next before the commencement of the suit (*Darling* v. *Clue*, 4 F. & F. 329).

Requisite evidence of user during statutory period.

A plea of forty or twenty years' user, under the 2nd and 4th sections of this statute, is not supported by proof of a user from a period of fifty years before the commencement of the action down to within four years of it (*Parker* v. *Mitchell*, 11 Ad. & Ell. 788). It was said in the earlier cases that some act of user must be shown to have been exercised in the year in which the action was brought (*Lowe* v. *Carpenter*, 6 Exch. 825; see *Ennor* v. *Barwell*, 2 Giff. 420); and also during the first year (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161). *Carr* v. *Foster* (3 Q. B. 581) seemed to intimate that the intermediate time was not so material (but see *De la Warr* v. *Miles*, 17 Ch. Div. 593). The C. A., however, recently denied any distinction between non-user for a year at the beginning or end or in the middle of the statutory period. Proof of actual user in every year is not essential, but the absence of user for any year will be fatal, unless explained in such a way as to warrant the inference of continual actual enjoyment, notwithstanding such temporary non-user (*Hollins* v. *Verney*, 13 Q. B. Div. 314, the case of right of way. See, in the case of light, *Smith* v. *Baxter*, 1900, 2 Ch. 138). The C. A. further laid down that no actual user can be sufficient to satisfy the statute, unless during the whole statutory term (whether user be proved in each year or not) the user is

2 & 3 Will. 4, c. 71, s. 4.

enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognised (*Hollins* v. *Verney*, 13 Q. B. Div. 315). If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under this statute (*Payne* v. *Shedden*, 1 M. & Rob. 383).

(2) Interruption.

A right to an easement was held established under this act which had only been actually enjoyed for nineteen years and a fraction, and then interrupted during the remainder of the twentieth year and down to the commencement of the action, the action, however, having been commenced within a year from the notice of the interruption (*Flight* v. *Thomas*, 11 Ad. & Ell. 688; 8 Cl. & Fin. 231; see *Eaton* v. *Swansea Co.*, 17 Q. B. 272). But the inchoate right will not be protected before the expiration of the full twenty years (*Battersea* v. *Commrs. of Sewers*, 1895, 2 Ch. 708; see *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324). The interruption which defeats a prescriptive right under the Prescription Act is an adverse obstruction, not a mere discontinuance of user by the claimant himself (*Carr* v. *Foster*, 3 Q. B. 581; see note to sect. 6, *post*). The mere intermission of the exercise of the right for more than a year, in the middle of the prescriptive period, is not necessarily an interruption of the right within the meaning of this section: such an intermission may be explained, and it is for the jury to say whether there has notwithstanding been a substantial enjoyment of the right for the requisite period (*Ib.*; see *Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630; *Hollins* v. *Verney*, 13 Q. B. Div. 314; *Smith* v. *Baxter*, 1900, 2 Ch. 138).

Where it appeared that at a period much earlier than twenty years before the commencement of the action, a stream of water had flowed through the plaintiff's lands; but that there had been some interruption about twenty-two years before the action, and it was not till within nineteen years that the stream had again flowed constantly in its former course, and it was objected that there was a want of sufficient evidence to support the plaintiff's claim, *Tindal*, C.J., said, it would be very dangerous to hold that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment (*Hall* v. *Swift*, 4 Bing. N. C. 381; see *Carr* v. *Foster*, 3 Q. B. 585, 586). The interruption may be caused by the act of a stranger, as well as by that of the person in whose land the easement is claimed (*Davies* v. *Williams*, 16 Q. B. 558). A fluctuating interruption was held not sufficient to prevent a right to light being acquired (*Presland* v. *Bingham*, 41 Ch. Div. 268, where the onus of proof as to interruptions was considered).

An interruption in the enjoyment may cause the acquisition of a qualified easement instead of altogether preventing the acquisition of any easement (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; see *Brook* v. *Archer*, 1868, W. N. 5). Although, under this section, no interruption will prevent a right from being acquired by twenty years' user, unless it has been acquiesced in for a whole year, yet an interruption for a shorter period may have the effect of showing that the enjoyment never was as of right, and thereby of preventing a right being acquired under the second section of this act (*Eaton* v. *Swansea Co.*, 17 Q. B. 267; see *Brook* v. *Archer*, 1868, W. N. 5).

Acquiescence in interruptions.

Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, and twelve months had not elapsed from the date of that promise before proceedings were taken, it was held, that there had not been such an interruption of the enjoyment as would deprive the owner of the light of his remedy (*Gale* v. *Abbott*, 10 W. R. 748). It was said by *Kindersley*, V.-C., that if the plaintiff had allowed twelve months to elapse without taking

proceedings, even though he had continued to complain, that would have been a submission to the interruption within sect. 4 (*Ib.*). It has, however, been held that, in order to negative submission to the interruption to light, it is not necessary to bring an action or actively remove the obstruction (*Glover* v. *Coleman*, L. R. 10 C. P. 108). Non-acquiescence in an interruption is a question of fact for a jury (*Bennison* v. *Cartwright*, 5 B. & S. 1). An interruption acquiesced in for four years before action brought was held to bar the right (*Tibury* v. *Silva*, 45 Ch. D. 98). A person asserting an interruption must prove that some notice was given to the person interrupted of the person by whose authority the interruption was made; the mere existence of a physical obstruction is not sufficient notice (*Seddon* v. *Bank of Bolton*, 19 Ch. D. 462).

2 & 3 Will. 4, c. 71, s. 4.

As to evidence of interruptions to the right of common, see *Davies* v. *Williams*, 16 Q. B. 558; *Welcome* v. *Upton*, 6 M. & W. 536. Where the lord attempted to stop the user of a common, the fact that some of the tenants yielded is not an interruption of the right within the meaning of this section, so as to bar the rights of freeholders, who as a body have never yielded to, or acquiesced in, the claim of the lord (*Warwick* v. *Queen's College*, 10 Eq. 105).

In actions on the case the claimant may allege his right generally as before the act.

5. In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied to specially.

Pleading before 2 & 3 Will. 4, c. 71.

Before the passing of the Prescription Act, 1832, a prescription in a *que estate* must always have been laid in the person who was seised of the fee simple. A tenant for life, for years, or at will, or a copyholder, could not prescribe in this manner, by reason of the imbecility of their estates; for as prescription was deemed to be always beyond time of memory, it would have been absurd that those whose estates commenced within the memory of man should have prescribed for any thing. Therefore, a tenant for life must have prescribed under cover of the tenant in fee simple, and a copyholder under cover of his lord (6 Rep. 60 a; Fortesc. 340). The uniform practice, in a plea justifying under a right of common, was to set out the title to the common specially, by showing a seisin in fee of the land to which the defendant claimed a right of com-

2 & 3 Will. 4, c. 71, s. 5.

mon, either in himself or in some other person under whom he derived title, and then to prescribe in the *que estate* for the right of common, by showing the right to have been in the party seised in fee, and all those whose estate he had in the land from time immemorial (*Grimstead* v. *Marlow*, 4 T. R. 718; 1 Wms. Saund. 346, n. (1)). And if the defendant was lessee for years, he must have shown the seisin in his lessor, and prescribed in him; for if he laid the prescription in himself it was bad (Cro. Car. 599; 4 Rep. 38; *A.-G.* v. *Gauntlett*, 3 Y. & Jer. 93).

Pleading under 2 & 3 Will. 4, c. 71.

By the above section, the claimant might allege his right generally; and in pleading to actions of trespass, where previously it would have been necessary to have alleged the right to have existed from time immemorial, it was sufficient under the act to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed during the period provided by the act, and without claiming in the name of the owner of the fee.

The 5th section gives a new plea, by enacting, that in certain cases it shall be sufficient to allege the enjoyment "as of right." If the parties choose to avail themselves of that provision, they must follow the very words; and if they neglect to do so, the plea is bad (*Stamford* v. *Dunbar*, 13 M. & W. 827; *Holford* v. *Hankinson*, 5 Q. B. 584). For the meaning of "enjoyment as of right," see *Tickle* v. *Brown*, 4 Ad. & Ell. 369, and other cases quoted *ante*, p. 9.

Evidence admissible under a general denial of enjoyment as of right.

In several cases decided upon this section it was held that under a general denial of the enjoyment as of right, evidence of unity of possession was admissible, inasmuch as such proof went to show that the enjoyment was not as of right (*Onley* v. *Gardiner*, 4 M. & W. 496; *Clayton* v. *Corby*, 2 Q. B. 813; *England* v. *Wall*, 10 M. & W. 699; *Clay* v. *Thackrah*, 9 C. & P. 47).

In *Beasly* v. *Clark* (2 Bing. N. C. 709), *Tindal*, C.J., said, "Under a replication denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the 5th section not inconsistent with the simple fact of enjoyment, being referable, as we understand the statute, to the fact of enjoyment as before stated in the act, viz., an enjoyment claimed and exercised as of right." So, under a general denial, evidence might be given of asking leave within the period (*Monmouthshire Co.* v. *Harford*, 1 C. M. & R. 614), or of an agreement commencing within the period (*Tickle* v. *Brown*, 4 Ad. & Ell. 383). As to whether a parol permission extending over the whole period could be shown, see *Kinloch* v. *Neville*, 6 M. & W. 806.

Matters to be replied specially.

It was said that where a defendant justified under an enjoyment for a statutory period if the plaintiff relied on a licence covering the whole period, it must be replied specially (*Tickle* v. *Brown*, 4 Ad. & Ell. 369; see *Lowry* v. *Crothers*, I. R. 5 C. L. 98). It was decided that where a defendant pleaded an enjoyment for a statutory period, and the plaintiff relied on the existence of a life estate, &c. (see sect. 7), such life estate must be replied specially (*Pye* v. *Mumford*, 11 Q. B. 666).

Pleading prescriptive rights under the Jud. Acts.

The above section and the decisions under it must now be read in connection with the rules of pleading established under the Jud. Acts, and so far as inconsistent therewith the section must be taken to have been repealed (Jud. Act, 1875, sects. 17, 21, 33). R. S. C., Ord. 19, provides (r. 4) that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies; and further (r. 15) that a party must raise by his pleading all matters which show the action or counterclaim not to be maintainable, and all such grounds of defence or reply as, if not raised, would be likely to take the opposite party by surprise; and further (r. 17), that in a defence or

reply a general denial shall not be sufficient, but the party must deal specifically with each allegation of fact of which he does not admit the truth. Pleadings need not state inferences of law (*Hanmer* v. *Flight*, 24 W. R. 347). 2 & 3 Will. 4, c. 71, s. 5.

The forms of pleading contained in the appendices to R. S. C.—which are not to be slavishly adhered to (*The Isis*, 8 P. D. 228), but illustrate the meaning of the act (*Turquand* v. *Fearon*, 40 L. T. 545)—include a statement of claim in an action for obstruction of light (App. C. sect. 6, No. 10), which contains the simple allegation, "The plaintiff is the owner of a house in which are the following ancient lights, &c." Further, to the defence in an action for polluting water given in App. D. sect. 6, there is added the following note:—"If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of his claim, *i.e.*, whether by prescription, grant, or what."

As to pleading a claim in various forms, see further the note, *post*, p. 21.

It would seem from Ord. 19, that the general allegations and denials which were sufficient within sect. 5 of the Prescription Act, 1832, are now insufficient. Accordingly, in an action to restrain the obstruction of an alleged private right of way, the plaintiff was bound in his pleading to give a short statement of the title by which he claimed, and whether by grant or by prescriptive user (*Harris* v. *Jenkins*, 22 Ch. D. 483; *Farrell* v. *Coogan*, 12 L. R. Ir. 14). Compare the action for trespass, where the defendants pleaded that the *locus in quo* was a highway, and were ordered to amend so as to show the mode or title in or under which they claimed that it had become a highway, and were ordered to give particulars of acts of dedication (*Spedding* v. *Fitzpatrick*, 38 Ch. Div. 410).

Under the R. S. C., Ord. 19, r. 18, a joinder of issue operates as a denial of every material allegation of facts in the defence or reply, as the case may be. Where a party justifies the acts complained of by an allegation of a prescriptive right, it is doubtful whether a mere joinder of issue will include a denial of the allegation that the acts were done in exercise of the right (see Bullen & Leake, Pleading, 354, 522).

New assignment.

In a case before the Jud. Acts, a plea of a right of way for the occupiers of a close for twenty years, for horses, carts, waggons, and carriages, at their free will and pleasure, was traversed. Under the issue, the plaintiff was allowed to show that the defendant had a right of way for horses, carts, waggons, and carriages, for certain purposes only, and not for all, and was not compelled to new assign; and he could show that the purpose for which the defendant had used the road, and in respect of which the action was brought, was not one of those to which the right extended (*Cowling* v. *Higginson*, 4 M. & W. 245). In an action of trespass, defendant justified as having acted in exercise of a right of way for foot passengers. Plaintiff taking issue, gave evidence at the trial that defendant had used the alleged pathway with horses and carts. Held, that the excessive user should have been new assigned (*Lane* v. *Hone*, I. R. 6 C. L. 232). What was formerly alleged by way of new assignment is now introduced by amendment of claim or by reply (R. S. C., Ord. 23, r. 6).

Amendments.

According to the practice before the Jud. Acts, it was a rule that in cases of prescription the allegation must be proved as laid (2 Roll. Abr. 706; 5 Rep. 79; 4 Rep. 29 b; 1 Campb. 313; see *Brook* v. *Willet*, 2 H. Bl. 224). It was not material that a party proved a larger right than he alleged (Cro. Eliz. 722; 1 Taunt. 142; *West* v. *Andrews*, 1 B. & C. 77; *Bailey* v. *Appleyard*, 8 Ad. & Ell. 167; *Manifold* v. *Pennington*, 4 B. & Cr. 161; *Pigott* v. *Bayley*, 6 B. & C. 16); but if he alleged a larger right than he proved, he could not amend (*Drewell* v. *Towler*, 3 B. & Ad. 735; see *Ricketts* v. *Salway*, 2 B. & Ald. 363; *Beadsworth* v. *Torkington*, 1 Q. B. 782; *Brunton* v. *Hall*, *Ib.* 792). If the allegation of right was divisible, the plaintiff was entitled to a limited verdict for a

2 & 3 Will. 4, c. 71, s. 5.

divisible part of the right alleged, though he failed to prove the residue (*Giles* v. *Groves*, 12 Q. B. 721).

Since the Jud. Acts, a much wider liberty of amendment has been introduced. R. S. C., Ord. 28, r. 1, provide that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. And this wider liberty of amendment has been allowed in pleading prescriptive rights (*Budding* v. *Murdoch*, 1 Ch. D. 42; *Laird* v. *Briggs*, 19 Ch. D. 22; *Bourke* v. *Alexandra Co.*, 1877, W. N. 30). As to amending at the trial by pleading lost grant, see *Brown* v. *Dunstable*, 1899, 2 Ch. 387; *Gardner* v. *Hodgson's Co.*, 1900, 1 Ch. 601; *Smith* v. *Baxter*, 1900, 2 Ch. 147.

Restricting the presumption to be allowed in support of claims herein provided for.

6. In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

This section forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute (*Bright* v. *Walker*, 1 C. M. & R. 222; *ante*, p. 8). Compare the refusal of the court to recognise inchoate easements (*Battersea* v. *Commrs. of Sewers*, 1895, 2 Ch. 708; *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324). The meaning of this section seems to be that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but when there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight or evidence, so as to preclude a jury from taking it along with other circumstances into consideration as evidence of a grant (*Hanmer* v. *Chance*, 4 D. J. & S. 626). Thus acquiescence on the part of the owner of a servient tenement, over which an easement is in fact used in the expenditure of money by the owner of the dominant tenement with a view to such user, might prevent the former from interfering with such user although the easement may not have been enjoyed for the full statutory period (see *Rochdale Canal Co.* v. *King*, 2 Sim. N. S. 88; *Bankart* v. *Tennant*, 10 Eq. 141).

The "interruption" which defeats a prescriptive right under this statute is an adverse obstruction, not a mere discontinuance of user by the claimant himself. In a case under the 1st section, if proof be given of a right of enjoyment at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether at that time the right had ceased or was still substantially enjoyed. The inference to be drawn from the facts proved on this point is not a presumption within the 6th section. Where a commoner has ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before and after: it was held that a jury were justified in finding a continued enjoyment of the right during thirty years (*Carr* v. *Foster*, 3 Q. B. 581; see *Hall* v. *Swift*, 4 Bing. N. C. 381; *Dare* v. *Heathcote*, 25 L. J. Ex. 245).

Proviso for persons under disabilities.

7. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which

shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible. 2 & 3 Will. 4, c. 71, s. 7.

It is the intention of the act that an enjoyment of thirty years, or twenty years, shall be of no avail against an idiot or other person labouring under incapacity, but that one of sixty or forty years shall confer an absolute title, even against parties under disabilities (see *Wright* v. *Williams*, 1 M. & W. 77). This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim) is *tenant for life*. During the period of a tenancy for life the exercise of an easement will not affect the fee; in order to do that there must be that period of enjoyment *against* an owner of the fee (*Bright* v. *Walker*, 1 C. M. & R. 222; *ante*, p. 8). A claim was defeated by proof of an outstanding life estate under this section (*Hale* v. *Oldroyd*, 14 M. & W. 739). Under sects. 1, 4 and 7 of this act an enjoyment as of right for thirty years next before the commencement of an action may be proved by showing that the party has enjoyed for several periods amounting together to thirty years, and that during the whole time between such periods, and between the last of them and the action (if such period intervened), the estate over which the right has been exercised was in the hands of a tenant for life (*Clayton* v. *Corby*, 2 Q. B. 813).

Cases where right is declared absolute.

The cases in which the right is declared by the statute to be absolute and indefeasible are as follows:—By the 1st section, where the right, profit or benefit shall have been taken as required for the full period of sixty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing. By the 2nd section, where any way or easement, or any watercourse, or the use of any water, shall have been enjoyed as therein mentioned for the full period of forty years, the right thereto is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. By the 3rd section, the enjoyment of light for the full period of twenty years without interruption is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

What time to be excluded in computing the term of forty years appointed by this act.

8. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient (*f*) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (*g*).

Omission of easement in 8th section.

(*f*) The words of the 2nd section extend to all easements; but the word "easement" is omitted in the 8th section. There seems reason for thinking that the word *convenient* has crept into the 8th section instead of the word "easement," for, with that exception, the expressions in the two sections

2 & 3 Will. 4, c. 71, s. 8.

are the same. It does not appear why it should be supposed that the legislature would have neglected to protect the interests of reversioners in the case of other easements than ways and watercourses (see *Wright* v. *Williams*, 1 M. & W. 77).

(*g*) The 8th section applies expressly to the computation of an enjoyment for forty years; and it would be contrary to all rules of construction to hold that it applies also to the computation of an enjoyment for twenty years (*Palk* v. *Skinner*, 18 Q. B. 568). Under the 7th and 8th sections of this act, the time during which the servient tenement has been under lease for a term exceeding three years, is to be excluded from the computation of forty years' enjoyment, but not from the computation of an enjoyment for twenty years (*Ib.*). The effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment, which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned (*Onley* v. *Gardiner*, 4 M. & W. 500).

A tenancy for life is excluded from the period of forty years by the 8th section on condition that the reversioner shall bring his action within three years after its determination; a user of forty years confers a *primâ facie* title, which is good, unless the reversioner pursues his remedy within the three years (*Wright* v. *Williams*, 1 M. & W. 77). The word "reversion" at the end of the section does not include remainder (*Symons* v. *Leaker*, 15 Q. B. D. 629; see *Laird* v. *Briggs*, 16 Ch. D. 440; 19 Ch. Div. 22).

Replication of life estate.

Where a replication to a plea of enjoyment of an easement for forty years, under this act, sets up a life estate in order to bring the case within the 8th section of the act, it must show that the plaintiff is the party entitled to the reversion expectant upon such life estate (*Wright* v. *Williams*, 1 M. & W. 100).

Not to extend to Scotland.

9. This act shall not extend to Scotland.

This act has been extended to Ireland by 21 & 22 Vict. c. 42.

II.—Modes of claiming Incorporeal Rights apart from the Prescription Act, 1832.

A *Whether the Prescription Act*, 1832, *has superseded the Common Law?*...20.
B *Of Grants, Express and Implied, of Incorporeal Rights and herein of Licences in Relation to Real Estate*...21.
C *Of the Presumption of Lost Grants*...24.
D *Prescription at Common Law*...25.
E *Custom and Usage*...31.
F *Modes of Claiming Profits* à prendre...34.

A. *Whether the Prescription Act*, 1832, *has superseded the Common Law?*

Prescription Act has not superseded common law.

There is nothing in the Prescription Act, 1832, to interfere with a claim of a right of way or other easement by express grant (*Bright* v. *Walker*, 1 C. M. & R. 223, *ante*, p. 8; *Livett* v. *Wilson*, 3 Bing. 115; *Plant* v. *James*, 4 Ad. & Ell. 749, 765; *Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554). Although that statute has facilitated the proof of profits *à prendre* and easements, it has not superseded the common law; so that a party may

elect to proceed either under the statute or according to the common law (see *Holford* v. *Hankinson*, 5 Q. B. 584; *Aynsley* v. *Glover*, 10 Ch. 283). In *Onley* v. *Gardiner* (4 M. & W. 496), where the defendant failed in proving a sufficient title under the statute to a right of way in consequence of an unity of possession, the court allowed the defendant to amend his plea, by pleading a right of way immemorially (see *Richards* v. *Fry*, 3 Nev. & P. 72; *Welcome* v. *Upton*, 5 M. & W. 403, 404; *Parker* v. *Mitchell*, 11 Ad. & Ell. 788; *Lowe* v. *Carpenter*, 6 Ex. 825). In the case of light, where unity of possession was raised as an objection to the plaintiff's title under the statute, he established his title independently of the statute by proof of enjoyment from time immemorial (*Aynsley* v. *Glover*, 10 Ch. 283); *Mellish*, L.J., remarking that the Prescription Act, 1832, had not taken away any of the modes of claiming easements which previously existed (*Ib.* 285; see *Dalton* v. *Angus*, 6 App. Cas. 814; *Smith* v. *Baxter*, 1900, 2 Ch. 146). In *Norfolk* v. *Arbuthnot* (5 C. P. Div. 392), and *Ecc. Commrs.* v. *Kino* (14 Ch. Div. 213), both the former modes of claiming light were treated as still existing. See *contra*, *Tapling* v. *Jones*, 11 H. L. C. 290; *Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 863. **Prescription.**

In the case of tithes, where a party pleads a modus existing from time immemorial, he may proceed just in the same way as he might have done before the Tithe Act, 1832, was passed (*Stamford* v. *Dunbar*, 13 M. & W. 822).

It is frequently advisable to plead together in the same case alternative claims of (1) prescription by statute, (2) prescription at common law, and (3) lost grant. For if on the evidence the enjoyment could not be brought down to the commencement of action, prescription by statute could not be relied upon. Again, if the enjoyment were shown to have commenced within the period of legal memory, prescription at common law could not be relied upon. See Bullen & Leake, Pleadings, 4th ed., Pt. II. 518. The three alternative claims were pleaded together in *Bailey* v. *Stevens*, 12 C. B. N. S. 91; *Norfolk* v. *Arbuthnot*, 4 C. P. D. 293. See as to pleading lost grant, *post*, p. 25. **Pleading.**

In stating a claim under the statute it may be also advisable to plead prescription both for the longer and shorter periods mentioned in sects. 1 and 2 (*Stamford* v. *Dunbar*, 13 M. & W. 827); the reason being to meet a possible difficulty arising from failure of proof by reason of interruption, &c. (see *Welcome* v. *Upton*, 5 M. & W. 398; 6 M. & W. 536; *Hollins* v. *Verney*, 13 Q. B. Div. 304, and cases quoted in the judgment).

B. *Of Grants, Express and Implied, of Incorporeal Rights; and herein of Licences in Relation to Real Estate.*

The title to incorporeal rights may arise by grant, whether express or implied. See the decisions in the case of ways (see p. 50, *post*); water (see p. 71, *post*); support (see p. 92, *post*); and light (see p. 99, *post*).

By sect. 49 of the Conv. Act, 1881, the word "grant" is not necessary to convey incorporeal hereditaments; and by sect. 62, easements may be granted by way of use.

A right of way, or a right of passage for water (where it does not create an interest in land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant (*Hewlins* v. *Shippam*, 5 B. & C. 229; see *Hastings* v. *N. E. R.*, 1898, 2 Ch. 674). According to the older cases at common law a deed was necessary to create either a freehold interest in an incorporeal right (*Hewlins* v. *Shippam*, *sup.*; *Blanchard* v. *Blanchard*, 1 Ad. & E. 536), or a leasehold interest (*Somerset* v. *Fogwell*, 5 B. & C. 875, a case of a several fishery; *Bird* v. *Higginson*, 6 Ad. & E. 824, a right of sporting; *Wood* v. *Leadbitter*, 13 M. & W. 843). In accordance with this doctrine, it was held at common law that an agreement, otherwise than by deed, for an incorporeal right, was **Necessity of a deed to pass incorporeal rights.** **Effect of an agreement not under seal; older cases at common law;**

Grants.

merely a parol licence revocable at will, though valuable consideration had been given or expense incurred (*Fentiman* v. *Smith*, 8 East, 107; *Cocker* v. *Cowper*, 1 C. M. & R. 418; *Bryan* v. *Whistler*, 8 B. & C. 298; *Adams* v. *Andrews*, 15 Q. B. 284; see *R.* v. *Hornden-on-the-Hill*, 4 M. & S. 565; *Thomas* v. *Fredericks*, 10 Q. B. 775; *Smart* v. *Jones*, 33 L. J. C. P. 154).

recent cases.

It has, however, been laid down more recently that an agreement for valuable consideration, though not under seal, is sufficient to create a right to an easement, and for the purpose of creating a lawful user is as good as a deed (*Dalton* v. *Angus*, 6 App. Cas. 765, 782). And see the earlier cases in equity, where it was held that a parol licence for an easement was irrevocable where expense had been incurred, and there had been acquiescence (*Devonshire* v. *Eglin*, 14 Beav. 530; *Moreland* v. *Richardson*, 22 Beav. 596; *Mold* v. *Wheatcroft*, 27 Beav. 510; *Laird* v. *Birkenhead Co.*, Joh. 500; *Newby* v. *Harrison*, 1 J. & H. 393; *Bankart* v. *Tennant*, 10 Eq. 141; *Carr* v. *Benson*, 3 Ch. 524. Again, it has been recently suggested that the decision in *Walsh* v. *Lonsdale* (21 Ch. Div. 9), may have altered the earlier law in relation to agreements as to sporting rights (*Lowe* v. *Adams*, 1901, 2 Ch. 600). And it has been decided that a verbal agreement for an easement may be enforced where there has been part performance (*McManus* v. *Cooke*, 35 Ch. D. 681). In a case, however, where there was no writing and no part performance, sect. 4 of the Statute of Frauds prevented the recovery of damages for breach of a verbal agreement giving the right to shoot over land and take away game, such right being treated as real estate (*Webber* v. *Lee*, 9 Q. B. Div. 315).

Licences in relation to Real Estate.

Nature of a licence.

As regards licences generally in relation to real estate: "A dispensation or licence properly passeth no interest, nor alters or tranfers property in anything, but only makes an action lawful which, without it, would have been unlawful" (*Thomas* v. *Sorrell*, Vaughan, 351). A licence authorizing the commission of an act illegal by statute was held void (*Edwick* v. *Hawkes*, 18 Ch. D. 199). A personal licence, as to enter a house to seize goods, is not assignable (*Re Davis, Ex parte Rawlins*, 22 Q. B. Div. 193; see *Ackroyd* v. *Smithson*, 10 C. B. 164). A personal licence of pleasure cannot be exercised with or by servants; *secus*, in the case of a licence of profit (*Norfolk* v. *Wiseman*, cited 7 M. & W. 77). As to the legal nature of the rights conferred by a railway passenger's ticket, see *Butler* v. *Manchester S. & L. R. Co.*, 21 Q. B. Div. 207.

Grant of licence: express;

A licence to be binding on a third party must be by deed, as in the case of a licence to use a common (*Hoskins* v. *Robins*, 2 Wms. Saund. 728, and n. 12; Shep. Touch. 330; *Monk* v. *Butler*, Cro. Jac. 574; see *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Ramsey* v. *Rawson*, 1 Vent. 18—25); or a licence to a former tenant to enter to remove chattels after a new tenant is in possession (*Roffey* v. *Henderson*, 17 Q. B. 574). But as against the licensor a parol licence is an excuse for a trespass until countermanded (*Hewlins* v. *Shippam*, 5 B. & C. 232; *Cornish* v. *Stubbs*, L. R. 5 C. P. 339). A parol agreement which is void under sect. 4 of the Statute of Frauds may operate as a licence (*Carrington* v. *Roots*, 2 M. & W. 257; *Crosby* v. *Wadsworth*, 6 East, 602; compare *Webber* v. *Lee*, 9 Q. B. Div. 315). As to parol licence by the Crown, see *Harper* v. *Charlesworth*, 4 B. & C. 590.

implied.

Where a party places goods of another upon his own close, he gives the owner an implied licence to enter for the purpose of recaption (*Patrick* v. *Colerick*, 3 M. & W. 483; *Wood* v. *Leadbitter*, 13 M. & W. 853); but no such licence will be implied to a purchaser of goods to enter the premises of the vendor to take them (*Williams* v. *Morris*, 8 M. & W. 488; see *Wood* v. *Manley*, 11 Ad. & Ell. 34).

Revocation of licences: executed licences to do

As regards the revocation of licences, a mere licence which is not coupled with a grant, and which has not been executed, is revocable whether under seal or not (*Wood* v. *Leadbitter*, 13 M. & W. 845). Even where the licence had been executed and expense incurred by the licensee,

Licences.

acts on land of licensor,

according to the older cases at common law a parol licence to do an act on the land of the licensor was revocable (*R.* v. *Hornden-on-the-Hill*, 4 M. & S. 565; see *Plimmer* v. *Wellington*, 9 App. Cas. 699; *Islington* v. *Hornsey*, 1900, 1 Ch. 695: it should be observed, however, that under such circumstances there might be a contract for breach of which, if the licence were revoked, damages might be recovered, see *Kerrison* v. *Smith*, 1897, 2 Q. B. 445). In equity a licence to do acts on the land of the licensor might, where expense had been incurred by the licensee, be held irrevocable (*Devonshire* v. *Eglin*, 14 Beav. 530, and other cases quoted *ante*, p. 22; *Plimmer* v. *Wellington*, 9 App. Cas. 699; *Civil Service Association* v. *Whiteman*, 68 L. J. Ch. 484; compare *Ramsden* v. *Dyson*, L. R. 1 H. L. 129).

on land of licensee;

As regards acts on the land of the licensee, licences for these acts were, in the older common law cases, distinguished from licences for acts on the land of the licensor (see notes to *Coryton* v. *Lithebye*, 2 Wms. Saund. 363). And where a parol licence for acts of the former nature had been given which involved expenditure by the licensee, and the work had been executed, it was held that the licensor could not revoke the licence, and require the *status quo ante* to be restored; at least, not without tendering the expenditure (*Winter* v. *Brockwell*, 8 East, 308; *Liggins* v. *Inge*, 7 Bing. 682; *Blood* v. *Kellar*, 11 Ir. C. L. R. 124; *Davies* v. *Marshall*, 31 L. J. C. P. 61; but see *Aldin* v. *Latimer*, 1894, 2 Ch. 437).

licence coupled with a grant;

Again, where a parol licence was coupled with a grant of something capable of being granted by parol, it was held irrevocable (*Wood* v. *Leadbitter*, 13 M. & W. 845). So a licence to dig for tin and to dispose of the tin was held irrevocable on account of carrying an interest in the ore (*Doe* v. *Wood*, 2 B. & Ald. 738; see *Northam* v. *Plowden*, 11 Exch. 70; and as to mining licences generally, see MacSwinney on Mines). So, also, where there was an agreement in writing to let, for one year, a shooting, with the right to the game shot, and the letting was continued by parol for some years, it was held that the right was not a licence revocable at will, although it was validly determined by a month's notice terminating at the end of a year (*Lowe* v. *Adams*, 1901, 2 Ch. 598; compare *Wilson* v. *Tavener*, 1901, 1 Ch. 578; and see the cases as to profits *à prendre*, *ante*, p. 3). Where by the conditions of sale of goods the buyer was to be allowed to enter to take them, it was held that the licence could not, after sale, be revoked, but could be executed even by force (*Wood* v. *Manley*, 11 Ad. & Ell. 34; see *Wood* v. *Leadbitter*, 13 M. & W. 853).

mode of revocation.

The locking a gate is sufficient notice of revocation of a parol licence to pass through it (*Hyde* v. *Graham*, 1 H. & C. 593; see *Russell* v. *Harford*, 2 Eq. 507). A parol licence for an easement over land is revoked by the transfer of the land to a third person (*Wallis* v. *Harrison*, 4 M. & W. 538; see *Roffey* v. *Henderson*, 17 Q. B. 574; *Coleman* v. *Foster*, 1 H. & N. 37).

The licensee under a revocable licence is entitled to reasonable notice of revocation (*Cornish* v. *Stubbs*, L. R. 5 C. P. 334; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400; *Aldin* v. *Latimer*, 1894, 2 Ch. 448). As to what is a reasonable notice, see *Wilson* v. *Tavener*, 1901, 1 Ch. 578; compare *Lowe* v. *Adams*, 1901, 2 Ch. 598.

Remedies: damages;

In some cases of revocation, even where a licence has been rightfully revoked, damages may be recovered by the licensee on the ground of breach of contract (*Kerrison* v. *Smith*, 1897, 2 Q. B. 445; see *Cornish* v. *Stubbs*, L. R. 5 C. P. 334; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400). But the Statute of Frauds may prevent the recovery of damages (*Webber* v. *Lee*, 9 Q. B. Div. 315; compare *Carrington* v. *Roots*, 2 M. & W. 257).

injunction.

Where previously to the execution of a lease and as part of the consideration therefor an agreement not under seal for the exercise by the tenant of sporting rights was entered into, the tenant obtained an injunction restraining interference by the landlord with the sporting rights until a grant thereof under seal had been executed (*Frogley* v. *Lovelace*, Johns. 333).

Lost Grant.

C. *Of the Presumption of Lost Grants.*

The doctrine of lost grant was thus stated by *Parke*, B. (*Bright* v. *Walker*, 1 C. M. & R. 217):—

Presumption at common law of grant of incorporeal rights from exercise during twenty years.

"For a long series of years prior to the passing of the act 2 & 3 Will. 4, c. 71, judges have been in the habit, for the furtherance of justice, and for the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years, by analogy to the Statute of Limitations (21 Jac. 1, c. 16). Such presumption did not always proceed on a belief that the thing presumed had actually taken place, but (2 Stark. on Ev. 669) a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation. And though in theory it was mere presumptive evidence, in practice and effect it was a bar. The Act 2 & 3 Will. 4, c. 71, is intended to make that possession a bar or title of itself, which was so before only by the intervention of a jury" (see *Holcroft* v. *Heel*, 1 Bos. & P. 400; *Campbell* v. *Wilson*, 3 East, 294; *Read* v. *Brookman*, 3 T. R. 591; Cowp. 110; *Brown* v. *Dunstable*, 1899, 2 Ch. 387).

Principle of doctrine.

In the older cases uninterrupted enjoyment of an easement for twenty years was treated sometimes as a bar to an action on the case, sometimes as evidence from which the jury were directed by the court to presume a grant, licence or agreement (*Yard* v. *Ford*, 2 Wms. Saund. 503; *Cross* v. *Lewis*, 2 B. & C. 689; see *Livett* v. *Wilson*, 3 Bing. 118; and the notes to *Yard* v. *Ford*, 2 Wms. Saund. 500). The growth of the doctrine of lost grant was traced by *Cockburn*, C.J., in *Angus* v. *Dalton* (3 Q. B. D. 105) and *Bryant* v. *Foot* (L. R. 2 Q. B. 181). In recent cases the principle has been thus stated:—Where there has been long continued possession and assertion of a right, the right should be presumed to have had a legal origin, if such a legal origin was possible; and the courts should presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title (*Phillips* v. *Halliday*, 1891, A. C. 231; *Simpson* v. *Godmanchester*, 1896, 1 Ch. 218). And again:—Where the court finds an open uninterrupted enjoyment for a long period unexplained, *omnia presumuntur rite esse acta;* and the court will, if reasonably possible, find a lawful origin for the right in question (*A.-G.* v. *Simpson*, 1901, 2 Ch. 698).

Origin of doctrine.

The doctrine of lost grant was originally adopted as a mode of claiming incorporeal rights alternative to that of prescription at common law, which last-mentioned mode was liable to be defeated by proof of unity of possession since the time of legal memory (*Mounsey* v. *Ismay*, 34 L. J. Ex. 55; 3 H. & C. 486; *Dalton* v. *Angus*, 6 App. Cas. 816).

Present extent of doctrine.

Since the Prescription Act, 1832, the doctrine has been resorted to as an alternative not only to prescription at common law, but also to prescription by statute. A lost grant was presumed in *Simpson* v. *Godmanchester*, 1896, 1 Ch. 214; 1897, A. C. 696: and see *Gardner* v. *Hodgson's Co.*, 1900, 1 Ch. 601; 1901, 2 Ch. 198; *Neaverson* v. *Peterborough Council*, 1901, 1 Ch. 22; 1902, 1 Ch. 557. The doctrine has been applied to presuming not only a grant from an individual but a faculty from the ordinary (*Phillips* v. *Halliday*, 1891, A. C. 228). *Semble*, a grant from the Crown of a lost charter may be presumed (*Goodtitle* v. *Baldwin*, 11 East, 490; *A.-G.* v. *Horner*, 14 Q. B. Div. 263; see *A.-G.* v. *Wright*, 1897, 2 Q. B. 318; *Rivers* v. *Adams*, 3 Ex. D. 365; and compare the cases as to lost grants of land by the Crown, *post*, p. 121). Where the right was capable of being granted but the enjoyment is shown to have had, in fact, an invalid origin, a subsequent lost grant may be presumed; unless, perhaps, the enjoyment be consistent rather with the invalid origin than with the presumption of a later legal one (*Phillips* v. *Halliday*, 1891, A. C. 228, 236).

Rebutting the presumption: by evidence of

The question whether the presumption of a lost grant can be rebutted by evidence that no grant was in fact made, has given rise to a difference of judicial opinion. Some judges have considered that such evidence

would not suffice to rebut the presumption; *e.g.*, *Thesiger*, L.J., in *Angus* v. *Dalton*, 4 Q. B. Div. 172; *Cotton*, L.J. (*Ib.* 187); *Lindley*, J., in *Dalton* v. *Angus*, 6 App. Cas. 765. Other judges have said that such evidence would be admissible and should be considered; *e.g.*, *Cockburn*, C.J., in *Angus* v. *Dalton*, 3 Q. B. D. 130; *Brett*, L.J., in *Angus* v. *Dalton*, 4 Q. B. Div. 201. Compare the opinion of *Bowen*, J. (*Dalton* v. *Angus*, 5 App. Cas. 783). Again, *Bramwell*, L.J., refused to find a lost grant which he was certain had never existed (*Norfolk* v. *Arbuthnot*, 5 C. P. Div. 393). See the opinions to same effect of *Brett*, L.J. (*De la Warr* v. *Miles*, 17 Ch. Div. 591), and of *Farwell*, J. (*A.-G.* v. *Simpson*, 1901, 2 Ch. 599). **Lost Grant.** no grant in fact;

The court has refused to presume a lost grant—

(1) Where the grant would have been contrary to statutory provisions of a public nature (*Goodtitle* v. *Baldwin*, 11 East, 488; *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287; *Neaverson* v. *Peterborough Council*, 1902, 1 Ch. 557; compare *Campbell* v. *Wilson*, 3 East, 294). As regards statutory provisions of a private nature, these may be waived, and a waiver may be presumed (*Goldsmid* v. *G. E. R. Co.*, 25 Ch. D. 511; 9 App. Cas. 927). by other circumstances.

(2) Where the person in possession of the servient tenement was incapable of making a grant, not being owner of the fee; *e.g.*, a rector (*Barker* v. *Richardson*, 4 B. & Ald. 579) or a tenant for years (*Daniel* v. *North*, 11 East, 372; *Wood* v. *Veale*, 5 B. & Ald. 454; see 2 Wms. Saund. 510; *secus*, if the enjoyment had begun previous to the tenancy: *Cross* v. *Lewis*, 2 B. & C. 686).

(3) Where there were no capable grantees, or where it would have been necessary to presume a succession of lost grants (*Tilbury* v. *Silva*, 45 Ch. Div. 118, 122).

(4) Where the right was of a nature which could not be claimed by prescription (*Bryant* v. *Lefever*, 4 C. P. Div. 177; *Dalton* v. *Angus*, 6 App. Cas. 817).

(5) Where the enjoyment was not as of right (*Hanna* v. *Pollock*, 1900, 2 Ir. R. 671); *e.g.*, where it was *clam* (*Partridge* v. *Scott*, 3 M. & W. 230; *Solomon* v. *Vintners' Co.*, 4 H. & N. 585; *Dalton* v. *Angus*, 6 App. Cas. 757; *Union Co.* v. *London Dock Co.*, 1901, 2 Ch. 305); or under a mistake (*Campbell* v. *Wilson*, 3 East, 301; see *Chamber Co.* v. *Hopwood*, 32 Ch. Div. 549).

(6) Where the enjoyment was capable of other explanation; *e.g.*, as being an extension of rights expressly granted by a document in evidence (*A.-G.* v. *Horner*, 14 Q. B. Div. 258, where the production of the grant of a market on Thursdays and Saturdays precluded the presumption of a lost grant of a market on other days. See *Neaverson* v. *Peterborough Council*, 1902, 1 Ch. 557; and compare *R.* v. *Hudson*, Str. 909, and other cases quoted, *post*, p. 26).

According to modern practice, a lost grant, if relied upon, should be pleaded (*Smith* v. *Baxter*, 1900, 2 Ch. 147); but claims based on lost grant have been added by amendment at the trial (*Brown* v. *Dunstable*, 1899, 2 Ch. 380, 387; *Gardner* v. *Hodgson's Co.*, 1900, 1 Ch. 601). Formerly, the names of the parties to, and the date of, the supposed grant had to be stated (*Hendy* v. *Stephenson*, 10 East, 55; see *Livett* v. *Wilson*, 3 Bing. 115; *Doe* v. *Read*, 5 B. & Ald. 232); but on averment that the deed had been lost profert was excused (*Read* v. *Brookman*, 3 T. R. 151). The statement of date and parties is no longer necessary (see the pleadings in *Norfolk* v. *Arbuthnot*, 4 C. P. D. 293; *Brown* v. *Dunstable*, 1899, 2 Ch. 380). **Pleading.**

D. *Prescription at Common Law.*

Prescription at common law is of two sorts,—either a personal right, which has been exercised by a man and his ancestors; or a right attached to the ownership of a particular estate, and only exercisable by those who are seised of the estate. The first is termed a prescription in the person; the second is called a prescription in a *que estate*, which, in plain English, means a right or privilege claimed by prescription as annexed to and **Different sorts of prescription.**

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going along with particular lands (Co. Litt. 113 b, 121 a; 3 Gwill. 1291; *Austin* v. *Amhurst*, 7 Ch. D. 692; *Constable* v. *Nicholson*, 14 C. B. N. S. 230; 32 L. J. C. P. 240). As to prescribing in *que estate*, see note to Prescription Act, 1832, s. 5, *ante*, p. 15. There is a third mode of prescription, which is apparently, but not really, a third, namely, claiming as a member of a corporation. There the member claims in right of the body corporate as a person (*per Fry*, J., *Austin* v. *Amhurst*, 7 Ch. D. 692).

Nature of prescription at common law.

Every species of prescription by which property is acquired or lost is founded on this presumption: that he who has a quiet and uninterrupted possession of any thing for a certain number of years is supposed to have a just right, without which he would not have been suffered to continue in the enjoyment of it; for a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants, and that acquiescence also supposes some reason for which the claim was forborne (1 Domat, 461). The most ancient and distinguished writers on the common law of England have recognized the principle, that a right to any incorporeal hereditament may be acquired by length of time. This mode of acquisition they have denominated *prescription*, "*præscriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis*" (Co. Litt. 113 b). Provision was made against the insecurity to property for want of a reasonable term of limitation by the stat. 3 Edw. 1 (Westm. 1), c. 39, by protecting possession, when as old as Richard I., against certain legal proceedings. By analogy to that statute, the term of legal memory was fixed at the same period; but as no provision was made to shift the period, in consequence of the continual lapse of time, the reign of Richard I. was left as the point from which legal memory was dated. Hence, in order to constitute a prescription previously to the Prescription Act, 1832, the enjoyment must have existed *time out of mind*, or, in other words, must have commenced antecedent to the reign of Richard I. (Bract. L. 2, c. 22; *Lynn Regis* v. *Taylor*, 3 Lev. 160; 1 Bl. Comm. 76; 2 *Id.* 263). The period called *legal memory*, in contradistinction to living memory, commenced in 1189 (Co. Litt. 114 b; 2 Inst. 238; 2 Ves. sen. 511). But in order to make persons on the alert in guarding their rights, and to prevent disputes respecting rights which have been long and peaceably enjoyed, the courts have interpreted an enjoyment of an incorporeal right for the period of forty years, or even twenty years, unless rebutted by other circumstances, *presumptive evidence* that the right has existed time out of mind, and consequently (unless its origin could be proved) a sufficient foundation for establishing a prescriptive right (10 East, 476; 2 Brod. & Bing. 403; Cowp. 215; 2 Wils. 23). And accordingly a regular usage for twenty years, not explained nor contradicted, was that upon which many public and private rights were held, there being nothing in the usage to contravene public policy (*R.* v. *Joliffe*, 2 B. & C. 54; 6 East, 214; 2 Wms. Saund. 175, a, d; see *Whitstable* v. *Gann*, 11 C. B. N. S. 412). To every prescription there were two inseparable incidents—time and usage (Co. Litt. 113). Prescription, and time whereof no memory runneth to the contrary, were all one in law (Litt. s. 170). And this was understood not only of the memory of anyone living, but also of proof by any record or writing, or otherwise, to the contrary, which was considered within memory (Co. Litt. 115 a). Thus a lease of ground for fifty-six years to be a passage negatived a prescription, and suffering it to be used for three or four years after the expiration of the lease was held not to amount to a gift to the public (*R.* v. *Hudson*, Str. 909). It was said that prescription at common law is not maintainable where we know the whole truth (*Wheaton* v. *Maple*, 1893, 3 Ch. 69; *Norfolk* v. *Arbuthnot*, 5 C. P. Div. 392; see *Labrador Co.* v. *The Queen*, 1893, A. C. 104).

Twenty years' enjoyment presumptive evidence of prescriptive right.

Prescription must be certain and reasonable.

A prescription ought to be certain; therefore a prescription for copyholders to pay to the lord for a fine upon death *two years' rent or less* is bad (Com. Dig. Prescription (E. 3); see *A.-G.* v. *Mathias*, 4 K. & J. 592). And a claim to carry from a close so much clay as might at any time be required for making bricks at a brick kiln in every year, and at all times of the year, was held bad

(*Clayton* v. *Corby*, 5 Q. B. 415; see 2 Q. B. 813). And a prescription ought to be reasonable; and therefore a man cannot prescribe for an heriot upon the death of every stranger within his manor (Com. Dig. Prescription (E. 4)). But it may be reasonable, although unusual or inconvenient, as for a way over a churchyard, or through a church (2 Roll. Abr. 265, l. 40). There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected (*Dyce* v. *Hay*, 1 Macq. H. L. C. 305). **Prescription.**

Every prescription supposes a grant once made and afterwards lost, and therefore nothing can be claimed by prescription which in its nature could not have been granted (*Goodman* v. *Saltash*, 7 App. Cas. 654). And as a grant supposes a capable grantee, easements cannot be prescribed for by "inhabitants" (*Fox* v. *Venables*, Cro. Eliz. 180), nor can profits *à prendre* be prescribed for by "owners and occupiers" (*Tilbury* v. *Silva*, 45 Ch. D. 107). **Supposes a grant.**

A prescription by immemorial usage can in general only be for incorporeal hereditaments, which may be created by *grant*, such as commons, ways, waifs, estrays, wreck, warren, park, treasure trove, royal fishes, fairs, markets, and the like (Co. Litt. 114 a; 5 Rep. 109 b; 1 Ventr. 387; Bac. Abr. Customs (B.); Com. Dig. Prescription (C.); *Ib.* Franchises (A. 1)). A prescription to have a free warren in a manor and in the demesnes thereof is good (*R.* v. *Talbot*, Cro. Car. 311; Jones, 320; as to franchises, see Cruise's Dig. tit. XXVII.; 2 Bl. Comm. 37—40). The general rule with regard to prescriptive claims is, that every such claim may be good if by possibility it might have had a legal commencement (1 T. R. 667). Profits *à prendre* (see *ante*, p. 3) and also easements (see *ante*, p. 6) can be claimed by prescription. **What may be claimed by prescription.**

The owner of one close may be bound by prescription to maintain a fence between his close and an adjoining close (*Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274). And the owner of land fronting the sea may be similarly bound to maintain a sea-wall for the protection of an adjoining owner (*Hudson* v. *Tabor*, 2 Q. B. Div. 292; *R.* v. *Essex*, 14 Q. B. Div. 561; 11 App. Cas. 449; *L. & N. W. R.* v. *Fobbing Levels*, 66 L. J. Q. B. 127). As to the duty of a riparian proprietor on a tidal river in this respect, see *Nitro-Phosphate Co.* v. *London and S. Katharine's Dock Co.*, 9 Ch. Div. 503; *Burt* v. *Victoria Co.*, 47 L. T. 378. **Maintenance of fences.**

A claim to visitation fees may be supported by prescription (*Shepherd* v. *Payne*, 16 C. B. N. S. 132; 33 L. J. C. P. 158); also a claim to marriage fees (*Bryant* v. *Foot*, L. R. 3 Q. B. 497). **Fees.**

The right to hold a fair or market may be acquired by grant and by prescription (2 Inst. 220). Where a market has been held immemorially in certain places within a manor, it may be presumed the market was granted to be holden in any convenient place within the manor (*De Rutzen* v. *Lloyd*, 5 Ad. & Ell. 456). A market and a fair may be held on the same day in the same manor (*Newcastle* v. *Worksop Council*, 1902, W. N. 77). Where a royal charter granted a market on two days of the week, and a usage to hold the market also on additional days was proved, the court refused to presume a lost grant of the market for the additional days (*A.-G.* v. *Horner*, 14 Q. B. Div. 245). The grant of a market does not imply a right in the grantee to prevent persons selling marketable articles on market days in their own houses within the limits of the franchise (*Macclesfield* v. *Chapman*, 12 M. & W. 18; *Penryn* v. *Best*, 3 Ex. Div. 292). But such a right may be acquired by prescription (*Ib.*; *Fearon* v. *Mitchell*, L. R. 7 Q. B. 696; *Moseley* v. *Walker*, 7 B. & C. 40; *Macclesfield* v. *Pedley*, 4 B. & Ad. 404). A right to market tolls was held to have been acquired by prescription in *Lawrence* v. *Hitch*, L. R. 3 Q. B. 521. The lord of the manor, to whom the grant of a market is made, has a right to remove the market-place from one situation to another within the precincts of his grant (*Curwen* v. *Salkeld*, 3 East, 538; see *De Rutzen* v. *Lloyd*, 5 Ad. & Ell. 456; *London* v. *Lowe*, 42 L. T. 16). As to the enlargement of a market, see *A.-G.* v. *Cambridge*, L. R. 6 H. L. 303; *A.-G.* v. *Horner*, 14 Q. B. Div. 245. Where an old market franchise has been increased in strength and character by statute, the old franchise is **Markets.**

Prescription. gone, and the statute is alone to be looked to (*Abergavenny* v. *Straker*, 42 Ch. D. 89; see *Birmingham* v. *Foster*, 1894, W. N. 43). A statutory market will be protected by injunction even where the statute provides a particular remedy (*Stevens* v. *Chown*, 1901, 1 Ch. 894).

A market may be disturbed by establishing a new market, either within or without the limits of the franchise (*Dorchester* v. *Ensor*, L. R. 4 Ex. 341). If a new market is held on the same day as an old market, it is presumed to be a disturbance of the old market, but if on a different day actual damage must be shown (*Ib.*; *Elwes* v. *Payne*, 12 Ch. D. 472; *Yard* v. *Ford*, 2 Wms. Saund. 500). A market may also be disturbed by establishing a rival place of sale, though not technically a market (*London* v. *Lowe*, 42 L. T. 16; *Goldsmid* v. *G. E. Ry. Co.*, 25 Ch. D. 541; 9 App. Cas. 927; *Abergavenny* v. *Straker*, 42 Ch. D. 83); and the rival place of sale may be outside the limits of the franchise (*S. CC.*). But as an ordinary rule, the sale of a man's own goods in the ordinary course of business, in his own shop, outside the limits of the franchise, is not a disturbance (*Manchester* v. *Lyons*, 22 Ch. Div. 307). Where the grantee of a market from the Crown suffered another to erect a market in his neighbourhood, and to use it for twenty-three years without interruption, such user was a bar to an action on the case for disturbance (*Holcroft* v. *Heel*, 1 Bos. & P. 400; see 2 Wms. Saund. 502, n.; and *Campbell* v. *Wilson*, 3 East, 294). See, however, *London* v. *Lowe* (42 L. T. 16), where acts of disturbance were held not justified, although they had continued for more than half a century. The Markets and Fairs Clauses Act, 1847, consolidates the provisions usually contained in acts for regulating markets and fairs. As to the meaning of "fair," see *Collins* v. *Cooper*, 68 L. T. 450. And as to markets generally, see Pease & Chitty on Markets.

Stallage. There is a distinction between market tolls which are paid for the use of a market, and stallage which is paid for the occupation of lands within the market (*London* v. *St. Sepulchre*, L. R. 7 Q. B. 313; *R.* v. *Casswell*, *Id.* 382; *Yarmouth* v. *Groom*, 1 H. & C. 102). The test is, has a man any occupation beyond what the general public has? (*R.* v. *Bedford*, 45 L. T. 616, 621). Stallage tolls are rateable, but market tolls are not (*S. CC.*; and see *Percy* v. *Ashford Union*, 34 L. T. 579). As to occupiers of stands within a market being entitled to franchise, see *Hall* v. *Metcalfe*, 1892, 1 Q. B. 208. The word "toll" in a grant of a market may include stallage (*Newcastle* v. *Worksop Council*, 1902, W. N. 77). An exemption from stallage for the inhabitants of a town can be only by way of custom, not by grant or prescription. Whether an exemption or discharge from toll, other than stallage, could be claimed by such grant or prescription for inhabitants generally was questioned in *Lockwood* v. *Wood*, 6 Q. B. 50.

Tolls. Toll-*traverse* is defined to be a sum demanded for passing over the private soil of another (Com. Dig. tit. Toll (A.); see *A.-G.* v. *Simpson*, 1901, 2 Ch. 692), or a duty which a man pays for passing over the soil of another in a way not a high street (Vin. Abr. tit. Toll (A.)), or for a passage over the private ferry, bridge, &c. of another (1 Sid. 454). Toll-traverse may be claimed by prescription by a corporation or an individual, without alleging any consideration, and payment time out of mind is sufficient to support the prescription (2 Wils. 296; see *Brecon Co.* v. *Neath Co.*, L. R. 7 C. P. 555; 8 C. P. 157; *New Windsor* v. *Taylor*, 1899, A. C. 41). Until the Prescription Act, 1832, such toll could not have been claimed unless it had been taken time out of mind (Fitzh. tit. Toll, pl. 3). It must be reserved contemporaneously with the dedication to the public (*Pelham* v. *Pickersgill*, 1 T. R. 660; see *Lawrence* v. *Hitch*, L. R. 3 Q. B. 521; *A.-G.* v. *Simpson*, 1901, 2 Ch. 693). In order to support a prescription against public right, a consideration must be proved; as where *toll-thorough*, that is, a toll for passing over the public highway, is claimed (*Nottingham* v. *Lambert*, Willes, 111; *Brett* v. *Beales*, 10 B. & C. 508; *A.-G.* v. *Simpson*, 1901, 2 Ch. 692). And where the plaintiff claimed toll-thorough, and showed that the soil and the tolls before the time of legal memory belonged to the same owner, although they had been severed since, it was held that

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it was to be presumed that the right of passage had been granted to the public in consideration of the toll (*Pelham* v. *Pickersgill*, 1 T. R. 660). A right of distress is incident to every toll (Bac. Abr. Distress, F. pl. 6), but it cannot be sold, except in the case of turnpike tolls under 3 Geo. 4, c. 126, s. 39. Tolls may be recovered in assumpsit, without giving proof of anything like a contract by the party against whom the claim is made; and stallage, which is a satisfaction to the owner of the soil for the liberty of placing a stall upon it, may be recovered in the same way without showing any contract between the owner of the market and the occupier of the stall (*Newport* v. *Saunders*, 3 B. & Ad. 411). The exemption from toll may also be claimed by prescription or by the king's grant (4 Inst. 252; 1 H. Bl. 206; *London* v. *Lynn Regis*, 4 T. R. 130; 1 Bos. & P. 512; 7 Br. P. C. 126; *Truro* v. *Reynolds*, 8 Bing. 275; *Middleton* v. *Lambert*, 1 Ad. & Ell. 401; 3 Nev. & M. 841). The citizens or burgesses of a city, borough, &c., may prescribe to be quit of tolls (F. N. B. 226, I.; 1 H. Bl. 206; Com. Dig. Toll (G. 1.)). As to whether inhabitants of a place may prescribe to be quit of toll, see *Baker* v. *Brereman*, Cro. Car. 418; recognized, 6 Q. B. 63. Port or anchorage tolls may be claimed by prescription (*Foreman* v. *Whitstable*, L. R. 4 H. L. 266). See further as to the distinction between toll-thorough and toll-traverse, *Brecon Co.* v. *Neath Co.*, L. R. 7 C. P. 555; 8 C. P. 157.

What cannot be claimed by prescription.

An easement for a term of years cannot be gained by prescription (*Wheaton* v. *Maple*, 1893, 3 Ch. 65). No prescriptive right can be acquired to justify a public nuisance (*A. G.* v. *Barnsley*, 1874, W. N. 37; see *Brown* v. *Russell*, L. R. 3 Q. B. 251; *Mumford* v. *Oxford, &c. R. Co.*, 1 H. & N. 34). Nor can a claim be made by prescription to anything which could not have had a lawful beginning (*Goodman* v. *Saltash*, 7 App. Cas. 648). But it seems that it is not necessary that the thing should be legal through all the time of prescription (*Millington* v. *Griffiths*, 30 L. T. 65, 68). And the courts are under an obligation to presume, if possible, a legal origin to support claims based on long continued and undisputed enjoyment (*Halliday* v. *Philipps*, 23 Q. B. Div. 56; *Tilbury* v. *Silva*, 45 Ch. Div. 98; *L. & N. W. R.* v. *Fobbing Levels*, 66 L. J. Q. B. 127; *A. G.* v. *Wright*, 1897, 2 Q. B. 324; *A.-G.* v. *Copeland*, 1902, 1 K. B. 690). Compare the presumption of legal origin in *Goodman* v. *Saltash*, *sup.*, and *Haigh* v. *West*, 1893, 2 Q. B. 23; and compare the cases quoted as to lost grant, *ante*, p. 24.

Legal origin.

A title to lands and other corporeal substances, of which more certain evidence may be had, cannot be made by prescription, as that a man, and all those whose estate he has, have been seised time out of mind of particular lands (Brooke, Prescription, 122; Vin. Abr. Pres. B. pl. 2; Dr. & St. dial. 1, c. 8; Finch, 132; 2 Bl. Comm. 264). The right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription. It is otherwise of a right to take coal in another man's land (*Wilkinson* v. *Proud*, 11 M. & W. 33; see *Stoughton* v. *Leigh*, 1 Taunt. 402). What arises by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands (which are now abolished by stat. 9 & 10 Vict. c. 62), felons' goods, and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title (Co. Litt. 114; 2 Bl. Comm. 265). A prescription for a right common to all the subjects of the realm cannot be supported (*Pell* v. *Towers*, Noy, 20; Br. Abr. Pres. pl. 71). One prescription cannot be prescribed against another prescription, for the one is as ancient as the other; as if a man prescribe for a way, light or other easement, another cannot prescribe for liberty to stop it when he pleases (*Aldred's case*, 9 Rep. 58 b; 2 Mod. 105; Com. Dig. Prescription (F. 4)).

Statutes in relation to custom and prescription.

A man cannot prescribe or allege a custom against a statute of a public nature because it is the highest matter of record in law, unless the custom or prescription be saved or preserved by another act (Co. Litt. 115. See *Noble* v. *Durell*, 2 T. R. 271; *Goodtitle* v. *Baldwin*, 11 East, 488). And

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Lord *Coke* makes a difference between statutes in the negative and in the affirmative; for a statute in the affirmative without any negative, express or implied, does not take away the common law; and likewise between statutes that are in the negative, for if a statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as well as he may against a common law (Harg. Co. Litt. 115 a, n. (15)). But the benefit of a statute of a private nature may be waived, and the waiver may be presumed (*Goldsmid* v. *G. E. R. Co.*, 25 Ch. D. 511; 9 App. Cas. 927).

How prescriptive rights may be destroyed.

An ancient custom may be destroyed by the express provisions of a statute or by positive language inconsistent with the existence of the custom (*Merchant Taylors' Co.* v. *Truscott*, 11 Exch. 855; *Salters' Co.* v. *Jay*, 3 Q. B. 109). But where a statute making an act illegal comes into force while a prescription is running, the prescription, after the proper period has elapsed, may be an answer to an individual suing as an individual (*Millington* v. *Griffiths*, 30 L. T. 65). Where a statute has "embraced and confirmed" a right which had previously existed by custom or prescription, that right becomes thenceforward a statutory right. The lower title by custom or prescription is merged in and extinguished by the higher title derived from the statute (*New Windsor* v. *Taylor*, 1899, A. C. 49). A prescriptive right to take tolls was held to have merged in and been extinguished by statutes which were only temporary in their operation (*Ib.*). Easements are sometimes extinguished by the express words of a statute, *e.g.*, the Inclosure Acts, 1801 and 1845 (see *Turner* v. *Crush*, 4 App. Cas. 221), or by necessary implication from a statute (*Yarmouth* v. *Simmons*, 10 Ch. D. 518).

By the common law a man might have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the Statute of Limitations (32 Hen. 8, c. 2) it is enacted that no person shall make any prescription by the *seisin or possession* of his ancestor or predecessor, unless such seisin or possession had been within threescore years next before such prescription made (2 Bl. Comm. 263, 264). And the remedy for such rights, so far as it depended upon real actions, was further abridged by the abolition of real actions after 31st December, 1834, by the Real Property Limitation Act, 1833, s. 36 (see *post*). It was said by Lord *Redesdale* that where a profit of any kind to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding such profit to a third person, the consequence is, that the title to it, whatever its nature, shall be presumed to be discharged (*Norbury* v. *Meade*, 3 Bligh, 245). But in *Neill* v. *Devonshire* (8 App. Cas. 135), it was said that an incorporeal hereditament such as a several fishery, which can only pass by deed, cannot be abandoned.

A title gained by prescription or custom is not lost by mere interruption of *possession* for ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of right of common, and the land charged therewith of an estate equally high and perdurable in both (Co. Litt. 114 b). An unity of possession merely suspends; there must be an unity of ownership to destroy a prescriptive right (*Canham* v. *Fisk*, 2 Cr. & Jerv. 126). Thus, if a person having a right of common by prescription takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right (Co. Litt. 113 b). Easements are extinguished by the union of seisin of the dominant and servient tenements in the same person (*James* v. *Plant*, 4 Ad. & El. 749). They also are extinguished when the purpose for which they were created no longer exists (*National Manure Co.* v. *Donald*, 4 H. & N. 8). A prescriptive right may be lost by the destruction of the subject-matter (4 Rep. 88); but not by an alteration of the quality of the thing to which a prescription is annexed (Hob. 39; 4 Rep. 86 a, 87 a). Alterations in the dominant tenement will sometimes extinguish an easement (*Allan* v. *Gomme*, 11 Ad. & El. 772). The

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release of an easement may be implied from abandonment or non-user (*Cook* v. *Bath*, 6 Eq. 177). It was said that a release of a right of way, or of a right of common, will not be presumed by mere non-user for a less period than twenty years, although it is otherwise as to lights (*Moore* v. *Rawson*, 3 B. & C. 339). But "it is not so much the duration of the cesser, as the nature of the act done by the grantee of the easement or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material" (*R.* v. *Chorley*, 12 Q. B. 519; see *Crossley* v. *Lightowler*, 2 Ch. 482; *Eccl. Commrs.* v. *Kino*, 14 Ch. Div. 213; *James* v. *Stevenson*, 1893, A. C. 162). The right to hold courts for the determination of civil suits, granted by the king's charter to the steward and suitors of a court of ancient demesne, was held not to be lost by a non-user of fifty years (*R.* v. *Havering*, 5 B. & Ald. 691; *R.* v. *Hastings*, *Id.* 692, n.). An unlicensed change of days for holding fairs may forfeit the charter (*Newcastle* v. *Worksop Council*, 1902, W. N. 77; where see as to losing the right to fair tolls).

Defeat of prescriptive claim.

A claim to prescriptive right may be defeated by showing the origin of the user, and that it is not in accordance with the right claimed (*Commrs. of Sewers* v. *Glasse*, 19 Eq. 155; see *Neill* v. *Devonshire*, 8 App. Cas. 135).

Effect of ancient grant

An ancient grant without date did not necessarily defeat a claim to a prescriptive right; for it might be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury (*Addington* v. *Clode*, 2 Bl. Rep. 989); but if the ancient grant is clearly not antecedent to the time of legal memory it will disprove immemorial prescription (*Welcome* v. *Upton*, 5 M. & W. 398; see *R.* v. *Westmark*, 2 M. & Rob. 305; compare *Labrador Co.* v. *The Queen*, 1893, A. C. 104). The grant by the Crown of a franchise to hold a market on Thursdays and Saturdays precludes the presumption of a lost grant from the Crown giving a right to exercise the franchise on other days (*A.-G.* v. *Horner*, 14 Q. B. Div. 245; see *Neaverson* v. *Peterborough Council*, 1901, 1 Ch. 22; 1902, 1 Ch. 557). Where a bishop, having free warren by prescription over the demesne and tenanted lands of a manor whereof he was seised *jure ecclesiæ*, accepted a grant from the Crown to himself and his successors of free warren over the demesne lands of all his manors in England: it was held that, even admitting the grant to have the effect of extinguishing the prescription as to the demesne lands (which the court considered to be at least doubtful), it could not affect it over the other lands of the manor (*Carnarvon* v. *Villebois*, 13 M. & W. 313).

Prescription against the Crown.

Formerly a prescription could not run against the king, as no delay in resorting to his remedy would bar his right. The maxim was *nullum tempus occurrit regi* (2 Inst. 273; 2 Roll. 264, l. 40; Com. Dig. Prescription (F. 1); Broom's Maxims, p. 61, 6th ed.). This rule, however, was subject to various exceptions (see Co. Litt. 114 a and b, and Hargrave's note, 119 a). Liberties and franchises were excepted in the Crown Suits Act, 1769, limiting the claims of the Crown to sixty years (see *post*, note on the limitation of the rights of the Crown). By 32 Geo. 3, c. 58, the Crown is barred in informations for usurping corporate offices or franchises by the lapse of six years (see Bac. Abr. 7th ed., Prerogative (E. 6), 467, and stat. 7 Will. 4 & 1 Vict. c. 78, s. 23; *R.* v. *Harris*, 11 Ad. & Ell. 518). By the Prescription Act, 1832, ss. 1, 2 (*ante*, pp. 1, 4), the Crown is placed upon the same footing with the subject as to the rights affected by those sections. *Secus*, as to the rights affected by sect. 3 (*Perry* v. *Eames*, 1891, 1 Ch. 658; *Wheaton* v. *Maple*, 1893, 3 Ch. 48).

E. *Customs and Usages.*

Difference between prescription and custom.

Custom differs from prescription in this respect: that a custom is properly a local usage not annexed to the person; such as the custom that all the copyholders of a manor have common of pasture upon the waste; whereas prescription is in a particular person (Co. Litt. 113 b; 4 Rep. 31 b). Custom is local, prescription personal: and the difference lies in the mode of claim suited to the difference of the claimants. Where the

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claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there; or if he prescribes in the *que estate*, it must be under cover of the tenant in fee (*Bean* v. *Bloom*, 2 Bl. R. 928; *S. C.*, 3 Wils. 456; *Sharp* v. *Lowther*, Cas. temp. Hard. 293; *Lynn Regis* v. *Taylor*, 3 Lev. 160). See further, as to the distinction between custom and prescription proper, Brown's Law of Limitation, pp. 134, 209.

"A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is in effect the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to look out for its origin; but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus a *custom* for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom, as it was held in 5 Co. 84; and yet a *grant* of such an easement to fishermen within the district *eo nomine* might well be held to be void" (*per Tindal*, C. J., *Lockwood* v. *Wood*, 6 Q. B. 64, 65; and see *Goodman* v. *Saltash*, 7 App. Cas. 654).

The "inhabitants" of a town cannot by that name and description prescribe for an easement *in alieno solo;* where such a claim has been allowed, it will be found to have been invariably rested on the ground of custom, and not of prescription (*Fox* v. *Venables*, Cro. Eliz. 180; *Day* v. *Savadge*, Hob. 85, 5th edit.; *Gateward's case*, 6 Rep. 59 b; *S. C.*, as *Smith* v. *Gateward*, Cro. Jac. 152; *Baker* v. *Brereman*, Cro. Car. 418; *Fitch* v. *Rawling*, 2 H. Bl. 393; see *A.-G.* v. *Acton*, 22 Ch. D. 228). An easement as a right of way *in alieno solo* may be claimed by custom (*Grimstead* v. *Marlow*, 4 T. R. 717). As to a claim by "parishioners" to a church way, see *Batten* v. *Gedye*, 41 Ch. D. 507.

What customs are valid.

Custom is "local common law"; which, as a general rule, is proved by usage (*per Jessel*, M. R., *Hammerton* v. *Honey*, 24 W. R. 603). As to the relation of custom to statute, see *ante*, p. 29. Equally in the case of custom as in that of prescription, long enjoyment, in order to establish a right, must have been as of right, and therefore neither by violence nor by stealth, nor by leave asked from time to time (*Mills* v. *Colchester*, L. R. 2 C. P. 476; 3 C. P. 575). "It is an acknowledged principle that, to give validity to a custom, it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption" (*per Tindal*, C. J., *Tyson* v. *Smith*, 9 Ad. & El. 421).

A custom must be —certain;

A custom accordingly must be certain. Thus a custom is void which sets up a claim to lay coals to an indefinite extent and for an indefinite time on the lands of other copyholders whereby their lands may be made practically useless, although they would still be liable to pay their rents and perform their services (*Broadbent* v. *Wilkes*, Willes, 360; recognized in *Salisbury* v. *Gladstone*, 9 H. L. C. 692; see the custom as to turbary, *post*, p. 41).

—reasonable,

Again, a custom must be reasonable. "It belongs to the judges of the land to determine whether a custom is reasonable or not. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for '*consuetudo ex certâ causâ rationabili usitata privat communem legem*' (Co. Litt. 113 a), as the custom of gavelkind and borough-English, which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation. But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement: as a custom set up in

a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord (Year B. Trin. 2 H. 4, fol. 24, B. pl. 20). So a custom that the lord of the manor shall have £3 for every pound breach of any stranger (21 H. 4 (a)); or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage, at the lord's will (Litt. s. 212)." (*Per Tindal*, C. J., *Tyson* v. *Smith*, 9 Ad. & Ell. 421.) Thus an alleged custom to make grips at sides of roads for drainage was bad as unreasonable (*Nicol* v. *Beaumont*, 50 L. T. 112). So also an alleged custom that an outgoing tenant should look to the incoming tenant for payment for seeds, &c., to the exclusion of the landlord's liability (*Bradburn* v. *Foley*, 3 C. P. D. 129). But a manorial custom of leasing was held reasonable (*R.* v. *Venn*, L. R. 10 Q. B. 310), and a custom for commoners to take rabbits on the waste (*Coote* v. *Ford*, 83 L. T. 482); *secus*, a custom for any person to do so (*Ib.*). **Custom.**

Again, the custom must have commenced from time immemorial. Accordingly a custom to erect stalls for hiring servants at statute sessions was held bad, statute sessions having been introduced by the Statutes of Labourers, the first of which was in the reign of Edward 3 (*Simpson* v. *Wells*, L. R. 7 Q. B. 214). A custom is usually proved by evidence extending over at least half a century (*Hammerton* v. *Honey*, 24 W. R. 604). But a regular usage for twenty years unexplained and uncontradicted may suffice to support an immemorial custom (*R.* v. *Jolliffe*, 2 B. & C. 54). —immemorial;

Lastly, a custom must be continuous (see *Hammerton* v. *Honey*, 24 W. R. 603). —continuous.

Customs derogatory from the general right of property must be construed strictly, and, above all things, they must be reasonable (*Rogers* v. *Brenton*, 10 Q. B. 57). It is a general rule that customs are not to be enlarged beyond the usage, because it is the usage and practice that make the law in such cases, and not the reason of the thing (11 Mod. 160; Fitzgib. 243). An usage for the inhabitants to have common to their houses was held not to extend to a new house (Owen, 4; see *Chilton* v. *London*, 7 Ch. D. 735). A custom binding tenants of a manor to repair their tenements was good (*Blackmore* v. *White*, 1899, 1 Q. B. 293). A custom would be bad which required a township, part of a parish, to pay a proportion of a church rate without requiring the inhabitants of the township to be summoned to consider the rate (*R.* v. *Dalby*, 3 Q. B. 602). A custom exempting occupiers of a hamlet from contributing to repair of highways beyond its limits was held not proved (*R.* v. *Rollett*, L. R. 10 Q. B. 469). A custom to go on a close and take water from a spring was held good when claimed for the inhabitants of a township (*Race* v. *Ward*, 4 Ell. & Bl. 702; see *Harrop* v. *Hirst*, L. R. 4 Exch. 43; *Smith* v. *Archibald*, 5 A. C. 512), but not when claimed for the public generally (*Dungarvan* v. *Mansfield*, 1897, 1 I. R. 420). A custom for victuallers during a fair to enter upon a certain close within a borough, and to erect booths there leaving sufficient part of such close open for use as a public highway, and paying to the owner of the soil a reasonable compensation, was held good (*Elwood* v. *Bullock*, 6 Q. B. 383). So a custom for victuallers during a fair to erect booths on a common part of the waste of a manor (*Tyson* v. *Smith*, 9 Ad. & Ell. 406). A custom to deposit oysters on the foreshore was good (*Truro* v. *Rowe*, 1901, 2 K. B. 870); and for fishermen to dry nets (5 Co. 84 (a)). A custom is good for the inhabitants of a vill to dance on a particular close for their recreation (*Abbot* v. *Weekly*, 1 Lev. 176; cited 4 El. & Bl. 713; *Hall* v. *Nottingham*, 1 Ex. D. 1; see *Warrick* v. *Queen's College*, 10 Eq. 105; *Abercromby* v. *Fermoy*, 1900, 1 Ir. R. 302). The right of recreation by custom cannot be claimed for the public, but must be confined to the inhabitants of a particular district (*Bourke* v. *Davis*, 44 Ch. D. 120; *Coventry* v. *Willes*, 12 W. R. 127; *Forbes* v. *Eccl. Commrs.*, 15 Eq. 51; see *Tyne Commrs.* v. *Imrie*, 81 L. T. 174; *Paterson* v. *Bain*, 6 App. Cas. 833). And such a right for the inhabitants of **Instances of customs.**

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several adjoining parishes claimed over land in one of such parishes was bad (*Edwards* v. *Jenkins*, 1896, 1 Ch. 308). A custom for the freemen of a town to hold horse races was held good (*Mounsey* v. *Ismay*, 3 H. & C. 486; 34 L. J. Ex. 52). A custom for the inhabitants of a parish to exercise horses in a place beyond the parish is bad (*Sowerby* v. *Coleman*, L. R. 2 Ex. 96). As to a way to the parish church, see *Batten* v. *Gedye*, 41 Ch. D. 507. A custom was good which bound the parson as owner of the great tithes to keep a bull and boar for the use of the parishioners (*Lanckbury* v. *Bode*, 1898, 2 Ch. 120). As to custom in the election of churchwardens, see *R.* v. *Green*, 30 L. T. 255; *Bremner* v. *Hull*, L. R. 1 C. P. 748. There may be a custom obliging landowners to maintain sea frontages (*L. & N. W. R.* v. *Fobbing Levels*, 66 L. J. Q. B. 127). As to claiming profits *à prendre* by custom, see generally the note below.

Customs as to mines and quarries.

A custom for the lord of a manor to enter on the waste and to dig through the same for the purpose of working the quarries below was held good (*Rogers* v. *Taylor*, 1 H. & N. 706; 26 L. J. Ex. 203). So, also, the custom for the lord to enter on copyhold tenements for purpose of mining proved to exist in the Isle of Man (*Ballacorkish Co.* v. *Harrison*, L. R. 5 P. C. 49). An alleged custom for the lord of a manor to work mines under any parcel of the manor so as to let down the surface, without making compensation, was held bad (*Hilton* v. *Granville*, 5 Q. B. 701; Cr. & Ph. 283; a decision criticised unfavourably in *Blackett* v. *Bradley*, 1 B. & S. 140; and in *Buccleuch* v. *Wakefield*, L. R. 4 H. L. 410; but approved in *Bell* v. *Love*, 10 Q. B. Div. 561; 9 App. Cas. 286; see *Consett Co.* v. *Ritson*, 22 Q. B. D. 321; in the C. A., 43 W. R. 122; *Hayles* v. *Pease*, 1899, 1 Ch. 567). A similar custom requiring the lord to pay compensation would be good (*Aspden* v. *Seddon*, 1 Ex. Div. 510). As to customs and rights in respect of the waste of a manor, see *post*, p. 45.

As to mining customs in the High Peak District, see *Wake* v. *Redfearn*, 43 L. T. 123; *Wake* v. *Hall*, 8 App. Cas. 195. A custom of tin bounders as to marking out tin works on waste lands in Cornwall is stated in *Rogers* v. *Brenton* (10 Q. B. 26). Tin bounders also claim to be entitled by custom to divert all water within their bounds for the purposes of their mines (*Gaved* v. *Martyn*, 19 C. B. N. S. 732). This claim was discussed, and it was held that a presumption should be made that a right to use the water had been acquired by arrangement with the owner of the mine as well as with the bounders (*Ivimey* v. *Stocker*, 1 Ch. 396).

Usages.

The customs referred to above must be distinguished from usages which are imported into commercial contracts, or into contracts between landlord and tenant (*Dashwood* v. *Magniac*, 1891, 3 Ch. 370). As to these usages, see *Wigglesworth* v. *Dallison*, 1 Smith, L. C. 528, and the notes thereto. Such usages need not be immemorial (*Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 386; *Tucker* v. *Singer*, 8 App. Cas. 508, where a modern usage for a tenant whose lease reserved minerals to take away flints turned up in the ordinary course of good husbandry was upheld). A modern usage as to cutting timber was considered in construing a will; and as between persons claiming under it rendered that not waste which would have been waste between others (*Dashwood* v. *Magniac*, 1891, 3 Ch. 352). Mercantile usage, however, cannot prevail against positive law (*Goodwin* v. *Robarts*, L. R. 10 Exch. 357).

F. *Modes of Claiming Profits* à Prendre.

Profit *à prendre* in another's soil.

Rights of common in the waste of a manor can be claimed by freeholders by prescription (*Warrick* v. *Queen's College*, 6 Ch. 716), and by copyholders by custom (*post*, p. 37). But except in the case of common claimed by copyholders by custom, a profit claimed out of another man's soil must be alleged by way of prescription, and not by way of custom; for a custom to take a profit *in alieno solo* is bad (*Blewitt* v. *Tregonning*, 3 Ad. & Ell. 575; see *ante*, p. 3). The reason why a profit *à prendre* cannot be supported by a custom in an indefinite number of people is,

that the subject of the profit *à prendre* would in that case be liable to be entirely destroyed (*per* Lord *Campbell*, C.J., *Race* v. *Ward*, 4 Ell. & Bl. 705). In trespass for taking stones, &c., from the sea-shore, defendant pleaded a custom in the inhabitants of a township of which he was a member, and also a prescriptive right for the inhabitants and overseers of highways to take such stones. Held that such a custom was bad, being a profit *à prendre in alieno solo;* and that the overseers of the highways and the inhabitants of a township, not being a corporation, were not capable of taking by grant, and therefore could not claim such right by prescription (*Constable* v. *Nicholson*, 14 C. B. N. S. 230; *Pitts* v. *Kingsbridge Board*, 19 W. R. 884; see *A.-G.* v. *Mathias*, 4 K. & J. 591). "Owners and occupiers" cannot claim a profit *à prendre* by prescription (*Tilbury* v. *Silva*, 45 Ch. D. 98). A claim, however, by "inhabitants" of tenements in a borough to the privilege of oyster dredging within a fishery which had been acquired by prescription by the borough corporation was supported by presuming a grant to the corporation subject to a trust (in the nature of a charitable trust) in favour of the inhabitants (*Goodman* v. *Saltash*, 7 App. Cas. 633; see the charitable trusts held to exist in *A.-G.* v. *Meyrick*, 1893, A. C. 1; *Wilson* v. *Barnes*, 38 Ch. Div. 507). Compare the right of fishing vested in a corporation in trust for its members (*Re Free Fishermen of Faversham*, 36 Ch. Div. 329); and the case where a vestry had during a long period let the grazing on a highway, and a lawful origin was found by presuming a grant to a trustee for the parish (*Haigh* v. *West*, 1893, 2 Q. B. 19). A Crown grant to the inhabitants of a parish to take profits *à prendre* out of a royal manor is valid, the effect of the grant being to incorporate the inhabitants for the purpose of enabling them to exercise the right (*Willingale* v. *Maitland*, 3 Eq. 103). But such a grant will not be presumed from proof of user by the inhabitants, if the presumption is inconsistent with the past and existing state of things and there is no trace of such a corporation having existed at any time (*Rivers* v. *Adams*, 3 Ex. D. 361). In the case of such a grant an action is maintainable only by the inhabitants as a corporation (*Chilton* v. *London*, 7 Ch. D. 735).

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As to claims to profit *à prendre*, see further the note to sect. 1 of the Prescription Act, 1832, *ante*, p. 2; and the note on commons, *post*, p. 37.

III.—Rights of Common.

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(1) Several species of common.

Common is a right or privilege which one or more persons claim to take or use in some part or portion of that which another man's lands, waters, woods, &c., naturally produce, without having an absolute property in

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such lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing by some agreement between lords and tenants, for some valuable purposes, which by age being formed into a prescription continues good, although there be no deed or instrument in writing that proves the original contract or agreement (4 Rep. 37 a; 2 Inst. 65; Vent. 387; Bac. Abr. Common). When the Crown dedicated land as "permanent common," but designated no commoner, common of pasturage was not created (*Sydney* v. *A. G. for N. S. Wales*, 1894, A. C. 444). Common has been divided into five sorts, viz.: 1st, *Common of pasture*, which is a right or liberty that one man or more have to feed or fodder their beasts or cattle in another man's land. 2ndly, *Common of turbary*, or the liberty of cutting turves in another's soil, to be burnt in a house (see Noy, 145; *Wilson* v. *Willes*, 7 East, 121; 3 Lev. 165). 3rdly, *Common of estovers*, which is a right of taking trees, loppings, shrubs, or underwood, in another's woods, coppices, &c. (see Cro. Jac. 25, 256; 5 Rep. 25 a; 4 Rep. 87 a; Cro. Eliz. 820; Plowd. 381). 4thly, *Common of piscary*, or a right and liberty of taking fish in another's pond, pool, or river. And 5thly, a liberty which in some manors the tenants have, of digging and taking sand, gravel, stone, &c. in the lord's soil (Bac. Abr. Common, (A.)). All claims of this kind, in order to be valid, must be made with some limitation and restriction (*Clayton* v. *Corby*, 5 Q. B. 419).

What commonable rights may be prescribed for.

A party may prescribe to take the sole and several herbage which may be granted (Co. Litt. 122; *Hoskins* v. *Robins*, Pollexf. 13; *Potter* v. *North*, 1 Vent. 385; *Welcome* v. *Upton*, 6 M. & W. 543; see *North* v. *Cox*, 1 Lev. 253; *Johnson* v. *Barnes*, L. R. 8 C. P. 527). Instances of sole pasturage are to be found in the South Downs, in Sussex, and they are frequently transferred in gross; it is the same with the cattle-gates in the North of England, although some have thought the owners of them are tenants in common of the soil (*Welcome* v. *Upton*, 6 M. & W. 541, 542; *R.* v. *Whixley*, 1 T. R. 137). The grant of *vesturam terræ* or *herbagium terræ* does not pass the land or soil itself (Co. Litt. 4 b). A cattle-gate is not a more extensive right than the above, and does not include the right to the soil (*Rigg* v. *Lonsdale*, 1 H. & N. 923, 936; see *Robinson* v. *Wray*, L. R. 1 C. P. 490). A person may prescribe to have the sole and several pasture, vesture or herbage, in exclusion of the owner of the soil, for a *limited time in every year* (Fitz. Prescription, 51; Co. Litt. 122 a; 2 Roll. Abr. 267 (L.) pl. 6; Winch's Rep. 5; Hutt. 45; *Johnson* v. *Barnes*, L. R. 8 C. P. 527); or for the whole year (*Hoskins* v. *Robins*, 2 Saund. 324; *S. C.*, 2 Lev. 2; Pollexf. 13; 1 Mod. 74). So a tenant may prescribe to have all the thorns growing upon such a place in exclusion of the owner of the soil (*Dowglass* v. *Kendal*, Cro. Jac. 256). But a man cannot prescribe to have *common eo nomine* for the *whole* year, in exclusion of the lord, for this is held to be repugnant to the nature of the thing (Co. Litt. 122 a; 1 Roll. Abr. 396 (A.), pl. 1, 2; 2 Roll. Abr. 267, pl. 3; 2 Lev. 268; 1 Ventr. 395). However, it is said that the lord may by custom be restrained to a qualified right of common during a part of the year (Yelv. 129; 1 Brownl. 187; Cro. Jac. 208, 257). So it is said the lord may be restrained, together with the commoners, from using a common at all during a part of the year (1 Roll. Abr. 405, 406); and that the commoners may prescribe to have common in exclusion of the lord for part of a year (2 Roll. Abr. 267 (L.), pl. 1; 1 Wms. Saund. 353, n. (2)). The claim in right of a freehold estate and the lands which formerly belonged to the manor farm, of a separate right of feeding and folding an unlimited number of sheep, is not a claim of a right of common, but of something in the nature of a separate right of feeding and folding (Kielway, 198 a; *Punsany and Leader's case*, 1 Leon. 11), which may have arisen out of an exception made by the lord upon granting the lands, or it may have been created by an act of parliament (*Ivatt* v. *Mann*, 3 M. & G. 699). A right of pannage, *i.e.*, the consumption by pigs of fallen acorns, may be prescribed for (*Chilton* v. *London*, 7 Ch. D. 562); as also a right to cut and carry away litter from a forest (*De la Warr* v. *Miles*, 17 Ch. Div. 535).

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A person cannot prescribe for a right of common as occupier of a messuage (*English* v. *Burnell*, 2 Wils. 258; *Davies* v. *Williams*, 16 Q. B. 543). Where rights of common have been exercised for many years by the freehold tenants of a manor, and also by the inhabitants, the court will presume that the inhabitants claimed through the freehold tenants. And where such rights have been exercised for many years, the court will try to find a legal origin for those rights, and presume a grant, if necessary (*Warrick* v. *Queen's College*, 6 Ch. 716). Such rights may be claimed in the case of copyhold tenants of the manor by custom, and in the case of the freehold tenants by prescription (*Ib.*).

Claims to common by prescription.

Rights of common in the wastes of the lord may be claimed by custom by copyholders (*Gateward's case*, 6 Rep. 59; *Bean* v. *Bloom*, 2 Bl. R. 926; *S. C.*, 3 Wils. 456). They cannot prescribe in their own names by reason of the want of permanence. Nor can they in their lord's name, for he cannot claim common in his own land. They are therefore allowed to claim it by custom (*per* Lord *Denman*, *Rogers* v. *Brenton*, 10 Q. B. 61; see *Warrick* v. *Queen's College*, 10 Eq. 122). But common cannot be claimed by "dwellers" in a manor (*Allgood* v. *Gibson*, 25 W. R. 60; 34 L. T. 883); or by "occupiers" of copyhold lands under the copyholders (*Austin* v. *Amhurst*, 7 Ch. D. 689; *Knight* v. *King*, 20 L. T. 494). For cases where trusts of commonable rights for the benefit of occupiers were held to have been created, see *A.-G.* v. *Meyrick*, 1893, A. C. 1; *Simcoe* v. *Pethick*, 1898, 2 Q. B. 555.

Claims to common by custom.

(2)

Common of pasture.

Common of pasture is, where one person has, in common with other persons, the right of taking by the mouths of his cattle the herbage growing on the land of which some other person is the owner. This species of common is either appendant, appurtenant, or in gross (Selw. N. P. Common, s. 2).

Common appendant.

Common appendant is a right belonging to the owners and occupiers of arable lands to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are horses and oxen to plough the land, and cows and sheep to manure it (Co. Litt. 122 a). This as matter of universal right was originally permitted not only for the encouragement of agriculture but for the necessity of the thing. For when lords of manors granted out parcels of land to tenants for services either done or to be done, these tenants could not plough or manure the land without beasts. These beasts could not be sustained without pasture, and pasture could not be had but in the lord's wastes, and in the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common as inseparably incident to the grant of the lands (2 Bl. Com. 33; *Tyrringham's case*, 4 Rep. 36 a; 2 Inst. 85). There is no general common law right of tenants of a manor to common appendant in the waste. *Parke*, B., said, although there are some books which state that common appendant is of common right, and that common appendant is the common law right of every free tenant in the lord's wastes (see *Mellor* v. *Spateman*, 1 Wms. Saund. 346 d, 6th ed.; *Bennett* v. *Reeve*, Willes, 227; Com. Dig. Comm. B.), it is not to be understood that every tenant of a manor has by common law such a right, but only that certain tenants have such a right, not by prescription, but as a right at common law, incident to the grant. The right therefore is not a common right of all tenants, but belongs only to each grantee, before the stat. *Quia emptores*, of arable land by virtue of his individual grant and as incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant, or by prescription, though it differs in its extent, being limited to such cattle as are kept for ploughing and manuring the arable land granted, and as are of a description fit for that purpose; whereas the right by grant or prescription has no such limits and depends on the will of the grantor (*Dunraven* v. *Llewellyn*, 15 Q. B. 810, 811). As to this decision see Williams' Real Prop., App. C., 605, 15th ed., and *Warrick* v. *Queen's College*, 10 Eq. 123.

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Common appendant can only be claimed in the lord's wastes (2 Inst. 85; 1 Roll. 396; 4 Rep. 37), for the claimant's own commonable cattle levant and couchant upon the land (*Ib.*; Burr. 320). A right of common for cattle "*levant and couchant*," upon inclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer, is capable of maintaining (*Whitelock* v. *Hutchinson*, 2 M. & Rob. 205; 5 T. R. 46; *Bennett* v. *Reeve*, Willes, 227; *Benson* v. *Chester*, 8 T. R. 396; *Willis* v. *Ward*, 2 Chit. 297). In other words the right is governed by the number of cattle which the commoner has the means of housing and providing for in the winter (*Dyce* v. *Hay*, 1 Macq. H. L. C. 313). Levant and couchant expresses a measure of the number of cattle that may be put in, and does not necessarily refer to cattle actually fed upon the particular land (*Johnson* v. *Barnes*, L. R. 7 C. P. 592). It is rather the measure of capacity of the land than a condition to be actually complied with (*Robertson* v. *Hartopp*, 43 Ch. Div. 517; see *Carr* v. *Lambert*, L. R. 1 Exch. 168). This species of common must have existed from time immemorial (1 Roll. Abr. 396), and only arises in the case of grants of arable land (*Warrick* v. *Queen's College*, 6 Ch. 730). It might formerly be claimed as appendant to a cottage, because by 31 Eliz. c. 7 (repealed by 15 Geo. 3, c. 32), it was requisite for a cottage to have four acres of land attached to it (*Emerson* v. *Selby*, 1 Salk. 169; 2 Lord Raym. 1015). Common appendant is so necessarily incident to the land, that it cannot be severed from it, and, therefore, however often the land may be divided, every parcel of it is entitled to common appendant (*Bennett* v. *Reeve*, Willes, 240). The right to common appendant is extinguished by the erection of permanent buildings on the land in respect of which it is claimed, but not by the conversion of arable land into pasture (*Warrick* v. *Queen's College*, 6 Ch. 730; *Robertson* v. *Hartopp*, 43 Ch. Div. 517).

Meaning of levant and couchant.

Common appurtenant.

Common appurtenant may be claimed by prescription or by grant. And after the extinction of a prescriptive right of common by a unity of possession of the waste with the land in respect of which the right is claimed, proof that the successive tenants of such lands for above fifty years under different lords had actually enjoyed the right of common is evidence for presuming a new grant from the lord (*Cowlam* v. *Slack*, 15 East, 108). This species of common, though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant or prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land (4 Rep. 37 a). And it may be not only for beasts usually commonable, such as horses, oxen and sheep, but likewise for goats, swine, &c. (1 Roll. Abr. 399); but not geese (*Morley* v. *Clifford*, 20 Ch. D. 753). A fold course is a right of common appurtenant of pasture for sheep (*Robinson* v. *Duleep Singh*, 11 Ch. Div. 798). Common appurtenant for a fractional part of a cow was claimed in *Nicholls* v. *Chapman* (5 H. & N. 643). In the case of common appurtenant there must be some connection between the occupation of the lands in respect of which the right is enjoyed, and the right itself, which connection must limit the right (*Baylis* v. *Tyssen-Amhurst*, 6 Ch. D. 58). A copyholder cannot lawfully claim common appurtenant without stint in respect of his copyhold tenement; but such common must be limited to the cattle levant and couchant on the tenement to which it is annexed, or the number must be ascertained by the court rolls, or in some other manner (*Morley* v. *Clifford*, 20 Ch. D. 753; see *Benson* v. *Chester*, 8 T. R. 396; *Scholes* v. *Hargraves*, 5 T. R. 46). A person may claim common appurtenant for a certain number of cattle, in which case the cattle of a stranger may be put upon the common, as no injury can arise to the owner of the soil as the number is ascertained (Bac. Abr. 96; *Richard* v. *Squibb*, 1 Ld. Raym. 726; see *Stevens* v. *Austin*, 2 Mod. 185; *Thornel* v. *Lassels*, Cro. Jac. 27). The principle furnished by *Potter* v. *North* (1 Wms. Saund. 635; *Hoskins* v. *Robins*, 2 Wms. Saund. 726), as to claims to common by custom or prescription, seems to be to ascertain the extent of the rights conferred, and the rights reserved by the grant, and to see whether the act be in deroga-

tion of the latter (*Jones* v. *Richard*, 6 Ad. & Ell. 530; see 5 *Ib.* 413). If the common appurtenant be for an uncertain number of cattle, it is limited to the claimant's own commonable cattle levant and couchant upon his lands (see *Manchester* v. *Vale*, 1 Wms. Saund. 28, ed. 1871; and see further, as to common appurtenant for cattle levant and couchant, *Bowen* v. *Jenkins*, 6 Ad. & Ell. 911). A right of common appurtenant for cattle levant and couchant is not extinguished or suspended by reason of a change in the condition of the tenement, if the tenement might still easily be turned to the purpose of feeding cattle (*Curr* v. *Lambert*, L. R. 1 Exch. 168). As to the evidence in support of a claim to common appurtenant, see *Commrs. of Sewers* v. *Glasse*, 19 Eq. 150; and as to the proper mode of pleading a prescriptive right to common appurtenant, see *Baylis* v. *Tyssen-Amhurst*, 6 Ch. D. 500. **Rights of Common.**

If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right, but it is otherwise as to common appurtenant and other kinds of common, as common of estovers or piscary. But both common appendant and common appurtenant will be apportioned on alienation of part of the land to which the common is appendant or appurtenant (Co. Litt. 122 a, 164 a; *Tyrringham's case*, 4 Rep. 36; *Wild's case*, 8 Rep. 78; *O'Hare* v. *Fahy*, 10 Ir. C. L. R. 318). **Apportionment of common.**

The rent-charges under the acts for the commutation of tithes in England and Wales, in respect of the tithes of common appendant or appurtenant, are to be charged on the allotments thereafter to be made in respect of the lands to which the right of common is attached (Tithes Act, 1839, s. 14).

Common because of vicinage or neighbourhood, is not strictly a right of common. It happens where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with each other, the beasts of the one straying mutually into the other's fields without any molestation from either. It is confined to two townships (*Commrs. of Sewers* v. *Glasse*, 19 Eq. 159), and if you have three vills, each of which has a common, A., B. and C., and vill B. lies between A. and C., B. may intercommon with A. or C., but A. cannot intercommon with C. (*Ib.*) It is only a permissive right, intended to excuse what, in strictness, is a trespass in both, and to prevent a multiplicity of suits (*Musgrove* v. *Cave*, Willes, 322; *Wells* v. *Pearcy*, 1 Bing. N. C. 556; *Gullett* v. *Lopes*, 13 East, 348). And therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape and stray thither of themselves, the law winks at the trespass (Co. Litt. 121, 122; 4 Rep. 38; 2 Bl. Comm. 33). Although it may be claimed by prescription, it is rather matter of immemorial custom. The substance of the custom is, that cattle lawfully on one common have been used to stray upon the other. All that it is necessary therefore for the pleadings to show is, that the cattle were lawfully on their own common before they strayed, and that is done by showing thirty years' user under the Prescription Act, 1832 (*Prichard* v. *Powell*, 10 Q. B. 603; see *Hetherington* v. *Vane*, 4 B. & Ald. 428; and as to pleading, see *Morewood* v. *Wood*, 14 East, 327). Reputation may be given in evidence in support of the immemorial right of such common so pleaded (*Prichard* v. *Powell*, *sup.*). Common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence separating the downs (*Heath* v. *Elliot*, 4 Bing. N. C. 388). This common cannot be claimed by usage between the close of an individual and a common (*Clarke* v. *Tinker*, 10 Q. B. 604). Nor can it be claimed by custom in respect of a private estate over which no other right of common is shown (*Jones* v. *Robin*, 10 Q. B. 620). **Common because of vicinage.**

To establish a right of common *pur cause de vicinage* an intercommoning between the two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle

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strayed from one to the other, but were constantly either driven back by their own respective owners, or turned off by the owners of the land into which they had strayed (*Clarke* v. *Tinker*, 10 Q. B. 604).

Common because of vicinage.

Where the commons of two towns adjoin, and a right of common by reason of vicinage exists, and in one town there are fifty acres of common and in the other town one hundred acres of common, the commoners in the first town cannot put more cattle upon the entire common than the common of fifty acres will feed (*Corbet's case*, 7 Rep. 5 a; *Commrs. of Sewers* v. *Glasse*, 19 Eq. 161). Where common *pur cause de vicinage* exists one commoner cannot take the law into his own hands and distrain another commoner's cattle for a surcharge (*Cape* v. *Scott*, L. R. 9 Q. B. 269).

An end may be put to this species of common by inclosure (*Tyrringham's case*, 4 Rep. 36 b, 38 b, 39 a; *Corbet's case*, 7 Rep. 5 a). Where one common is inclosed leaving open a passage for a highway, so that cattle could stray from one to the other by means of the highway, the common by vicinage still continues (*Gullett* v. *Lopes*, 13 East, 348). In case of open field lands, the owner of any particular spot may, by custom, exclude the other from right of pasture there, by inclosing his own land (2 Wils. 269). When there is a common *pur cause de vicinage* between two wastes, and one of them is under a private act conveyed to allottees, for the purpose of being inclosed, and the commissioners extinguish all rights of common on such one waste, these proceedings do not of themselves put an end to the common *pur cause de vicinage* (*Clarke* v. *Tinker*, 10 Q. B. 604; *Wells* v. *Pearcy*, 1 Bing. N. R. 556).

Common in gross.

Common in gross is such a right of common as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. It is a separate inheritance, entirely distinct from landed property, and may be vested in one who has no land in the manor (Co. Litt. 122 a; 2 Bl. Comm. 34). Common appurtenant for a certain number of cattle may be converted into common in gross (*Drury* v. *Kent*, Cro. Jac. 14; *Bunn* v. *Channen*, 5 Taunt. 244). So a common appurtenant to a manor may be granted in gross (1 Roll. Abr. 402, pl. 3; *Day* v. *Spooner*, Cro. Car. 432; Sir W. Jones, 375; 2 Wms. Saund. 727, n.) A right of common in gross *sans nombre*, in the latitude in which it was formerly understood, cannot exist (*Mellor* v. *Spateman*, 1 Wms. Saund. 622; 1 Ld. Raym. 407; *Bennett* v. *Reeve*, Willes, 232; *Benson* v. *Chester*, 8 T. R. 396), and it can have no rational meaning but in contradistinction to stinted common, where a man has a right only to put on a particular number of cattle (*Bennett* v. *Reeve*, Willes, 232). A right of common in gross does not confer a vote for the coroner of a county (*R.* v. *Day*, 3 Ell. & Bl. 859).

A corporation may prescribe for common in gross for cattle levant and couchant within the town, but not for common in gross *sans nombre* (*Mellor* v. *Spateman*, 1 Wms. Saund. 629; *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.; *Johnson* v. *Barnes*, L. R. 8 C. P. 527). Where all freemen inhabiting an ancient borough claimed right of common, and 5 & 6 Will. 4, c. 76, extended the limits of the borough, the right of common was reserved to those who resided within the old limits (*Beadsworth* v. *Torkington*, 1 Q. B. 782; *Hulls* v. *Estcourt*, 2 New Rep. 131). See a plea of common by a burgess under a grant to a corporation, *Parry* v. *Thomas*, 5 Exch. 37.

The Tithes Act, 1839, s. 13, provides the mode in which Lammas lands and a right of common in gross are to be charged with rent-charges, in lieu of tithes, under the acts for the commutation of tithes.

(3) Common of turbary.

Common of turbary is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appurtenant to a house, not to land; for turves are to be burnt in a house; nor can it extend to a right to dig turf for sale (*Valentine* v. *Penny*, Noy, 145; see *Hayward* v. *Cannington*, 1 Lev. 231; 1 Sid. 354). An ancient right of turbary can only exist as being a right in respect of an ancient dwelling-

house or building, or at the most, for the house which supplies the place of that house (*Warrick* v. *Queen's College*, 6 Ch. 730). In an action of trespass the user of this right of common was held to extend to all parts of a common fit for the production of fuel, but not to a rock (*Peardon* v. *Underhill*, 16 Q. B. 120). A custom for all the customary tenants of a manor, having gardens, to dig turf for making grass plots, at all times of the year, and as often and in such quantity as occasion required, is bad, as being indefinite and destructive of the common (*Wilson* v. *Willes*, 7 East, 121, recognized in *Salisbury* v. *Gladstone*, 9 H. L. C. 692, *post*, p. 44; see *Peppin* v. *Shakespear*, 6 T. R. 748). Common of turbary, appurtenant to a house, will pass by a grant or demise of such house with the appurtenances (*Solme* v. *Bullock*, 3 Levinz, 165; *Dobbyn* v. *Somers*, 13 Ir. C. L. R. 293). There is nothing in law to prevent a party dealing with his own land and demising it, from annexing to the land or granting to the lessee a right to take turbary upon other lands of the landlord, to be consumed upon houses to be subsequently built upon the premises (*Hill* v. *Barry*, Hay & J. 688; *Duggan* v. *Carey*, 8 Ir. C. L. R. 210). The right of turbary is apportionable (*Hargrove* v. *Congleton*, 12 Ir. C. L. R. 368). As to trusts of turbary right for benefit of occupiers, see *A.-G.* v. *Meyrick*, 1893, A. C. 1; *Simcoe* v. *Pethick*, 1898, 2 Q. B. 555.

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(4) Common of estovers.

Common of estovers, or *estouviers*, that is, necessaries (from estover, to furnish), is a liberty of taking necessary wood for the use or furniture of a house or farm from off another's estate. The Saxon word bote is used by us as synonymous to the French estovers: and therefore house-bote is a sufficient allowance of wood to repair or to burn in the house; which latter is sometimes called fire-bote; plough-bote, and cart-bote, are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing hedges or fences, as pales, stiles, and gates, to secure inclosures. These botes or estovers must be reasonable ones: and such any tenant or lessee, except a strict tenant at will, may take off the land let or demised to him without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary (Co. Litt. 41; 2 Bl. Com. 35). A person having common of estovers in a certain wood of another, by view and delivery of the owner's bailiff, by taking estovers without such view and delivery is a trespasser, though he takes less than he was entitled to (5 Rep. 25 a). The rule is founded on the obligation upon tenants of making necessary repairs (*De Salis* v. *Crossan*, 1 Ball & B. 188). Where no wood exists, and where part of the premises demised are bog, from which no other beneficial use can arise, a tenant is in Ireland entitled to use such bog for the purposes of fuel (*Howley* v. *Jebb*, 8 Ir. C. L. R. 435). Where tenants abuse their right of estovers, the court will grant an injunction, as if they cut turf for sale (*Courtown* v. *Ward*, 1 Sch. & Lef. 8; see *Wilson* v. *Bragg*, 8 Bac. Abr. 428, Waste (O)).

Every tenant for life or years has a liberty of this kind of common right in the lands which he holds unless restrained, which is usual by particular covenants or exceptions (2 Bl. Com. 282). The right to estovers may also be appendant or appurtenant to a messuage by prescription or grant, to be exercised in lands not occupied by the tenant of the house; as if a man grants estovers to another for the repair of a certain house, they become appurtenant to that house; so that whoever afterwards acquires it, shall have such common of estovers. This right may be claimed either by prescription or grant, but (except in the case of copyholders) it cannot be claimed by custom; for, according to a well-known rule, a custom to take profits *in alieno solo* is bad (*Gateward's case*, 6 Rep. 59; *Bean* v. *Bloom*, 3 Wils. 456; 2 Sir W. Black. 926; *Grimstead* v. *Marlowe*, 4 T. R. 717; *Selby* v. *Robinson*, 2 T. R. 758; *Hoskins* v. *Robins*, 1 Vent. 123—163; 2 Saund. 320).

A person having common of estovers, either by grant or prescription annexed to his house, may alter the rooms or chambers, or build new chimneys, or add to the house without losing the right, but he cannot use

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any of the estovers in the parts newly added (*Luttrell's case*, 4 Rep. 87 a). Common of estovers can only be claimed by prescription for an ancient house (F. N. B. 180; 4 Co. 86; see, however, *Arundel* v. *Steer*, Cro. Jac. 25); but if it be pulled down and another rebuilt, either in the same or another place, the prescription will not be lost (*Costard and Wingfield's case*, Godb. 97; *Cowper* v. *Andrews*, Hob. 39). A person having common of estovers is not entitled to estovers out of timber which the owner of the soil has cut down in part of the wood, but he must take his estovers out of the residue (*Basset* v. *Maynard*, Cro. Eliz. 820; *Dowglass* v. *Kendal*, Cro. Jac. 256). A person having common of estovers appurtenant to a house cannot grant the estovers to another, reserving the house to himself, nor grant the house to another, reserving the estovers to himself (Plowd. 381).

The estovers taken must be reasonable, and limited to the wants of the tenement in respect of which a man claims them, upon which therefore they must be expended (7 E. 4, 27: 12 E. 4, 8; 8 Rep. 54); and cannot be sold to be used elsewhere (11 H. 6, 11 b; *Pembroke's case*, Clayt. 47). A claim of a prescriptive right to cut down and carry away all the trees and wood growing on a certain close, is void as being too large (*Bailey* v. *Stevens*, 12 C. B. N. S. 91).

A prescriptive right in an individual to cut and carry away litter from a forest was established in *De la Warr* v. *Miles*, 17 Ch. Div. 535. As to Crown grants of the right of lopwood to the inhabitants of a parish, see *Willingale* v. *Maitland*, 3 Eq. 103; *Rivers* v. *Adams*, 3 Ex. D. 361; and *Chilton* v. *London*, 7 Ch. D. 735, *ante*, p. 35.

(5) **Common of piscary.**

A *common of fishery* is a right of fishing in common with other persons in a stream or river, the soil whereof belongs to a third person. This does not differ in any respect from any other right of common (Salk. 637); and trespass will not lie for an injury to it. Common of fishery may be claimed by tenants of a manor by custom (*Tilbury* v. *Silva*, 45 Ch. Div. 115); but not by inhabitants of a parish (*Bland* v. *Lipscombe*, 24 L. J. Q. B. 155 n.; *Lloyd* v. *Jones*, 6 C. B. 81); nor by "dwellers" in a manor (*Allgood* v. *Gibson*, 34 L. T. 883); the ground being that, independently of manorial rights, a fishery *in alieno solo*, which is a profit *à prendre*, must be claimed not by custom but by prescription (*Bland* v. *Lipscombe*, *sup.*); and a large and indefinite class cannot prescribe (*Tilbury* v. *Silva*, *sup.*). A grant of a "free fishery" is *primâ facie* a grant of non-exclusive fishery (*Bloomfield* v. *Johnston*, L. R. 8 C. L. 68). A "common fishery," as distinguished from a "common of fishery," means a fishery extending to all mankind, as in the sea (*Benett* v. *Costar*, 8 Taunt. 186).

Different kinds of fishery.

As to the various kinds of fisheries, the only substantial distinction is between an exclusive right of fishery usually called "several," sometimes "free," used as in "free warren"; and a right in common with others usually called common of fishery, sometimes "free," used as in "free port" (*Per Willes*, J., *Malcolmson* v. *O'Dea*, 10 H. L. C. 593). A grant of the exclusive right of fishing includes the right to take away fish (*Fitzgerald* v. *Firbank*, 1897, 2 Ch. 96).

Several fishery.

A several fishery is when a person has an exclusive right of fishery either in his own soil or in the soil of another (1 Selw. N. P. 751, 13th ed.) within particular limits (3 Salk. 360; 2 Salk. 637; see Co. Litt. 122 a, n. 7; *R.* v. *Ellis*, 1 M. & S. 652). Such a right is, strictly speaking, the proper subject of a grant, but not of an exception or reservation (*Doe* v. *Loch*, 2 Ad. & El. 743; *Wickham* v. *Hawker*, 7 M. & W. 76; *Corker* v. *Payne*, 18 W. R. 436; see *Hamilton* v. *Musgrave*, 19 W. R. 443; *Grove* v. *Portal*, 1902, 1 Ch. 727). The word "several" is not necessary to create such a right (*Hanbury* v. *Jenkins*, 1901, 2 Ch. 401).

A several fishery cannot be appurtenant to a several pasture (*Edgar* v. *Fishery Commissioners*, 23 L. T. 732). But a several fishery may be appurtenant to a manor (*Rogers* v. *Allen*, 1 Camp. 309). And in such a case will remain in gross if the lands of the manor are conveyed away (*Neill* v. *Devonshire*, 8 App. Cas. 153, 169; *Devonshire* v. *Pattinson*, 20 Q.

B. Div. 263), unless the intention to transfer the fishery appear in the conveyance (*Tilbury* v. *Silva*, 45 Ch. Div. 98). A several fishery, whether in tidal or non-tidal waters, may exist independently of riparian ownership, and that whether the owner of the fishery be the owner of the soil of the river (*Neill* v. *Devonshire*, 8 App. Cas. 153; *Devonshire* v. *Pattinson*, *sup.*; *Smith* v. *Andrews*, 1891, 2 Ch. 697; *Hanbury* v. *Jenkins*, 1901, 2 Ch. 401), or not (*A.-G.* v. *Emerson*, 1891, A. C. 654; *Miller* v. *Little*, 4 L. R. Ir. 302; *Foster* v. *Wright*, 4 C. P. D. 449). A perfect paper title to a several fishery may not be absolutely conclusive if there be evidence of user by others inconsistent therewith (*Blount* v. *Layard*, 1891, 2 Ch. 681, n.; *Neill* v. *Devonshire*, *sup.*; *Smith* v. *Andrews*, 1891, 2 Ch. 678). As to whether a right to a several fishery can be lost by abandonment, see *Neill* v. *Devonshire*, 8 App. Cas. 154, 170. A several fishery may be followed where the water gradually shifts its course (*Foster* v. *Wright*, 4 C. P. D. 438; see *Miller* v. *Little*, 4 L. R. Ir. 302; *Hindson* v. *Ashby*, 1896, 2 Ch. 1); but not where it leaves the old course and commences to follow a new course which was always distinguishable from the old (*Carlisle* v. *Graham*, L. R. 4 Ex. 361).

A claim to a fishery in gross is not within the Prescription Act (*Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687; 34 L. J. C. P. 309).

Distinction between fisheries in non-tidal, and tidal, waters:

In addition to the above distinction between common of fishery and a several fishery, it is important to bear in mind the distinction between (1) non-tidal waters (which include that part of a river in which the water is not salt, and in ordinary tides is unaffected by tidal influence, *Reece* v. *Miller*, 8 Q. B. D. 626); and (2) tidal waters.

non-tidal waters;

In the case of a non-tidal river the presumption is that each riparian owner is entitled to a several fishery in the river in front of his land *ad medium filum* (*Blount* v. *Layard*, 1891, 2 Ch. 689, n.). This is so even in the case of a navigable non-tidal river or "king's stream" (*Ib.*); or of a river flowing through a manor (*Lamb* v. *Newbiggin*, 1 C. & K. 549). It seems, however, that the several fishery of a riparian owner may extend over the whole stream (*Blount* v. *Layard*, 1891, 2 Ch. 688). As to fishery in a lake, see *Bristow* v. *Cormican*, 3 App. Cas. 641; *Marshall* v. *Ulleswater Co.*, 3 B. & S. 732; *Johnson* v. *Bloomfield*, I. R. 8 C. L. 68; *Blackett* v. *Clayton*, quoted 1897, 2 Ch. 564. As to whether the Crown can grant a right of fishing in a non-tidal river flowing over the soil of a subject, see *Devonshire* v. *Pattinson*, 20 Q. B. Div. 263. In non-tidal waters, an individual may acquire a title by prescription to a several fishery (Co. Litt. 122 a; Ventr. 391; see 2 Saund. 326; *Peers* v. *Lacy*, 4 Mod. 362), or to a fishing weir (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657; see *Barker* v. *Faulkner*, 1898, W. N. 69; *Hanbury* v. *Jenkins*, 1901, 2 Ch. 401). The public cannot have a right to fish in non-tidal waters founded on custom, prescription, or lost grant (*Smith* v. *Andrews*, 1891, 2 Ch. 699, and cases there quoted; *Blount* v. *Layard*, *Ib.* 689, n.).

tidal waters.

In tidal waters (whether sea or river), the right of fishing is *primâ facie* in the public (*Neill* v. *Devonshire*, 8 App. Cas. 177; *Malcolmson* v. *O'Dea*, 10 H. L. C. 618). This public right extends to shell fish (as oysters), as well as to floating fish (*Bagot* v. *Orr*, 2 Bos. & P. 472; *Saltash* v. *Goodman*, 7 Q. B. Div. 116); and includes the right to deposit oysters on the foreshore (*Truro* v. *Rowe*, 1901, 2 K. B. 870). The right to create a several fishery in tidal waters existed in the Crown before Magna Charta, and a several fishery so created could lawfully afterwards be made the subject of a grant by the Crown to an individual (*Malcolmson* v. *O'Dea*, *sup.*; see *Neill* v. *Devonshire*, 8 App. Cas. 135). And when the Crown acquired the right to such a fishery by merger since Magna Charta it could re-grant it (*Northumberland* v. *Houghton*, L. R. 5 Ex. 127). Long exclusive enjoyment alone may be ground for presuming the grant of such a fishery (*Edgar* v. *Fishery Commissioners*, 23 L. T. 732; *Mannall* v. *Fisher*, 5 C. B. N. S. 856; *Little* v. *Wingfield*, 8 Ir. C. L. R. 279; *Beaman* v. *Kinsella*, *Ib.* 291). So a several fishery in tidal waters has been presumed to have been granted to a corporation subject to a trust (in the nature of a charitable trust) in favour of inhabitants, authorizing them to dredge for oysters

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within a certain period annually (*Goodman* v. *Saltash*, 7 App. Cas. 633). A several fishery was held to have been granted to a corporation in trust for the members thereof (*Re Free Fishermen of Faversham*, 36 Ch. Div. 329). There may be a several fishery for oysters, the right to take floating fish remaining in the public (*Rogers* v. *Allen*, 1 Camp. 29). An individual may claim a several fishery in an arm of the sea by prescription (*Orford* v. *Richardson*, 4 T. R. 437; see *Ward* v. *Cresswell*, Willes, 265; *Crichton* v. *Collery*, 19 W. R. 107). A grant of foreshore would not of itself convey the right to a several fishery over it (*A.-G.* v. *Emerson*, 1891, A. C. 654). The owner of a several fishery over foreshore, whether owner of the soil or not, can restrain the reclamation of part of the foreshore (*Bridges* v. *Hinton*, 11 L. T. 653).

Ownership of soil in relation to fishing.

As to the relation of the ownership of a fishery to the ownership of the soil of the bed, it is settled that the owner of a several fishery must be presumed to be the owner of the soil, whether the fishery is in tidal waters (*A.-G.* v. *Emerson*, 1891, A. C. 649); or in a non-tidal river (*Holford* v. *Bailey*, 13 Q. B. 426; *Hanbury* v. *Jenkins*, 1901, 2 Ch. 401; *Palmer* v. *Thames Conservators*, 1901, W. N. 228); or in a lake (*Marshall* v. *Ulleswater Co.*, 3 B. & S. 732). The ownership is a limited one, in support and for the purposes of the fishery (*Hindson* v. *Ashby*, 1896, 2 Ch. 19). The terms of the grant may rebut this presumption (*Somerset* v. *Fogwell*, 5 B. & C. 886; see *Bloomfield* v. *Johnston*, I. R. 8 C. L. 95, 106; *A.-G.* v. *Emerson*, 1891, A. C. 655). In the case of a grant of a "free fishery," *i. e.*, a non-exclusive right, the presumption is that the soil does not pass (*Bloomfield* v. *Johnston*, *sup.*). For the ordinary rules as to the ownership of the soil below water, see *post*, p. 89. And as to when the rights of lords of manors depend upon the ownership of the soil, see *Grand Union Canal Co.* v. *Ashby*, 6 H. & N. 394; *Clarke* v. *Mercer*, 1 F. & F. 492. Where the waste of a manor is bounded by a river, and there is evidence of the exercise of rights of common (*e. g.*, fishing) over the bed, the bed *ad medium filum* forms part of the waste (*Tilbury* v. *Silva*, 45 Ch. D. 110); but it is not part of the waste, where the commoners' rights do not extend beyond the water's edge, and the bed is enjoyed as a separate tenement (*Ecroyd* v. *Coulthard*, 1898, 2 Ch. 368).

As to weirs, see *Weld* v. *Hornby*, 7 East, 195; *Hanbury* v. *Jenkins*, 1901, 2 Ch. 401; *Barker* v. *Faulkner*, 1898, W. N. 69.

As to the relief in equity in the case of common of fishery, see *post*, p. 50.

(6) **Customs to take sand, gravel, &c.**

Customs have been established for copyholders to take sand and gravel from the waste of the manor (*Peppin* v. *Shakespear*, 6 T. R. 748; *Daberley* v. *Page*, 2 T. R. 391; see *Portland* v. *Hill*, 2 Eq. 765), and loam for the repair of ancient tenements (*Robertson* v. *Hartopp*, 43 Ch. Div. 514). Compare the customs established for copyholders to take clay, &c. without limit from their copyhold tenements (*Salisbury* v. *Gladstone*, 9 H. L. C. 692; *Hanmer* v. *Chance*, 4 D. J. & S. 626).

As to taking materials for repairing highways from wastes or commons, see Highway Act, 1835, s. 51; Commons Act, 1876, s. 20; *Rylatt* v. *Marfleet*, 14 M. & W. 233; *Hayes Conservators* v. *Bromley Council*, 1897, 1 Q. B. 321.

(7) **Presumption that waste land belongs to lord of manor.**

Primâ facie the lord of the manor is entitled to all waste lands within the manor; and it is not essential that the lord should show acts of ownership of such lands; and evidence that the public have been used to throw rubbish on waste lands is rather evidence that it belongs to the lord than to any private individual (*Doe* v. *Williams*, 7 C. & P. 332). A right to any part of the waste may, however, be established against the lord by repeated acts of ownership, as by cutting trees, digging turf, and the like (*Tyrwhitt* v. *Wynne*, 2 B. & Ald. 554; *Barnes* v. *Mawson*, 1 M. & S. 77; *Richards* v. *Peake*, 2 B. & C. 918)

The lord may take gravel and loam from the waste, provided he does

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not infringe the commoners' rights (*Hall* v. *Byron*, 4 Ch. D. 667; see *Bateson* v. *Green*, 5 T. R. 411; *Folkard* v. *Hemmett*, 5 T. R. 417; *Hilton* v. *Granville*, 5 Q. B. 730). The *onus* of showing that such rights are interfered with lies on the commoner (*Hall* v. *Byron*, 4 Ch. D. 680; *Robertson* v. *Hartopp*, 43 Ch. D. 501).

Grants by the lord.

The lord may, with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right (*Folkard* v. *Hemmett*, 5 T. R. 417). In like manner there may be a valid custom for the lord with the assent of the homage to grant parcels of the waste to be holden by copy of court roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners (*Boulcott* v. *Winmill*, 2 Camp. 261; see *Northwich* v. *Stanway*, 3 Bos. & P. 346; *Lascelles* v. *Onslow*, 2 Q. B. D. 433), even where a sufficiency of common is not left (*Ramsey* v. *Cruddas*, 1893, 1 Q. B. 228). The consent of the majority of the homage is sufficient (*Ib.*). But without a custom for the purpose, the lord cannot make a new grant of copyhold (*R.* v. *Hornchurch*, 2 B. & Ald. 189; *R.* v. *Wilby*, 2 M. & S. 504). The consent of the Board of Agriculture is necessary for a new grant of copyhold (Copyhold Act, 1894, s. 81), and also the consent of the homage when such is the custom (sect. 83). A custom for the lord to grant leases of the waste of the manor without restriction is bad in point of law (*Badger* v. *Ford*, 3 B. & Ald. 153). A custom to inclose (even as against a common right of turbary), leaving sufficiency of common, is good; but the *onus* of proving that a sufficiency is left lies on the lord (*Arlett* v. *Ellis*, 7 B. & C. 346; see *Rogers* v. *Wynne*, 7 D. & R. 521; *Betts* v. *Thompson*, 6 Ch. 732; *Robertson* v. *Hartopp*, 43 Ch. D. 501). It seems that the lord may license training of horses on the waste so long as it does not injure the right of pasture (*Coote* v. *Ford*, 83 L. T. 483).

Presumption as to encroachments on the waste.

An encroachment by a copyholder on the waste becomes, at any rate where the lord may by custom grant the waste as copyhold, an accretion to the holding, and a copyhold title is acquired (so held by *Fry*, J., in *A.-G.* v. *Tomline*, 5 Ch. D. 750; see, however, *S. C.* before the C. A., 15 Ch. Div. 150). In the case of landlord and tenant generally, encroachments made by a tenant are for the benefit of the landlord, unless it appears clearly, by some act done at the time of the making of the encroachments, that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent (*Doe* v. *Rees*, 6 C. & P. 610). This doctrine originated in those cases where the landlord was lord of the manor, and the tenant encroached upon the waste (*Andrews* v. *Hailes*, 2 Ell. & Bl. 353). Where a tenant who holds under the lord of a manor encroaches upon the waste, he is presumed to have approved against the commoners for the benefit of the lord. In other cases, when the power to encroach is derived from the occupation of the premises held of a landlord, and the encroachment is occupied as if it was part of the holding, then at the end of the tenancy the presumption as between the landlord and tenant is, that it is part of the holding, and it belongs to the landlord (*Doe* v. *Tidbury*, 14 C. B. 324; see *A.-G.* v. *Tomline*, 15 Ch. Div. 155). It is not necessary that the land encroached upon should be contiguous to the tenant's holding (*Lisburne* v. *Davies*, L. R. 1 C. P. 259; see *Whitmore* v. *Humphries*, L. R. 7 C. P. 1).

Right to approve.

By the Statute of Merton (20 Hen. 3, c. 4), and by subsequent statutes (29 Geo. 2, c. 36, and 31 Geo. 2, c. 41), the lord of a manor may inclose so much of the common as he pleases, for tillage, or wood ground, provided he leaves common sufficient for such as are entitled to rights of common. But the consent of the Board of Agriculture is now necessary (56 & 57 Vict. c. 57). This inclosure, when justifiable, is called in law "*approving*," an ancient expression signifying the same as "*improving*" (2 Bl. Com. 34). The statutory right to approve applies as against common appurtenant of pasture (*Robinson* v. *Duleep Singh*, 11 Ch. D. 798); but there can be no approvement against tenants of a manor who have a right to dig gravel on the waste, and to take estovers (*Duberley* v. *Page*, 2 T. R. 391; *Grant* v. *Gunner*, 1 Taunt. 435; *Shakespear* v. *Peppin*, 6 T. R. 741). The statute

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does not authorize the lord to approve as against common of turbary or estovers; but such a right may exist by custom (*Lascelles* v. *Onslow*, 2 Q. B. D. 451; *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.; *Bateson* v. *Green*, 5 T. R. 411; *Place* v. *Jackson*, 4 D. & R. 318; 2 Atk. 189). There can be no inclosure under 29 Geo. 2, c. 36, as against persons entitled to the underwood on the waste (*Nicholls* v. *Mitford*, 20 Ch. D. 380). A custom for tenants to approve by the lord's consent, and by presentment of the homage of the court baron, does not restrain the lord's right to approve (*Duberley* v. *Page*, 2 T. R. 392, n.).

An owner *pur autre vie* of a common may approve under the statute (*Patrick* v. *Stubbs*, 9 M. & W. 830). A person seised in fee of part of the waste, although he be not lord, may approve without the consent of the homage, provided he leaves a sufficiency of common for the tenants of the manor (*Glover* v. *Lane*, 3 T. R. 445).

Where a lord approves, there lies upon him (apart from a custom to a different effect, *Ramsey* v. *Cruddas*, 1893, 1 Q. B. 228) the *onus* of showing that sufficient waste is left for the commoners (*Betts* v. *Thompson*, 6 Ch. 732). The question of sufficiency depends, not on the average number of sheep commoners have in fact turned out, but on the number they are entitled to turn out (*Robertson* v. *Hartopp*, 43 Ch. Div. 484, see p. 518, where the C. A. treat as doubtful the decisions in *Lake* v. *Plaxton*, 10 Exch. 196; and *Lascelles* v. *Onslow*, 2 Q. B. D. 433).

A lord cannot under 51 Geo. 3, c. 115, grant waste for a burial ground, discharged from a customary right of recreation (*Forbes* v. *Eccl. Commrs.*, 15 Eq. 5).

(8) **Inclosure acts.**

The greater part of the commons in England have been inclosed under local acts of parliament. The Inclosure (Consolidation) Act, 1801, consolidated certain provisions which had usually been inserted in acts of inclosure, and facilitated the mode of proving the several facts usually required on the passing of such acts. The 1 & 2 Geo. 4, c. 23, amended the law respecting the inclosure of open fields, common, and waste lands in England. The 3 & 4 Will. 4, c. 87, remedied defects in titles to real property allotted under inclosure acts, in consequence of the award not having been enrolled, or not having been enrolled within the time limited by the several inclosure acts, and authorized the appointment of new commissioners where the same should have been omitted. Further facilities for the inclosure of open and common, arable, meadow and pasture lands and fields in England and Wales were given by stat. 6 & 7 Will. 4, c. 115; 3 & 4 Vict. c. 31. By the Inclosure Act, 1845, the superintendence of applications for the inclosure of lands and the carrying the same into operation was entrusted to the first commissioner of woods and forests, and two other commissioners, who were styled "The Inclosure Commissioners for England and Wales." The powers and duties of these commissioners are now vested in the Board of Agriculture (52 & 53 Vict. c. 30). The act of 1845 has been amended by many recent acts, and these acts are now collectively known as the Inclosure Acts, 1845 to 1882 (Short Titles Act, 1896). The rules for construing inclosure acts as regards the right to support when the ownership of minerals and surface is severed are given in *Bell* v. *Dudley*, 1895, 1 Ch. 182; see *Consett Co.* v. *Ritson*, 43 W. R. 122.

Inclosure commissioners.

Where, under an inclosure act, the waste lands of a manor are directed to be allotted in certain proportions, the freehold of such part of the lands as are not portioned out in the award remains in the lord of the manor (*Packe* v. *Mee*, 9 W. R. 335). The legal estate in land allotted under an inclosure act passed to the allottee (*Simcoe* v. *Pethick*, 1898, 2 Q. B. 555; see *A.-G.* v. *Meyrick*, 1893, A. C. 1). See further, as to inclosure, Cooke on Inclosures, 4th ed.

Where by an agreement between the lord of the manor and the copyholders, the waste lands are allotted and inclosed, the allotments taken by the copyholders are of freehold tenure (*Paine* v. *Ryder*, 24 Beav. 151; *Doe* v. *Davidson*, 4 M. & S. 175).

29 & 30 Vict. c. 122, amended and extended by 32 & 33 Vict. c. 107, provides for the improvement, protection and management of commons near the metropolis. **Rights of Common.**

Under the Inclosure Act, 1845, gavelkind lands in Kent may be exchanged for lands in Middlesex held in common socage (*Minet* v. *Leman*, 7 D. M. & G. 340).

(9) **Interest of the commoner.**

The interest which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of his cattle. He must not meddle at all with the soil, nor with its fruit and produce, even though it may eventually improve and meliorate the common (1 Roll. Abr. 406, pl. 10; 12 H. 8, 2 a; *Harcourt's case*). Therefore he cannot cut the grass, wood, bushes, fern, or other thing, growing on the common; nor can he cut the molehills, or make fishponds there (12 H. 8, 2 a; *per Brooke*, J., 2 Leon. 202; Godb. 182, pl. 258; *Anon.*, Bridg. 10; *Samborn* v. *Harilo*, 2 Bul. 116; *Carrill* v. *Pack*, 1 Sid. 251). There may be a custom for the commoners to take rabbits on the waste (*Coote* v. *Ford*, 83 L. T. 482).

(10) **By what words a right of common will pass.**

By the conveyance of the lands to which either common appendant or appurtenant is annexed, the right of common will pass (*Solme* v. *Bullock*, 3 Lev. 165; *Sacheverell* v. *Porter*, Cro. Car. 482; *Drury* v. *Kent*, Cro. Jac. 14). Where common has been extinguished by union of ownership, and a grant is made of the land, to which, before the extinguishment, the right of common was attached, and the words "appertaining" and "belonging" only are used, the right will not pass. But if the words "or therewith used or enjoyed" are inserted, they would be sufficient to revive the right (*Clements* v. *Lambert*, 1 Taunt. 205; *Morris* v. *Eggington*, 3 Taunt. 24; *Barlow* v. *Rhodes*, 1 C. & M. 448; *Wardle* v. *Brocklehurst*, Ell. & Ell. 1058; *Baring* v. *Abingdon*, 1892, 2 Ch. 374). Now, by Conv. Act, 1881, s. 6, a conveyance of land includes all commons appertaining or reputed to appertain to the land or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as, part or parcel of or appurtenant to the land. The effect of an enfranchisement of copyholds being to extinguish all rights and privileges annexed to the copyholder's estate as such, the right of common will not pass by the word "appurtenances" in the deed of enfranchisement (Moore, 667; Cro. Jac. 253; 2 Ld. Raym. 1225; Salk. 170, 364); but must be made by express grant (Moore, 667; Cro. Eliz. 570; see *Doidge* v. *Carpenter*, 6 M. & S. 49). General words in a conveyance by the lord were held not to re-create rights of common (*Hall* v. *Byron*, 4 Ch. D. 667). And where a lord granted demesne lands together with all commons, &c., the words did not create a right of common (*Baring* v. *Abingdon*, 1892, 2 Ch. 374). On the other hand, where a copyhold tenement, to which a right of common was originally appendant, having vested in the lord by forfeiture, was granted by him as copyhold, with the appurtenances; it was held, that it was entitled to a right of common (*Badger* v. *Ford*, 3 B. & Ald. 153). And a copyholder, who has common in a waste *without* the manor of which his copyhold is parcel, does not lose it by enfranchisement of the copyhold (*Barwick* v. *Matthews*, 5 Taunt. 365).

Where upon an inclosure an allotment was awarded in lieu of commonable rights annexed to land (which were thereupon extinguished), a subsequent lease of the land with general words did not carry the allotment (*Williams* v. *Phillips*, 8 Q. B. Div. 437).

(11) **Extinguishment of common.**

A right of common may be extinguished by a release, by unity of possession of the land, by severance, or by the enfranchisement of a copyhold. If the commoner releases part of the common, it will operate as an extinguishment of the whole, because the right is entire throughout the whole land, therefore a release of part is a release of the whole (*Rotherham* v. *Green*, Cro. Eliz. 593; 1 Show. 350; *Johnson* v. *Barnes*, L. R. 8 C. P. 527). Common appendant and appurtenant become extin-

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guished by unity of possession of the land to which the right of common was annexed with the land in which the common was. But it is necessary that the party should have an estate equal in duration, quality, and other circumstances of right, in the tenements in respect of which the common is claimed, and in the premises over which the right was claimed (*R.* v. *Hermitage*, Carth. 239; *Bradshaw* v. *Eyr*, Cro. Eliz. 570; 4 Rep. 38 a; see *Lloyd* v. *Powis*, 4 El. & Bl. 485). Common appendant or appurtenant for cattle levant and couchant may also be extinguished by severance. As where a person, having common of this kind annexed to a messuage or tenement, conveys the messuage or tenement, excepting the common, the common is extinguished (1 Roll. Abr. 401). Where a right of common is annexed to a copyhold, and the lord grants the land to the copyholder and his heirs, with the appurtenances, the common is extinguished, because it was annexed to the customary estate, which being converted into a freehold, the right of common is gone (*Marsham* v. *Hunter*, Cro. Jac. 253; Gilb. Ten. 224). But there may be words amounting to a re-grant of common (*Doidge* v. *Carpenter*, 6 M. & S. 49; see *Baring* v. *Abingdon*, 1892, 2 Ch. 374). Common is not extinguished on the release of seigniorial rights in the freeholds of a manor (*Baring* v. *Abingdon*, *sup.*; *Broome* v. *Wenham*, 68 L. T. 651). Equity will, under certain circumstances, decree the continuance of common, where it would be extinct at law (*Styant* v. *Staker*, 2 Vern. 250; Comb. 127). Commonable rights are not extinguished by enfranchisement under the Copyhold Acts (Copyhold Acts, 1841, s. 81, 1852, s. 45, and 1894, s. 22). Nor are the lord's mineral rights or sporting rights affected (Copyhold Act, 1894, s. 23).

As to the extinguishment of a right of common appurtenant for cattle levant and couchant by alteration in the dominant tenement, see *Carr* v. *Lambert* (L. R. 1 Ex. 168).

(12) Remedies for disturbance of rights of common:

by abatement;

One remedy of commoners for an injury to the right of common is abatement. It is, however, the policy of the law not to allow commoners to abate except in a few cases. The abator is a judge in his own cause, which ought seldom to be permitted, whereas an action will best ascertain the just measure of the damages he has sustained. The cases where the law allows an abatement by a commoner are where the acts of the lord are directly contrary to the nature of the common. For by the grant of it, the grantor gives everything which is incident to the enjoyment of the grant, such as free ingress, egress, &c. Therefore, if the lord erect a wall, gate, hedge or fence on land surrounding the common, to prevent the commoner's cattle from going into the common, the commoner may abate the erection, because it is inconsistent with the terms of the grant (2 Roll. Abr. 145, (W.) pl. 2; *Cooper* v. *Marshall*, 1 Burr. 259; *Sadgrove* v. *Kirby*, 6 T. R. 485); but only so much of the erection as to make a way for his cattle to go into the common (15 Hen. 7, 10 b, pl. 18; 29 Edw. 3, 6; 2 Inst. 88; *Mason* v. *Cæsar*, 2 Mod. 65; see 1 Wms. Saund. 651). So where the commoner is deprived of part of his common by the erection of a wall gate or hedge upon the common itself, he may abate the whole erection, for it deprives him of his common, and forms no part of the soil of the common, and by such abatement the commoner does not at all meddle with the soil (*Mason* v. *Cæsar*, 2 Mod. 65; 2 Inst. 88; Litt. Rep. 38). And yet, as the lord may approve, leaving a sufficiency of common, the commoner acts at the peril of being punished in an action of trespass, provided the lord has left a sufficiency of common (*Arlett* v. *Ellis*, 7 B. & C. 346; 9 B. & C. 671; see *Robertson* v. *Hartopp*, 43 Ch. D. 496).

A commoner may pull down a house wrongfully erected upon the common, if necessary for the exercise of his right, unless persons are in it at the time (*Perry* v. *Fitzhowe*, 8 Q. B. 757; *Jones* v. *Jones*, 1 H. & C. 1; see *Harvey* v. *Bridges*, 1 Exch. 261). And may do so even where persons are in the house at the time, after notice and request to the occupier to remove it (*Davies* v. *Williams*, 16 Q. B. 543; see *Lane* v. *Capsey*, 1891, 3 Ch. 411). If a mere stranger erect a building upon land belonging to another, the owner of the land is justified in pulling down the building, although

the intruder is at the time in the building (*Barking* v. *Read*, 19 L. J. Q. B. 291).

If the lord plant trees on the common, and the commoner thereby cannot have his common so beneficially as he ought, he cannot cut them down, for they are part of the soil itself, being the fruit and produce of the soil, but he must bring an action (*Sadgrove* v. *Kirby*, 6 T. R. 483; 1 Bos. & P. 13). So if the lord's rabbits on a common increase so much that there is not a sufficiency of common left, a commoner cannot fill up the coney-burrows (*Cooper* v. *Marshall*, 1 Burr. 259; *S. C.*, 2 Wils. 51; 1 Roll. Abr. 405, pl. 3). Much less can a commoner kill the rabbits to prevent their increase to the prejudice of the common (*Hodson* v. *Grissell*, 1 Roll. Abr. 405, pl. 1, 2; Cro. Jac. 195; Yel. 104; 1 Lutw. 108; 2 Leon. 203; see 1 Wms. Saund. 651; *Robertson* v. *Hartopp*, 43 Ch. D. 501). As to a custom to take rabbits, see *Coote* v. *Ford*, 83 L. T. 482.

by distress;

A commoner can distrain the cattle of a stranger (*Hall* v. *Harding*, 4 Burr. 2428); but he cannot distrain the cattle of another commoner, because they come on the commonable land by colour of right (*Hall* v. *Harding*, 4 Burr. 2426). This principle applies to common *pur cause de vicinage*, as well as to common appurtenant (*Cape* v. *Scott*, L. R. 9 Q. B. 269). As to the right of distress for a surcharge, see further 1 Wms. Saund. 630.

by action,

The usual remedy adopted by commoners for an injury to the right of common is an action for a disturbance of the right of common, which may be maintained either against the lord or owner of the soil (*Hassard* v. *Cantrell*, Lutw. 101), or a stranger, or a commoner (1 Selw. N. P. 381, 13th ed.), or a company which has taken common and constructed a railway thereon without first making compensation to the commoners (*Stoneham* v. *L. B. & S. C. R.*, L. R. 7 Q. B. 1). In this action the plaintiff must prove an injury sustained; but the smallest injury is sufficient, as that of taking away the manure which was dropped on the common by the cattle (*Pindar* v. *Wadsworth*, 2 East, 154; see cases cited in *Marzetti* v. *Williams*, 1 B. & Ad. 426; *Blofield* v. *Payne*, 4 B. & Ad. 410; and *Beadsworth* v. *Torkington*, 1 Q. B. 782).

If one of the commoners surcharges the common, that is, puts more cattle into the common than he is entitled to do, the commoner who is injured may maintain an action against the other for a surcharge, notwithstanding he has himself been guilty of a surcharge (*Hobson* v. *Todd*, 4 T. R. 71; see *Bowen* v. *Jenkins*, 6 Ad. & Ell. 911; *Atkinson* v. *Teesdale*, 2 W. Bl. 817; *Cheesman* v. *Hardham*, 1 B. & Ald. 706). In case for a surcharge of common, the plaintiff need not show that he was exercising his right of common at the time of the surcharge, but only that he could not enjoy his common so beneficially as he ought (*Wells* v. *Watling*, 2 W. Bl. 1233).

An action of trespass will lie by one tenant in common against another, and also against his licensee, for making holes in the common, and for digging and taking turves away, when those acts are not done in the exercise of a right of common. But the plaintiff will recover such damages only as are proportionate to his interest (*Wilkinson* v. *Haygarth*, 16 L. J. Q. B. 103). An owner seised in fee of a close, upon which the burgesses of a borough had a right during a certain portion of the year to depasture their cattle, and having during that period exclusive possession of the close, may maintain an action of trespass against a party who, during that period, commits a trespass in the subsoil by digging holes; but not against one who, during that period, merely rides over the close (*Cox* v. *Glue*, 5 C. B. 533). As to pleading in an action of trespass against several claiming a right of common, see *Church* v. *Wright*, 15 C. B. N. S. 750; *Davies* v. *Williams*, 16 Q. B. 543.

Before the Real Property Limitation Act, 1833, the commoner was barred of his right of entry and ejectment, by having acquiesced in the inclosure of part of a common for more than twenty years, and his remedy was by writ of assize of common. The lord was not conclusively barred of his remedy to recover common lands which had been inclosed until the

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lapse of sixty years, within which time he might recover the lands by a real action (*Edwards* v. *M'Leay*, Cooper, C. C. 318; *Hawke* v. *Bacon*, 2 Taunt. 155; *Creach* v. *Wilmot*, *Id.* 159; see 2 Smith's L. C. 702, 10th ed.) Writs of assize have been abolished by Real Property Limitation Act, 1833, s. 36, *post*.

actions in Chancery Division.

As to proceedings in equity in relation to rights of common before the Jud. Acts, see *York v. Pilkington*, 1 Atk. 282; *Tenham* v. *Herbert*, 2 Atk. 483; *Whitchurch* v. *Hyde*, *Id.* 391; *Welby* v. *Rutland*, 6 Br. P. C. 575; 1 Br. C. C. 40, 572.

An action may be brought in the Chancery Division against the lord by one copyholder (if he sues on behalf of himself and the other copyholders, not otherwise) to have their rights of common ascertained (*Phillips* v. *Hudson*, 2 Ch. 243). An action for the purpose of establishing a right of common over the wastes of a manor may be maintained by a copyhold and freehold tenant of the manor on behalf of himself and all other copyhold and freehold tenants (*Smith* v. *Brownlow*, 9 Eq. 241; *Robertson* v. *Hartopp*, 43 Ch. D. 484); and by one freehold tenant of a manor on behalf of himself and all other freehold tenants (*Warrick* v. *Queen's College*, 6 Ch. 716; *Betts* v. *Thompson*, 6 Ch. 732). An action for the purpose of establishing a right of common over the wastes of a forest may be maintained by an owner and occupier of land within the forest on behalf of all the owners and occupiers (*Commrs. of Sewers* v. *Glasse*, 7 Ch. 456). The decree in such an action is given (19 Eq. 164). The defendants were the lord and two grantees of the waste, who were sued as representing other grantees. The decree was held binding on another grantee against whom a supplemental statement of claim was subsequently filed (*Commrs. of Sewers* v. *Gellatly*, 3 Ch. D. 610; see *Howard* v. *Maitland*, 11 Q. B. Div. 695).

As to production of documents in a suit instituted to establish a right of common, see *Minet* v. *Morgan*, 11 Eq. 284; *Warrick* v. *Queen's College*, 3 Eq. 683. On an issue whether land was common land or subject to any commonable rights of the commoners of certain parishes, evidence of reputation was admitted (*Evans* v. *Merthyr Tydfil Council*, 1899, 1 Ch. 241).

As to the law of common in general, see Bac. Abr. Common; Com. Dig. Common; Cruise's Dig. tit. XXIII.; Woolrych on Rights of Common, 2nd ed.

IV.—Of Rights of Way, (A) Public and (B) Private.

A. *Public Rights of Way and Highways, and herein of Balks and Ditches.*

(1) *What ways are highways*...50.
(2) *Creation of highways*...51.
(3) *Nature of rights of public over highways*...53.
(4) *Repair of highways*...54.
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(7) *Ownership of soil of highways and roadside wastes*...57.
(8) *Balks and ditches*...59.

(1) What roads are highways.

A right of way may be either public or private. Ways common to all the king's subjects are called highways (1 Ventr. 189; 1 T. R. 570). Whether a way be a public or private way is a matter of fact, and depends

much on common reputation (1 Ventr. 189; Hawk. P. C. b. 1, c. 76, s. 1). The public may have a right to a road as a common street, although the road does not terminate in a town or public road, but terminates in a common (*R.* v. *Wandsworth*, 1 B. & Ald. 63), and although there be no thoroughfare (*Rugby Charity* v. *Merryweather*, 11 East, 375; *Bateman* v. *Bluck*, 18 Q. B. 870; *Campbell* v. *Lang*, 1 Macq. H. L. C. 451; *Souch* v. *East London R. Co.*, 16 Eq. 108; *Vernon* v. *S. James*, 16 Ch. D. 449). See *Woodyer* v. *Hadden* (5 Taunt. 125), where a court, which was no thoroughfare, was held not a highway. There may be a highway over a *cul de sac* in a town, which is repaired by the public: but *quære* whether the doctrine applies to a long tract of land in the country, on which public money has not been expended (*Bourke* v. *Davis*, 44 Ch. D. 123). So a road may be a highway, although it is circuitous (*R.* v. *Lloyd*, 1 Camp. 261). A footpath across a churchyard may be a "churchway," to which the right is in the parishioners, or else a common highway (*Batten* v. *Gedye*, 41 Ch. D. 507). As to a faculty for such a path, see *Re St. John's, Cardiff*, 1898, P. 155. As to the distinction between a right of footway for the public and the right of the inhabitants of a district to use a promenade, see *Abercromby* v. *Fermoy*, 1900, 1 Ir. R. 302. **Rights of Way.**

On an issue, whether land is a highway, evidence of reputation is admissible. Thus the court accepted evidence as to a meeting held to consider the repairing of a way, and that several, since dead, signed a paper, stating that the land was not a highway, there being at the time no litigation (*Barraclough* v. *Johnson*, 8 Ad. & Ell. 99; see *Nicholls* v. *Parker*, 14 East, 331, n. to *Outram* v. *Moorewood*). But such evidence is not admissible to prove particular facts as to the boundaries of a highway (*R.* v. *Bliss*, 7 Ad. & El. 550; *Reg.* v. *Berger*, 1894, 1 Q. B. 823). **Evidence of reputation.**

Highways may be created—(1) by statute, (2) by dedication (*Cubitt* v. *Maxse*, L. R. 8 C. P. 714). The creation of a highway over a cemetery or churchyard may be authorized by faculty (*Re Bideford Parish*, 1900, P. 314). **(2) Creation of highways.**

A highway may be created by statute, *e.g.*, the Public Health Act, 1875, s. 154; the Inclosure Acts, 1801 and 1836; the Settled Estates Act, 1877, s. 20; or the Settled Land Act, 1882, s. 16. And when such a public right was created by a statute which also reserved private rights to the lord of the manor, the private reservation was subject to the public right (*Benfieldside Board* v. *Consett Co.*, L. R. 3 Exch. D. 54; see *L. & N. W. R.* v. *Evans*, 1893, 1 Ch. 28). **By statute.**

Where a highway is created by dedication, there must be both dedication by the owner and user by the public (*Cubitt* v. *Maxse*, L. R. 8 C. P. 715; *A.-G.* v. *Biphosphated Guano Co.*, 11 Ch. Div. 327). User by the public is evidence of the *animus dedicandi;* but a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment (*Poole* v. *Huskinson*, 11 M. & W. 830, adopted *Healey* v. *Batley*, 19 Eq. 388; *Vernon* v. *S. James*, 16 Ch. D. 456; *Mann* v. *Brodie*, 10 App. Cas. 386). The effect of interruptions was considered in *Healey* v. *Batley*, *sup.* The effect of user may depend on the nature of the land; and on the owner being resident or not (*Chinnock* v. *Hartley Council*, 63 J. P. 327). As to the particulars which will be ordered when dedication as a highway is set up as a defence to an action of trespass, see *Spedding* v. *Fitzpatrick*, 38 Ch. Div. 410. **By dedication.**

If a man opens his land, so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way; and a party not meaning to dedicate a way, but only to give a licence, should do some act to show that a licence only is intended. The common course is to shut up the way one day in every year (*British Museum* v. *Finnis*, 5 C. & P. 460; *R.* v. *Broke*, 1 F. & F. 514). The presumption of a dedication may be rebutted by proof of a bar having been placed across the street soon after the houses forming the street were finished; though the bar was soon afterwards knocked down, and the way had been since used **Presumption of dedication of ways to the public.**

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as a thoroughfare (*Roberts* v. *Carr*, 1 Camp. N. P. C. 262, n.; and see *Lethbridge* v. *Winter*, *Id.* 263, n.). But a gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public with the reservation of the right of keeping a gate across it to prevent cattle from straying (*Davies* v. *Stephens*, 7 C. & P. 570; *R.* v. *Bliss*, 2 Nev. & P. 464; see *Barry* v. *Lowry*, I. R. 11 C. L. 483). As to the effect of dealing with the land as private property, see *Friern Council* v. *Richardson*, 62 J. P. 547.

In determining whether or not a way has been dedicated, the proprietor's intention must be considered. If it appear only that he has suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a licence resumable in a particular event (*Barraclough* v. *Johnson*, 8 Ad. & El. 99). The mere setting out of an intended road, even where the public have traversed it, is not an irrevocable dedication (*Hall* v. *Bootle*, 44 L. T. 873). A dedication may be presumed from an user by the public during eight years, and even six years (*Rugby Charity* v. *Merryweather*, 11 East, 376). So where a court on one side of a public street in London was left open to the public, and occasionally used as a communication from one part of the street to another, a dedication was presumed (*R.* v. *Lloyd*, 1 Camp. 268; 3 T. R. 265). But the use by the public of an open space by passing over it in every direction without any defined path was not evidence of the dedication of the whole space to the public (*Robinson* v. *Cowpen Board*, 63 L. J. Q. B. 235). Nor will a dedication to the public be presumed in the case of a wood with a path or track through it leading in different directions where people have wandered at pleasure and made tracks, and in dry weather have used such tracks, which were never repaired, and which in wet weather were hardly passable (*Chapman* v. *Cripps*, 2 F. & F. 864; *Schwinge* v. *Dowell*, *Ib.* 845; *Eyre* v. *New Forest Board*, 8 T. L. R. 648). As to a footpath over a mountain, see *Macpherson* v. *Scottish Society*, 13 App. Cas. 744. Where a canal company originally erected a bridge for the use of the tenants of particular lands, but for ten years the public had crossed it without interruption: it was properly left to the jury to say, whether the company intended or not to dedicate it to the public (*Surrey Canal Co.* v. *Hall*, 1 M. & Gr. 382; see *R.* v. *Wright*, 3 B. & Ad. 681; *Tyne Commrs.* v. *Imrie*, 81 L. T. 174). The same evidence of user will raise a presumption of a dedication of a right of way over a sea wall or embankment by the owner of the soil, as in any other case of open and uninterrupted user by the public (*Greenwich* v. *Maudslay*, L. R. 5 Q. B. 397). Where an owner lays out a private carriage-way alongside a public footway, he is presumed to have dedicated the whole surface as a public footway (*A.-G.* v. *Esher Co.*, 1901, 2 Ch. 647).

If a road has been used by the public for a great number of years, a dedication by the owner of the soil may be presumed, whoever he may be; and it is not material to inquire who the precise owner was, or whether he intended to dedicate the road to the public (*R.* v. *East Mark*, 11 Q. B. 877; *R.* v. *Petrie*, 4 El. & Bl. 737). Thus long user of a way across copyholds is evidence of dedication by both lord and copyholder (*Powers* v. *Bathurst*, 42 L. T. 123).

As to the dedication of a river as a common highway, see *A. G.* v. *Simpson*, 1901, 2 Ch. 709, 716.

Who can dedicate.

Land acquired by a company for statutory objects may be dedicated if the public user be not inconsistent with those objects (*Grand Junction Co.* v. *Petty*, 21 Q. B. Div. 273; see *Re Gonty and Manchester Co.*, 1896, 2 Q. B. 439, the case of a private right of way). The Crown may dedicate (*R.* v. *East Mark*, 11 Q. B. 877; *Turner* v. *Walsh*, 6 App. Cas. 636; but see *Harper* v. *Charlesworth*, 4 B. & C. 591).

Acts of tenants not binding.

A tenant for ninety-nine years cannot dedicate a way to the public, without the consent of the owner of the fee; and permission by such tenant will not bind the landlord after the expiration of the term (*R.* v. *Bliss*, 7 Ad. & Ell. 555; *Barraclough* v. *Johnson*, 8 Ad. & Ell. 104; *Pryor* v. *Pryor*, 26 L. T. 760). In *Wood* v. *Veal* (5 B. & Ald. 454), the public had used a way over the *locus in quo* as

long as could be remembered; but the land had been under a lease for ninety-nine years during the whole time, and it was left as a question for the jury, whether there had been a dedication to the public before the term commenced (*Barraclough* v. *Johnson*, 8 Ad. & Ell. 104; see *R.* v. *Lloyd*, 1 Camp. 260; *Baxter* v. *Taylor*, 1 Nev. & M. 13; *Bermondsey* v. *Brown*, 1 Eq. 204). However, after a long lapse of time, and a frequent change of tenants, and from the notorious and uninterrupted use of a way by the public, it may be presumed that the landlord had notice of the way being used, and that it was so used with his concurrence (*R.* v. *Barr*, 4 Camp. N. P. C. 16; *Davies* v. *Stephens*, 7 C. & P. 570; see *Deeble* v. *Linecham*, 12 Ir. C. L. Rep. N. S. 1). Notice to the steward is notice to the landlord (*R.* v. *Barr*, *sup.*; *Doe* v. *Wilson*, 11 East, 56). And where a lease was granted of certain ground to be a passage for fifty-six years, evidence of the user of the road by the public three or four years after the expiration of the lease was held not to be evidence of a gift to the public (*R.* v. *Hudson*, Str. 909). Where evidence was given of acts of user extending over nearly seventy years, but during the whole period the land crossed by the way had been on lease, it was held that the jury might presume from these acts a dedication at a time anterior to the lease (*Winterbottom* v. *Derby*, L. R. 2 Ex. 316). The question whether a termor could dedicate was raised, but not decided, in *A.-G.* v. *Biphosphated Guano Co.*, 11 Ch. Div. 335.

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There may be a partial dedication of a highway to the public (*Stafford* v. *Coyney*, 7 B. & C. 257; see *Roberts* v. *Carr*, 1 Camp. 262; *R.* v. *Northamptonshire*, 2 M. & S. 262). Although the dedication of a way to the public may be *partial* or limited as to the sort of way (as to a horseway, &c.), yet there cannot be a *qualified* dedication to the public, subject to a power of resumption to the grantor; for that would be the reservation of a right inconsistent with the dedication to the public (*Fitzpatrick* v. *Robinson*, 1 Hudson & Brook, 585; see *Blundell* v. *Catterall*, 5 B. & Ald. 315; *Lade* v. *Shepherd*, 2 Str. 1004; *Barraclough* v. *Johnson*, 3 Nev. & P. 233). There can be no dedication of a way to the public for a limited time, certain or uncertain; if dedicated at all, it must be dedicated in perpetuity (*Dawes* v. *Hawkins*, 8 C. B. N. S. 848). Nor can there be a dedication to a *limited part* of the public, as to a parish; and such a partial dedication is simply void, and will not operate in law as a dedication to the whole public (*Poole* v. *Huskinson*, 11 M. & W. 827; *Bermondsey* v. *Brown*, 1 Eq. 204). Nor can a highway be dedicated subject to a toll (*A.-G.* v. *Simpson*, 1901, 2 Ch. 693). But a highway may be dedicated to the public, subject to a pre-existing right of user by the occupiers of adjoining land, for the purpose of depositing goods thereon (*Morant* v. *Chamberlin*, 6 H. & N. 541). Where an erection or an excavation exists upon land, and the land upon which it exists or to which it is contiguous is dedicated to the public as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things (*Fisher* v. *Prowse*, 2 B. & S. 770; see *Robbins* v. *Jones*, 15 C. B. N. S. 221). There may in law be a dedication to the public of a right of way, such as a footpath across a field, subject to the right of the owner of the soil to plough it up in due course of husbandry, and destroy all trace of it for the time (*Mercer* v. *Woodgate*, L. R. 5 Q. B. 26; *Arnold* v. *Blaker*, L. R. 6 Q. B. 433; see *R.* v. *Leeke*, 5 B. & Ad. 469). In such a case the public have no right to deviate (*Arnold* v. *Holbrook*, L. R. 8 Q. B. 96). Where part of a highway is dedicated as a carriage way and part as a footway the urban authority cannot, under sect. 150 of the Public Health Act, 1875, alter the relative proportions (*Robertson* v. *Bristol*, 1900, 2 Q. B. 198).

Limited dedication.

(3) Nature of public rights over highway.

The *primâ facie* right of the public is one of passage: but the reasonable and usual mode of using a highway as such includes other things (*Harrison* v. *Rutland*, 1893, 1 Q. B. 146). The public, however, have no right to remain on a highway for sporting (*R.* v. *Pratt*, 4 El. & Bl. 860),

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or for interfering with sport (*Harrison* v. *Rutland*, 1893, 1 Q. B. 142), or for watching trials of racehorses on adjoining land (*Hickman* v. *Maisey*, 1900, 1 Q. B. 752). Nor can they depasture cattle on the highway (*Dovaston* v. *Payne*, 2 H. Bl. 527; *Stevens* v. *Whistler*, 11 East, 51; see *Luscombe* v. *G. W. R. Co.*, 1899, 2 Q. B. 313). The owner of the soil may exercise all rights of ownership not inconsistent with the dedication to the public (*St. Mary, Newington* v. *Jacobs*, L. R. 7 Q. B. 47). As to the rights of using a highway possessed by occupiers of premises abutting thereon, see cases quoted p. 56, *post*.

When an ordinary highway runs between two fences, one on each side, the right of passage which the public has along it extends *primâ facie*, and unless there is evidence to the contrary, over the whole space between the fences (*R.* v. *U. K. Electric Telegraph Co.*, 31 L. J. M. C. 166; *Turner* v. *Ringwood Board*, 9 Eq. 418; *Nicol* v. *Beaumont*, 50 L. T. 112; *Locke King* v. *Woking Council*, 77 L. T. 790). Rebutting evidence was given in *Neeld* v. *Hendon Council*, 81 L. T. 405. The nature of the district, the width and level of the margins, and the regularity of the lines of fence must be considered (*Belmore* v. *Kent Council*, 1901, 1 Ch. 873). Where, by an inclosure award, a way was set out fifteen feet wide as a public bridlepath and footway and also as a private driftway, the public were held entitled to use the whole width for those purposes (*Pullin* v. *Deffel*, 64 L. T. 134). As to the application of the fifteen feet rule, see *Easton* v. *Richmond Board*, L. R. 7 Q. B. 69. County councils and district councils have power to assert the rights of the public to all roadside wastes (Local Government Act, 1888, s. 11 (1); Local Government Act, 1894, s. 26). As to the ownership of the soil of these wastes, see *post*, p. 58.

(4) **Repair of public ways.**

At common law, highways are repairable by the inhabitants of the parish (Glen on Highways, cap. 4). In the case of dedications before the Highway Act, 1835, the assent of the parish was not requisite (*R.* v. *Leeke*, 5 B. & Ad. 469). In the case of dedications since the act, parishes are not liable to repair the highway unless it is made to the satisfaction of the surveyor of the highways, and of two justices of the peace, who are to give a certificate to this effect, which certificate is to be enrolled (Highway Act, 1835, s. 23). After a lapse of time these formalities were presumed (*Leigh Council* v. *King*, 1901, 1 Q. B. 747).

Under recent statutory provisions, main roads are now repairable by the county council (Local Government Act, 1888, s. 11). And other highways (unless repairable by some person *ratione tenuræ*) by the district council (Local Government Act, 1894, s. 25; see *R.* v. *Shipley Council*, 61 J. P. 488). As to roads within urban districts, see Public Health Act, 1875, s. 144; *R.* v. *Poole*, 19 Q. B. D. 602; *R.* v. *Wakefield*, 20 Q. B. D. 810. A parish council may undertake the repair of a public footpath (Local Government Act, 1894, s. 13 (2)). Where there is no obligation to repair there can be (in the absence of special power) no right to repair (*Campbell Davys* v. *Lloyd*, 1901, 2 Ch. 518).

See further as to the repair of highways, *Dovaston* v. *Payne*, 2 Smith's L. C.; *R.* v. *Stoughton*, 2 Wms. Saund. 462, edit. 1871, and Glen on Highways.

(5) **Extinction of public ways.**

Where there has been a public king's highway, no length of time during which it may not have been used will prevent the public from resuming the right, if they think proper (*R.* v. *St. James's*, Selw. N. P. 1264, 13th ed.; see *Vooght* v. *Winch*, 2 B. & Ald. 662; *R.* v. *Montague*, 4 B. & C. 598). The public cannot release their right to a public highway by non-user (*Dawes* v. *Hawkins*, 8 C. B. N. S. 848; see *Freeman* v. *Tottenham R. Co.*, 13 W. R. 335; *Hillary* v. *Waller*, 12 Ves. 265), or by acquiescence in an obstruction (*Pullin* v. *Deffel*, 64 L. T. 134). A highway may be destroyed by the sea (*R.* v. *Hornsea*, 23 L. J. M. C. 59), or by a landslip (*R.* v. *Greenhow*, 1 Q. B. D. 703); and a way ceases to be a public highway when the access to it at both ends has become impossible (*Bailey* v. *Jamieson*, 1 C. P. D. 329). A public right of way may be extinguished

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by statute, either by express words (*Wells* v. *London and Tilbury R. Co.*, 5 Ch. D. 126), or by implication (*Yarmouth* v. *Simmons*, 10 Ch. D. 518). The repeal of a statute which had extinguished a public right of way did not revive the right (*Gwynne* v. *Drewitt*, 1894, 2 Ch. 616). A public right of way to a towing-path on the banks of a navigable tide river, is not destroyed by the river having been converted by statute into a floating harbour, although the user of the towing-path has been thereby increased (*R.* v. *Tippett*, 3 B. & Ald. 193). Where an inclosure act directs that all ways not set out shall be deemed part of the lands to be allotted, an ancient towing-path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction (*Simpson* v. *Scales*, 2 Bos. & P. 496; see *Thackrah* v. *Seymour*, 1 C. & M. 18). The 10th and 11th sections of the Inclosure (Consolidation) Act, 1801, did not extinguish a right to take water from a well which the inhabitants of a parish had immemorially exercised upon common land which had been inclosed, although the ancient way to the well was extinguished under the inclosure (*Race* v. *Ward*, 7 El. & Bl. 384). The Railways Clauses Act, 1845, sect. 16, does not empower a railway company to divert a public footpath so as to place it upon land of which the company has not acquired the ownership (*Rangeley* v. *Midland R. Co.*, 3 Ch. 306). The mere construction of a railway across a public footpath will not extinguish it (*Cole* v. *Miles*, 60 L. T. 145). But the company are not bound to make a bridge or tunnel (*Dartford Council* v. *Bexley Heath R. Co.*, 1898, A. C. 210).

(6) Remedy for nuisances to public ways:

In the case of public nuisance to a highway arising from nonfeasance in failing to repair it, no action will lie against an urban authority (*Cowley* v. *Newmarket*, 1892, A. C. 345; see *Sydney* v. *Bourke*, 1895, A. C. 433; *Thompson* v. *Brighton*, 1894, 1 Q. B. 332; *Lambert* v. *Lowestoft*, 1901, 1 Q. B. 590); and as against a person liable to repair *ratione tenuræ*, it was doubted whether an action for special damage for non-repair would lie (*Rundle* v. *Hearle*, 1898, 2 Q. B. 83). The remedy in the case of non-repair is by proceedings before justices (Highway Act, 1835, s. 94), or by indictment: which apparently lies against the inhabitants of a parish (Glen on Highways, Bk. 1, ch. 5), but not against a parish council (*R.* v. *Shipley Council*, 61 J. P. 488). In the case of a public nusiance arising from misfeasance the remedy is by indictment, or by information at the suit of the Att. Gen. In the case of a private nuisance by misfeasance the remedy is by action. But where that which is a public nuisance is also a private nuisance to an individual by inflicting on him some special damage, the individual may have his private remedy by action (*Soltau* v. *De Held*, 2 Sim. N. S. 143, 145; see *Wallasey Board* v. *Gracey*, 36 Ch. Div. 593). Instances of indictments for public nuisances, caused by the obstruction of highways, will be found in *R.* v. *Train*, 2 B. & S. 640; *R.* v. *U. K. Telegraph Co.*, 2 B. & S. 647, n.; *R.* v. *Longton Gas Co.*, 29 L. J. M. C. 118. Such an indictment cannot be compromised (*Windhill Board* v. *Vint*, 45 Ch. Div. 351).

by indictment,

A private person cannot sue for damage arising from the disturbance of a highway, unless he has sustained some special damage (Co. Litt. 56 a; 5 Rep. 73 a; 2 Bing. 263, 266; *Rose* v. *Groves*, 5 M. & G. 613; *Dobson* v. *Blackmore*, 9 Q. B. 1002; *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369). When the plaintiff proved no damage peculiar to himself, beyond being delayed on several occasions in passing along the road, he was not entitled to maintain the action (*Winterbottom* v. *Derby*, L. R. 2 Ex. 316). So, an individual cannot maintain an action where the obstruction is temporary and the injury sustained by the plaintiff is only in common with others (*Ricket* v. *Metropolitan R. Co.*, L. R. 2 H. L. 175; overruling *Wilks* v. *Hungerford Co.*, 2 Bing. N. C. 281; *Metropolitan Board of Works* v. *M'Carthy*, L. R. 7 H. L. 243; *Biggs* v. *London*, 15 Eq. 376). But if the plaintiff can prove a particular damage to himself beyond the general damage to the public, and that such damage is direct and substantial, an action can be maintained (*Benjamin* v. *Storr*, L. R. 9 C. P. 400). As to interference by public bodies with the right of an individual

by action for damages,

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to use a highway, see *Vernon* v. *S. James*, 16 Ch. D. 449; *Goldberg* v. *Liverpool*, 82 L. T. 362; *Chaplin* v. *Westminster*, 1901, 2 Ch. 329. In *Iveson* v. *Moore* (1 Lord Raym. 186), it was held, that the preventing of colliers from coming to a colliery by obstructing a public highway, by which the benefit of the colliery was lost, was such a damage as would enable a man to maintain an action for the nuisance (see *Rose* v. *Miles*, 4 M. & S. 101; *Rose* v. *Groves*, 5 M. & G. 620, *post*). The occupier of premises abutting on a highway may recover damages on the ground of an unreasonable use of a highway by others which has either occasioned loss of custom to the plaintiff (*Fritz* v. *Hobson*, 14 Ch. D. 542), or rendered his dwelling uncomfortable (*Benjamin* v. *Storr*, L. R. 9 C. P. 400; see *Sadler* v. *G. W. R.*, 1896, A. C. 450). In a case of doubt the right of such an occupier himself to use the highway for loading and unloading goods at his premises must yield to the public right of passage (*A. G.* v. *Brighton Association*, 1900, 1 Ch. 276). Such right is not the occupier's private right, but an individual interest in a public right (*Chaplin* v. *Westminster*, 1901, 2 Ch. 329). As to the reasonable user of a highway by the occupiers of premises abutting thereon, see *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 721; *Barber* v. *Penley*, 1893, 2 Ch. 447. As to pleadings and evidence where a public right of way is raised as a defence to an action of trespass, see *Webber* v. *Sparkes*, 10 M. & W. 485; *Wood* v. *Wedgewood*, 1 C. B. 273; and *Bracegirdle* v. *Peacock*, 8 Q. B. 174. As to particulars, see *Spedding* v. *Fitzpatrick*, 38 Ch. Div. 410. And as to the costs of such an action, see *Greenwell* v. *Howell*, 1900, 1 Q. B. 535; *Rex* v. *Norfolk Council*, 1901, 2 K. B. 268. Statutory penalties are imposed on persons committing specified nuisances on a highway by Highway Act, 1835, s. 72.

by injunction,

The Att. Gen. can obtain an injunction to restrain interference with a highway without showing actual injury (*A. G.* v. *Shrewsbury*, 21 Ch. D. 752), (see *A. G.* v. *L. & N. W. R.*, 1900, 1 Q. B. 78). But without proof of special damage an individual alone cannot sue (see *London, &c. Association* v. *London & India Docks Committee*, 1892, 3 Ch. 270), nor a vestry of a parish (*Bermondsey* v. *Brown*, 1 Eq. 204), nor a local authority (*Wallasey Board* v. *Gracey*, 36 Ch. D. 593; *Tottenham Council* v. *Williamson*, 1896, 2 Q. B. 353), nor a parish council (*Stoke Council* v. *Price*, 1899, 2 Ch. 277). Where, however, an individual can prove special damage, he can sue for an injunction without making the Att. Gen. a party (*Cook* v. *Bath*, 6 Eq. 177; *Barber* v. *Penley*, 1893, 2 Ch. 447). The remedy of a parishioner in respect of interference with a "churchway" is in the ecclesiastical court (*Batten* v. *Gedye*, 41 Ch. D. 507).

A local authority can restrain the placing of telephone wires over a highway if they interfere with the proper user of the street as a street; but not otherwise (*Wandsworth* v. *United Telephone Co.*, 13 Q. B. Div. 904; compare *National Telephone Co.* v. *S. Peter Port*, 1900, A. C. 317). The breaking up of the pavements of a town by an individual for the purpose of laying gas pipes, may be the subject of an indictment (*R.* v. *Longton Gas Co.*, 29 L. J. M. C. 118); but it will not be restrained by injunction as a public nuisance, the injury not being either irreparable or continuous (*A. G.* v. *Cambridge Co.*, 4 Ch. 71). Damages in a proper case may be awarded in substitution for an injunction (*Wedmore* v. *Bristol*, 11 W. R. 13), the jurisdiction of the court under Lord Cairns' Act not being affected by its repeal (*Sayers* v. *Collyer*, 28 Ch. Div. 103).

by abatement.

A private individual has no right to remove an obstruction to a highway, unless it is necessary in order that he may exercise his right of passage (*Bateman* v. *Bluck*, 21 L. J. Q. B. 406); or unless it causes a special injury to him (*Bagshaw* v. *Buxton Board*, 1 Ch. D. 224). But an obstruction may be removed by a highway authority (*Turner* v. *Ringwood Board*, 9 Eq. 418); *e.g.*, district councils (*Reynolds* v. *Presteign Council*, 1896, 1 Q. B. 604; *Louth Council* v. *West*, 65 L. J. Q. B. 535; see *Harris* v. *Northamptonshire Council*, 61 J. P. 599; *Murray* v. *Epsom Board*, 1897, 1 Ch. 35; *Rex* v. *Norfolk Council*, 1901, 2 K. B. 268). It is doubtful whether the right to abate exists in the case of nonfeasance (*Campbell Davys* v. *Lloyd*, 1901, 2 Ch. 518). In any case it would not justify a

member of the public in re-erecting a bridge which had been allowed to decay (*Ib.*).

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(7) Ownership of soil of highway.

The freehold of the highway is in the owner of the freehold of the soil, although the public may pass and repass at their pleasure (2 Inst. 705; *Lade* v. *Shepherd*, 2 Str. 1044). The owner of the soil is entitled to all profits, trees and mines upon or under the highway (1 Roll. Abr. 392; *Goodtitle* v. *Alker*, 1 Burr. 143). In the 82nd section of the Highway Act, 1835, there is a saving of mines to the owner of lands taken for widening narrow roads. The soil in turnpike roads does not vest in the trustees thereof, who have only the control of the highway, without a special clause for that purpose (*Davison* v. *Gill*, 1 East, 69; see also *R.* v. *Mersey Navigation*, 9 B. & C. 95; *R.* v. *Thomas*, *Id.* 114; *Salisbury* v. *G. N. R. Co.*, 5 C. B. N. S. 174). The owner of land adjoining only one side of the highway may maintain an action of trespass against one who suffers his cattle to depasture along the highway (*Dovaston* v. *Payne*, 2 H. Bl. 527; *Stevens* v. *Whistler*, 11 East, 51; see *Luscombe* v. *G. W. R.*, 1899, 2 Q. B. 313); or an action of ejectment for soil over which there is a public right of way (*Goodtitle* v. *Alker*, 1 Burr. 133; *Doe* v. *Wilkinson*, 3 B. & C. 413; and see *Scales* v. *Pickering*, 4 Bing. 448; *Bevan* v. *London Cement Co.*, 67 L. T. 615). And the owner of the soil can obtain an injunction to restrain a stranger from laying down pipes under the highway (*Goodson* v. *Richardson*, 9 Ch. 221). The principle of the ownership of the soil being in the owner of the adjoining land is carried so far that a man may be a trespasser on the highway when he is there not for passing or repassing but for other and different purposes, *e.g.*, sporting (*R.* v. *Pratt*, 4 El. & Bl. 860); or for interfering with sport (*Harrison* v. *Rutland*, 1893, 1 Q. B. 142); or for watching trials of racehorses on adjoining land (*Hickman* v. *Maisey*, 1900, 1 Q. B. 752). The owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public, and may exercise all other rights of ownership not inconsistent with such dedication; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage and another part to another, does not deprive him at common law of any rights as owner of the land which are not inconsistent with the right of passage by the public (*St. Mary, Newington* v. *Jacobs*, L. R. 7 Q. B. 47). Title to the soil of a highway (subject to the public right of passage) was acquired by letting the grazing for a long period (*Haigh* v. *West*, 1893, 2 Q. B. 19).

Where an inclosure act provided for the allotment of land to the lord in compensation for all right of soil, the soil of a private road set out under the act vested *ad medium filum* in the allottees of the adjacent land (*Neaverson* v. *Peterborough Council*, 1901, 1 Ch. 22). But there is no general presumption that the soil in roads set out under an inclosure act belongs to the adjoining owners (*R.* v. *Edmonton*, 1 M. & Rob. 24; *R.* v. *Wright*, 3 B. & Ad. 681; see *Haigh* v. *West*, *sup.*). Where the herbage of a road becomes vested by the Inclosure (Consolidation) Act, 1801, s. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors (*R.* v. *Hatfield*, 4 Ad. & Ell. 156; see *Hooper* v. *Bourne*, 3 Q. B. Div. 258). The soil in a road was held to remain in the lord of the manor, that portion of the soil only being taken from him for which he received compensation and which is allotted to others (*Poole* v. *Huskinson*, 11 M. & W. 827; see *R.* v. *East Mark*, 12 Jur. 332; *Neaverson* v. *Peterborough Council*, *sup.*).

The Public Health Act, 1875, s. 149, enacts that all streets within any urban district shall vest in the urban authority. The effect of this section is to vest in the authority such property, and such property only, as is necessary for the control, protection, and maintenance of the street as a highway for public use (*Tunbridge Wells* v. *Baird*, 1896, A. C. 442; compare *Midland R. Co.* v. *Wright*, 1901, 1 Ch. 738; *A. G.* v. *Barker*, 83 L. T. 245). So the authority had no power to erect lavatories below the surface of a street (*Tunbridge Wells* v. *Baird*, *sup.*). The effect of sect. 96

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of Metropolis Management Act, 1855, is the same (*Battersea* v. *County of London Lighting Co.*, 1899, 1 Ch. 474). A main road and the materials thereof, and all drains belonging thereto, except when the urban authority maintains it, is now vested in the County Council (Local Government Act, 1888, s. 11 (6); and see *Curtis* v. *Kesteven Council*, 45 Ch. D. 504). But the property of the local authority ceases when the highway ceases to be a highway (*Rolls* v. *St. George's Vestry*, 14 Ch. Div. 785).

Where closes abutting on opposite sides of the highway belong to different owners, each owner is, according to presumption of law, entitled to the soil under the highway *usque ad medium filum viæ* (*Beckett* v. *Leeds*, 7 Ch. 424; *Leigh* v. *Jack*, 5 Ex. Div. 270; *L. & N. W. R.* v. *Westminster*, 1902, 2 Ch. 279). Accordingly, such closes may be "adjoining or contiguous" within the meaning of a lease (*Haynes* v. *King*, 1893, 3 Ch. 439). As to the meaning of "adjoining" in covenants, see further *White* v. *Harrow*, 86 L. T. 4; *Ind, Coope & Co.* v. *Hamblin*, 84 L. T. 168; *Vale* v. *Moorgate*, 80 L. T. 487; and in a statute *Re Bateman and Parker*, 1899, 1 Ch. 599). The above-mentioned presumption exists only in the absence of evidence of ownership (*Beckett* v. *Leeds*, 7 Ch. 421). The presumption applies equally to a private as to a public road (*Holmes* v. *Bellingham*, 7 C. B. N. S. 329).

When soil of highway passes by conveyance.

The ordinary rule of law is, that in the case of the conveyance of land adjoining a highway, the soil of the highway, *ad medium filum viæ*, passes by the conveyance; and the fact that the land is set forth by admeasurement and referred to in a plan, which *includes* no portion of the highway, does not prevent the operation of such rule (*Berridge* v. *Ward*, 10 C. B. N. S. 400; and see *R.* v. *Strand Board*, 4 B. & S. 526, 12 W. R. 828, where the boundary of a parish was defined by statute; and *Micklethwait* v. *Newlay Co.*, 33 Ch. Div. 145, a case of land bounded by a river). The rule applies to streets in a town as well as to highways in the country (*Haynes* v. *King*, 1893, 3 Ch. 439; *Re White's Charities*, 1898, 1 Ch. 659; *L. & N. W. R.* v. *Westminster*, 1902, 1 Ch. 279); and to leases as well as conveyances (*Haynes* v. *King*, *sup.*; see *Landrock* v. *Metropolitan R. Co.*, 1886, W. N. 195). But the soil of the highway will not pass if it appears that such soil was not intended to pass, either from a map annexed to the conveyance, or from the form of the conveyance (*Salisbury* v. *G. N. R. Co.*, 5 C. B. N. S. 174; 28 L. J. C. P. 40; *Plumstead* v. *British Land Co.*, L. R. 10 Q. B. 16). The circumstances under which the conveyance was executed (*e.g.*, trees on the highway having been omitted from a valuation) may assist to rebut the presumption (*Pryor* v. *Petre*, 1894, 2 Ch. 11). And where a conveyance described land as bounded by a street, which at that time was intended to be used as a highway, but had not been dedicated, the soil of the street did not pass (*Leigh* v. *Jack*, L. R. 5 Ex. Div. 264). *Cotton*, L. J., doubted whether the rule would ever apply to cases where land is sold in plots for building purposes, even although the roads had been actually laid out (*Ib.*) As to the effect of subsequent circumstances not contemplated at the time of the grant, see *Micklethwait* v. *Newlay Co.*, 33 Ch. Div. 133. Where the grantor is the owner of the soil beyond the *medium filum*, the presumption is that the conveyance passes the soil so far as vested in him (*Re White's Charities*, 1898, 1 Ch. 659).

Strips of land lying along a highway, even though indirectly connected with parts of a waste, may well pass under a conveyance of the adjacent inclosure, though the deed purports to state the quantity of acres within the fences that were therein conveyed, if the words "more or less" were added (*Dendy* v. *Simpson*, 7 Jur. N. S. 1058; 9 W. R. 743; *Simpson* v. *Dendy*, 8 C. B. N. S. 433).

Ownership of waste adjoining highways.

At common law and independently of statute the presumption is, that waste land adjoining a road belongs to the owner of the soil of the adjoining inclosed land, and not to the lord of the manor (*Steel* v. *Prickett*, 2 Stark, 463; *Scoones* v. *Morrell*, 1 Beav. 251); whether such owner be a freeholder, copyholder, or leaseholder (*Doe* v. *Pearsey*, 7 B. & C. 304).

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The right to land adjoining either side of the road extends to the centre (*Cooke* v. *Green*, 11 Price, 736).

The presumptive right of the owner of the adjoining land may be repelled by evidence of acts of ownership by the lord of the manor (*Anon.*, Lofft, 358). And if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either done away, or considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them (*Grose* v. *West*, 3 Taunt. 39; *Headlam* v. *Hedley*, Holt, N. P. C. 463). Upon this question the lord may give evidence of grants by him of the waste between the road and the other inclosures of other persons at a distance from the spot claimed by the plaintiff, provided such evidence is confined to the road which passes by the spot claimed by the plaintiff (*Doe* v. *Kemp*, 7 Bing. 332; 2 Bing. N. C. 102; see *Stanley* v. *White*, 14 East, 332; *Dendy* v. *Simpson*, 18 C. B. 831).

The presumption may also be rebutted by the owner of the adjoining land accepting an allotment of the strip in question from commissioners appointed to inclose and allot the wastes of the manor (*Gery* v. *Redman*, 1 Q. B. D. 161). Where the lord has conveyed land to A. and other land to B., and it appears that a strip passed by one of these conveyances, but it is doubtful by which; no presumption arises in favour of A. from the fact that the strip lies between a highway and land indisputably comprised in the conveyance to A. (*White* v. *Hill*, 6 Q. B. 787). The presumption in favour of the adjoining owner may be rebutted by showing that the strip adjoins other land occupied adversely to such owner (*Doe* v. *Hampson*, 4 C. B. 267; 17 L. J. C. P. 225).

The question of the ownership of grass adjoining a highway has been raised under recent statutes. Thus, under sect. 149 of the Public Health Act, 1875, which vests in the urban authority all "streets" being highways repairable by the inhabitants at large, it was decided that the herbage along the sides of such streets belonged to the authority (*Coverdale* v. *Charlton*, 4 Q. B. Div. 104; consider, however, *Tunbridge Wells* v. *Baird*, 1896, A. C. 434); on the other hand, sect. 11 (6) of the Local Government Act, 1888, which vests in the County Council main roads and the materials thereof, does not vest strips of grass bordering the metalled part of the road or the herbage thereon (*Curtis* v. *Kesteven Council*, 45 Ch. D. 504). As to the rights of the public over roadside wastes, see *ante*, p. 54.

(8) Balks and ditches.

Balks are strips of land lying between lands which are private property. In presumption of law, balks belong to the owners of the adjacent land, unless the contrary is proved (*Godmanchester* v. *Phillips*, 4 Ad. & Ell. 560).

The rule about ditching is this: no man making a ditch can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and after, if he likes it, he plants a hedge upon the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet or eight feet has anything to do with it (*Vowles* v. *Miller*, 3 Taunt. 138). Where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the close on the side of the hedge opposite to the ditch (*Guy* v. *West*, Selw. N. P. 1218). And the land constituting the ditch is also part of the close on the side of the hedge opposite to the ditch (*Doe* v. *Pearsey*, 7 B. & C. 308). Whether the presumption applies to a natural watercourse, qu. (*Marshall* v. *Taylor*, 1895, 1 Ch. 641). If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership (*Guy* v. *West*, Selw. N. P. 1218; see as to acts of ownership of a ditch, *Searby* v. *Tottenham R. Co.*, 5 Eq. 409; *Norton* v. *L. & N. W. R. Co.*, 13 Ch. Div. 268; *Marshall* v. *Taylor*, *sup.*). If a tree grows near the confines of the land of two parties, so that the

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roots extend into the soil of each, the property in the tree belongs to the owner of the land in which the tree was first sown or planted (*Holder* v. *Coates*, M. & M. 112; see *Waterman* v. *Soper*, 1 Lord Raym. 737; *Masters* v. *Pollie*, 2 Roll. R. 141; *Anon.*, 2 Roll. R. 255). But the other owner can cut branches which overhang his land even where they have overhung for twenty years (*Lemmon* v. *Webb*, 1895, A. C. 1).

B. *Private Rights of Way.*

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(1) **Different kinds of ways.**

There are four kinds of ways (Co. Litt. 56 a):—1, a foot-way—2, a horse-way, which includes a foot-way—3, a carriage-way, which includes both horse-way and foot-way—4, a drift-way. Although a carriage-way comprehends a horse-way and a foot-way (*Davies* v. *Stevens*, 7 C. & P. 570), yet it does not necessarily include a drift-way (*Ballard* v. *Dyson*, 1 Taunt. 279); but evidence of a carriage-way is strong presumptive evidence of the grant of a drift-way (*Ibid.*). As to the meaning of a right of way to "lead manure," see *Brunton* v. *Hall*, 1 Q. B. 792. A way may be granted for agricultural purposes only (*Reynolds* v. *Edwardes*, Willes, 282); or for the carriage of coals only (*Iveson* v. *Moore*, 3 Ld. Raym. 291; 1 Salk. 15); or for the carriage of all other articles except coals (*Stafford* v. *Coyney*, 7 B. & C. 257; *Jackson* v. *Stacey*, Holt, N. P. C. 455). There may be a private right of way over a *cul de sac* (*Roe* v. *Siddons*, 22 Q. B. Div. 234).

Public and private ways co-existing.

There may be both an occupation way and a public highway over the same road (*Brownlow* v. *Tomlinson*, 1 M. & G. 484; *A.-G.* v. *Esher Co.*, 1901, 2 Ch. 647). The acquiring a right of way by the public does not destroy a previously existing right of way over the same line (*Duncan* v. *Louch*, 6 Q. B. 904). If the owner of land has granted to an individual an occupation way the subsequent absolute dedication by him of a footway to the public, in the same place, cannot be presumed, without also presuming, or proving, a release of the way by the individual; for without the release the owner can only be supposed to have given what he himself had, a right not inconsistent with the easement (*R.* v. *Chorley*, 12 Q. B. 515). The court acted on an enclosure award which set out the same way as a bridle and footpath for the public, and as a carriage-way for particular persons (*Pullin* v. *Deffel*, 64 L. T. 134).

Private access to highway.

The right of a person who has land abutting on a highway to pass from one to the other is incontrovertible (*Burgess* v. *Northwich*, 6 Q. B. D. 275; *Ramuz* v. *Southend Board*, 67 L. T. 169). It is a private right (*Chaplin* v. *Westminster*, 1901, 2 Ch. 329), quite different from such a person's individual interest in the public right of using the highway (*Ib.*; *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 676; *Fritz* v. *Hobson*, 14 Ch. D. 554).

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(2) Acquisition of private rights of way:

(a) by express reservation;

A private way is a right which one or more persons have of going over the land of another. This may be claimed by express reservation, or by grant, or as necessarily incident to a grant of land: or it may be claimed by prescription, custom, or by virtue of an inclosure act (Selw. N. P. 1266, 13th ed).

A right of way may be claimed by express reservation; as where A. grants land to another, reserving to himself a way over such land (1 Roll. Abr. 109, pl. 45; Com. Dig. Chimin (D. 2); and see *Cardigan* v. *Armitage*, 2 B. & C. 197). *Tindal*, C. J., in *Durham R. Co.* v. *Walker* (2 Q. B. 967), observed, "A right of way cannot in strictness be made the subject either of exception or reservation. A right of way *reserved* to a lessor is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same way as the right of sporting or fishing" (see *Doe* v. *Lock*, 2 Ad. & Ell. 705; *Wickham* v. *Hawker*, 7 M. & W. 63). In order to establish an easement claimed by lessors, as in the nature of a grant from the lessee, it would in general be essential to show the execution of the lease by the lessees (*Durham R. Co.* v. *Walker*, 2 Q. B. 967; *Corcor* v. *Payne*, I. R. 4 C. L. 380). The effect of such a reservation, operating as a re-grant, was considered (*Dynevor* v. *Tennant*, 33 Ch. Div. 420; 13 App. Cas. 279). A right of access stipulated for by a contract was extinguished by the deed of conveyance which did not reserve it (*Teebay* v. *Manchester R. Co.*, 24 Ch. D. 572). In such a case the court must see that the deed covers the whole ground of the contract (*Palmer* v. *Johnson*, 13 Q. B. Div. 357).

by express grant;

A way may be claimed by grant, as where an owner of land grants to another person a way through or over a particular close (Com. Dig. Chimin, D. 3). But the word "way" in a grant is not an apt word to create a new right of way. It is a word descriptive of an existing right —a right of way over the land of another person (*Roe* v. *Siddons*, 20 Q. B. Div. 236). The description of a right of way in a grant was rectified, as not in accordance with the intention (*Cowen* v. *Truefitt*, 1899, 2 Ch. 309). A covenant by an owner of land that another person shall have and use a way amounts to a grant (*Holme* v. *Seller*, 3 Lev. 305). A contract to grant a right of way was held equivalent to a contract for sale of real estate, so that no damages were given for breach (*Rowe* v. *London School Board*, 36 Ch. D. 619; see *Jones* v. *Watts*, 43 Ch. Div. 574). Where the plaintiff claimed a way over the defendant's soil, and in the defendant's lease, granting him all ways, without qualification, there was a covenant for contributing with other occupiers of the lessor's property to the keeping up paths used in *common* by them, and the plaintiff had always used the path in question, and there was no other path to which the covenant could apply, it was inferred that the defendant took the soil, subject to the plaintiff's right of way (*Oakley* v. *Adamson*, 8 Bing. 356). Where houses, with ground, part of an adjoining yard, were leased to a tenant, together with all ways with the said premises or any part thereof *used or enjoyed before;* and at the time of the lease the whole of the yard was in the occupation of one person who had always enjoyed a right of way to every part of that yard; the lessee was entitled to such right of way to the part of the yard demised to him (*Kooystra* v. *Lucas*, 5 B. & Ald. 830; *Staple* v. *Haydon*, 6 Mod. 3). If a right of way is appurtenant to a piece of land which is demised, the right of way passes also without any special mention of such right (*Skull* v. *Glenister*, 7 L. T. 827). Where an *underlease* described the ground demised and the ways granted by the words "always thereunto appertaining," a road over the soil of the original lessor was held not to pass by those words, although it might have done so by the words "heretofore used" (*Harding* v. *Wilson*, 2 B. & C. 96). Under a reversionary lease of a messuage granted by one who was entitled in reversion both to the messauge and also to the soil of an adjoining passage, a right of way over the passage was held to pass as being not merely convenient but necessary for the enjoyment of the messuage (*Hinchliffe* v. *Kinnoul*, 5 Bing. N. C. 1; see *Kavanagh* v. *Coal Mining Co.*, 14 Ir. C. L. R. 82). The conveyance of an inland farm with

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the "appurtenances" did not pass the right to take sea-weed from the neighbouring sea-shore (*Baird* v. *Fortune*, 7 Jur. N. S. 926; 10 W. R. 2). Now by Conv. Act, 1881, a conveyance of land includes all ways at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land (sect. 6). If these words (see cases, p. 63, *post*) are more extensive than the contract, the vendor is entitled to have them limited: so held where the contract was to buy land "with the appurtenances" (*Re Peek and School Board for London*, 1893, 2 Ch. 315). Easements may be granted by way of use (Conv. Act, 1881, s. 62).

A railway company cannot grant a private right of way over land required for the purposes of its undertaking (*Mulliner* v. *Midland R. Co.*, 11 Ch. D. 611); except where the way is not inconsistent with such purposes (*Re Gonty and Manchester Co.*, 1896, 2 Q. B. 439; see *Foster* v. *L. C. & D. R.*, 1895, 1 Q. B. 711).

On the construction of the devise of a right of way, it was held limited to the lifetime of the devisee (*Pym* v. *Harrison*, 33 L. T. 796). General words reserving a wayleave to a bishop for coal got out of any land were restricted by the context to land belonging to the See (*Midgley* v. *Richardson*, 14 M. & W. 495; see *Hedley* v. *Fenwick*, 3 H. & C. 349).

A right of way cannot be so granted as to pass to the successive owners of land as such, in cases where the way is not connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant (*Ackroyd* v. *Smith*, 10 C. B. 164; 19 L. J. C. P. 315; see *Thorpe* v. *Brumfitt*, 8 Ch. 650).

A grant of a right of way to Blackacre made to A., "his heirs and assigns," who at the time was tenant from year to year, and subsequently acquired the freehold, enured for the benefit of such freehold (*Rymer* v. *McIlroy*, 1897, 1 Ch. 528).

The grant should define the way (*Metropolitan R. Co.* v. *G. W. R. Co.*, 84 L. T. 333). And a grantor having once defined a way cannot alter it (*Deacon* v. *S. E. R. Co.*, 1889, W. N. 79). Compare the rule as to a way of necessity (*Pearson* v. *Spencer*, 1 B. & Sm. 584).

evidence as to grants;

In an action for obstructing a way, granted by a lease from the defendant to the plaintiff, the judge will receive evidence of the state of the premises at the time of the lease, and will then put a construction on the lease as to the line along which the way is granted: but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as showing where the way is or was intended to be; but if it be uncertain on the words of the grant which of two ways is intended, the judge will receive parol evidence to show which the grantor meant to grant (*Osborn* v. *Wise*, 7 C. & P. 761). In order to prove a grant of an occupation way through a lane to the defendant's premises, he offered two deeds, which purported to be grants by the owners of the soil of an occupation way through the lane, to tenants of premises situated on the opposite side of the lane from the defendant's premises. The deeds were inadmissible as evidence (*R.* v. *Chorley*, 10 W. R. 2).

effect of plan.

A grant of a private right of way was inferred from the description of boundaries in a lease together with the indorsed plan (*Espley* v. *Wilkes*, L. R. 7 Ex. 298; *Furness Co.* v. *Cumberland Society*, 52 L. T. 144). As to the effect of a plan, see *Bayley* v. *G. W. R. Co.*, 26 Ch. Div. 441, 457; *Randall* v. *Hall*, 4 D. G. & Sm. 343; *Roe* v. *Siddons*, 22 Q. B. D. 228; *Re Lindsay and Forder*, 72 L. T. 832; Dart, V. & P. 6th ed., 136.

Where there is unity of seisin, what words will pass ways which existed before the unity of seisin.

Where there is an unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word. In the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and

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enjoyed with the land" which forms the subject-matter of the conveyance (*James* v. *Plant*, 4 Ad. & Ell. 761). The words "belonging or appertaining" are insufficient (*Barlow* v. *Rhodes*, 1 C. & M. 439; *Baring* v. *Abingdon*, 1892, 2 Ch. 390). Nothing is more clear than that under the word "appurtenances," according to its legal sense, an easement which has become extinct, or which does not exist in point of law, by reason of unity of ownership, does not pass (*Grimes* v. *Peacock*, 1 Bulst. 17; *Saundeys* v. *Oliff*, Sir T. Moore, 467; *Whalley* v. *Thompson*, 1 Bos. & P. 371; *Phesey* v. *Vicary*, 16 M. & W. 484; *Clements* v. *Lambert*, 1 Taunt. 295; see *Worthington* v. *Gimson*, 2 E. & E. 618; 29 L. J. Q. B. 116; and *Tatton* v. *Hammersley*, 3 Ex. 279; *Wardle* v. *Brocklehurst*, 1 Ell. & Ell. 1058; *Bolton* v. *Bolton*, 11 Ch. D. 968; *Brett* v. *Clowser*, 5 C. P. D. 376).

Where there are two adjoining closes belonging to one owner, and there exists over one of them a formed road, which is in fact used for the purposes of the other, and that other is granted with the general words "together with all ways now used or enjoyed therewith," a right of way over the formed road will pass, even though that road had been first constructed during the unity of possession of the two closes (*Barkshire* v. *Grubb*, 18 Ch. D. 622; *Baring* v. *Abingdon*, 1892, 2 Ch. 390). *Thompson* v. *Waterlow* (6 Eq. 36) and *Langley* v. *Hammond* (L. R. 2 Ex. 161), so far as contrary to this view, have been overruled by *Watts* v. *Kelson* (6 Ch. 166) and *Kay* v. *Oxley* (L. R. 10 Q. B. 360) (see *Barkshire* v. *Grubb*, *sup.*; see further *Bayley* v. *G. W. R. Co.*, 26 Ch. Div. 457; *Roe* v. *Siddons*, 22 Q. B. Div. 226; and *Geoghegan* v. *Fegan*, I. R. 6 Ch. 139). The court will in these cases put such a construction upon general words, which *primâ facie* might apply to rights and not to ways enjoyed *de facto* only, as is to be gathered from the true intention of the parties (*Bayley* v. *G. W. R. Co.*, 26 Ch. Div. 455). As to the construction in such cases of the words "now or heretofore enjoyed," see *Roe* v. *Siddons*, 22 Q. B. Div. 224.

(b) Acquisition by implied grant upon severance of tenements.

The rule about rights of way which arise from implication is simply this, that on a severance of two properties anything like a right of way which is used and which is reasonably necessary for the reasonable and comfortable use of the part granted is intended to be granted too. The principle is that the grantor is assumed to have intended that his grant shall be effectual (*Bayley* v. *G. W. R. Co.*, 26 Ch. Div. 452; compare the obligation of a lessor not to derogate from his grant implied in *Grosvenor Hotel Co.* v. *Hamilton*, 1894, 2 Q. B. 836; *Aldin* v. *Latimer*, 1894, 2 Ch. 437). The doctrine of an implied grant of easements is only applicable to such as are apparent and continuous; and where contiguous premises held under the same title are at the time of the division of title in such an unfinished state that there are no indications of definite ways or windows, &c. there will be no such implied grant (*Glave* v. *Harding*, 27 L. J. Ex. 286). It was said that there is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity or continuous easements. It is clear law that upon a severance of tenements, easements used as of necessity or in their nature continuous, will pass by implication of law without any words of grant: but easements which are used from time to time only do not pass unless the owner by appropriate language shows an intention that they should pass (*Polden* v. *Bastard*, L. R. 1 Q. B. 161, where the right to go to a well and take water was held not to be a continuous easement). And where the owner of two adjoining tenements A. and B., who from time to time used a paved passage across A. to reach B., mortgaged A. without any reservation, the mortgage extinguished all right of way through the passage (*Taws* v. *Knowles*, 1891, 2 Q. B. 564). Where, however, at the date of the grant of a gravel pit, a tramway was in fact enjoyed with the pit in such a manner as to lead to a reasonable expectation that the enjoyment would be permitted to continue, a grant of the right to use the tramway was implied (*Brazier* v. *Glasspool*, 1901, W. N. 237). And a grant was implied of a right of way as being in the nature of a continuous and apparent easement in *Ford* v. *Met. R. Co.*, 17 Q. B. Div. 12 (where

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there were no words of grant); and in *Brown* v. *Alabaster*, 37 Ch. D. 490 (where "appurtenances" occurred; see *Nicholls* v. *Nicholls*, 1900, W. N. 4; 81 L. T. 811). In *Thomas* v. *Owen* (20 Q. B. Div. 231), *Fry*, L.J., laid down that an exception to the principle of *Polden* v. *Bastard* (*sup.*) existed in the case of a formed road made over an alleged servient tenement to, and for the apparent use of, the dominant tenement; in which case a grant may be implied. The exception applies not only to the case of a grant, but also to the case of a reservation implied to support an earlier grant (20 Q. B. Div. 231). The reservation of an easement of necessity was implied in *Shurbrook* v. *Tufnell*, 46 L. T. 886.

Ways of necessity;

As a right of way may be created by an express grant, so it may also arise by an implied grant, where the circumstances are such that the law will imply such grant. This right of way has been commonly termed a way of *necessity*, but it is in fact only a right of way by implied grant; for there seems to be no difference where a thing is granted by express words, and where it passes as incident to the grant by operation of law (1 Wms. Saund. 323, n.; see *Bullard* v. *Harrison*, 4 M. & S. 387). Where property devised or granted is landlocked, and there is no other way of getting at it without a way of some sort over the lands of the testator or grantor, a way of necessity is created *de novo* (*Pearson* v. *Spencer*, 1 B. & S. 583; *Pinnington* v. *Galland*, 9 Exch. 1; *Pyer* v. *Carter*, 1 H. & N. 916; see *Beaudely* v. *Brook*, Cro. Jac. 189; *Howton* v. *Fearon*, 8 T. R. 50). A grant of the right to use the staircase of a building was implied in a lease of an upper flat (*Miller* v. *Hancock*, 1893, 2 Q. B. 180). No grant will be implied where at the time the necessity did not exist (*Midland R. Co.* v. *Miles*, 33 Ch. D. 632). And a claim to a way of necessity was refused where one side of the land granted abutted on a highway twenty feet below it (*Titchmarsh* v. *Royston Co.*, 1899, W. N. 256). The right may arise by implied reservation. Thus if the owner of four closes, having no way to one of them but over the others, grant the latter without reserving a right of way, it will be reserved to him by operation of law (*Clarke* v. *Cogg*, Cro. Jac. 170; *Jordan* v. *Attwood*, Owen, 121; *London* v. *Rigg*, 13 Ch. D. 798). On the sale of land to a purchaser who has notice that the adjoining land is to be laid out in building in a manner which will make a way over the purchased land necessary to the vendor, such a right of way is reserved to the vendor by implication (*Davies* v. *Sear*, 7 Eq. 427).

A way of necessity cannot be pleaded generally, without showing the manner in which the land over which the way is claimed is charged with it (*Bullard* v. *Harrison*, 4 M. & S. 387; see 1 Wms. Saund. 323, n. 6).

instances of ways of necessity;

Where there is a private road through a farm, the parson may use it for carrying away his tithe, though there is another public way equally convenient (*Cobb* v. *Selby*, 6 Esp. 103; see *James* v. *Dodds*, 2 C. & M. 266). Where a man leases lands, reserving the timber, he may enter to show it to a purchaser (2 Rol. Abr. 74, 1, 41; 1 Rol. Abr. 109, 1, 5). So if a man grants to another certain trees in his wood, the grantee may go with carts over the grantor's lands to carry away the trees (*Liford's case*, 11 Rep. 52 a; Vin. Abr. Incident). A man having a right to wreck thrown on another man's land, has necessarily a right of way over such land to take the wreck (*Anon.*, 6 Mod. 149). Where at the time of the grant in respect of which a right of way was claimed, there was a way which continued to exist, another way could not be claimed as a way of necessity, on the ground of its being more convenient than the former way (*Dodd* v. *Burchall*, 1 H. & C. 113). As to a right of way by necessity to land which had escheated to the lord of the manor, see *Proctor* v. *Hodgson*, 10 Exch. 824.

nature of a way of necessity;

Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there exist to the tenement granted more ways than one, the grantee is entitled to one way only, which the grantor may select (*Bolton* v. *Bolton*, 11 Ch. D. 968). The grantee cannot in general claim a right of way over one particular defined road as a way of necessity (*Brown* v. *Alabaster*, 37 Ch. D. 500; *Titchmarsh* v. *Royston Co.*,

1899, W. N. 256). A way of necessity once created must remain the same way as long as it continues at all (*Pearson* v. *Spencer*, 1 B. & S. 584; compare *Deacon* v. *S. E. R. Co.*, 1889, W. N. 79; and *Allport* v. *General Security Co.*, 11 T. L. R. 310, a staircase to a flat). The lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made, over an outer close which belongs to the same landlord (*Gayford* v. *Moffatt*, 4 Ch. 133). So where land was taken compulsorily for sewage works, the local board acquired a way of necessity for all purposes connected with these works (*Serff* v. *Acton*, 31 Ch. D. 679). In general, however, a way of necessity is not created for all purposes for which the close to which the way leads may at any time be used; but only such a right of way as will enable the owner of the close to enjoy it in the condition it was in at the time of the creation of the way (*London* v. *Rigg*, 13 Ch. D. 798). **Rights of Way.**

A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; therefore if, at any subsequent period, the party formerly entitled to such way can approach the place to which it led by passing over his own land, by as direct a course as he would have done by using the old way, the latter will cease to exist (*Holmes* v. *Goring*, 2 Bing. 76; *Reynolds* v. *Edwards*, Willes, 282; but see *Buckley* v. *Coles*, 5 Taunt. 311, and the remarks of *Parke*, B., *Proctor* v. *Hodgson*, 10 Ex. 828; see also *Pheysey* v. *Vicary*, 16 M. & W. 491). **duration of a way of necessity.**

(o) Grants of rights of way are presumed from long enjoyment, where its commencement cannot be accounted for, unless a grant has been made (*Doe* v. *Read*, 5 B. & Ald. 237). The uninterrupted enjoyment of a right of way for twenty years, in the absence of evidence that it had been used by leave, or under a mistake, was held sufficient to leave to a jury to presume a grant, although the road in question had been extinguished twenty-six years before, under an inclosure act (*Campbell* v. *Wilson*, 3 East, 294). So where there had been an absolute extinguishment of a right of way for many years by unity of possession, but the way had been used for thirty years preceding an action for its obstruction, the jury were directed to presume a grant from the defendant (*Keymer* v. *Summers*, Bull. N. P. 74, cited 3 T. R. 157; see also *Livett* v. *Wilson*, 3 Bing. 115). Though an uninterrupted user for twenty years and upwards be a bar to an action, yet the rule must be taken with this qualification, that the user was with the acquiescence of the person seised of an estate of inheritance. The mere knowledge of the tenant is not sufficient (*Daniel* v. *North*, 11 East, 372); but if the user has been for a great length of time, it may be presumed that the landlord was aware of it (*Davies* v. *Stephens*, 7 C. & P. 570; *Jamieson* v. *Coulter*, 21 W. R. 852; *Gray* v. *Bond*, 2 Brod. & Bing. 667; see *Dawson* v. *Norfolk*, 1 Price, 247). A grant, however, may be presumed from one tenant to another (*Timmons* v. *Hewitt*, 22 L. R. Ir. 627). **Acquisition by grant presumed from user;**

A private way may be claimed by prescription; as that a man is seised in fee of a certain messuage, and that he, and all those whose estate he has in the same messuage, have from time immemorial had a way (describing it, as the case may be) from —— to ——. A way being only an easement, and not an interest, should not be laid as appendant or appurtenant (Yelv. 159). Where a particular tenant relied on a prescriptive right, he must, before the Prescription Act, 1832, s. 5, *ante*, p. 15, have set forth the seisin in fee of the owner, and then have traced his own title from the owner of the fee (2 Salk. 562; Com. Dig. Chimin (D. 2)). Where the defendant prescribed for a right of way, and it appeared that the defendant's land had, within fifty years, been part of a large common, afterwards inclosed, it was held, that the way, having existed before the inclosure, might be claimed by prescription (*Codling* v. *Johnson*, 9 B. & C. 933). If the lessor enjoy a prescriptive right of way, or any other easement, by virtue of the demised premises, such right will pass to the tenant for life or years. Before the Prescription Act, 1832 (see s. 5, *ante*, p. 15), the only distinction between a tenant for years and a tenant for life was **prescription at common law;**

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that the former in pleading could not prescribe in his own right; but he must have asserted the right through his landlord, or the owner of the freehold (*Cantrell* v. *Stephens*, Styl. 300; *Dawney* v. *Cashford*, Carth. 432). The user on which the prescription is based must be uninterrupted. Locking a gate across the way is interruption, although the claimant is given a key (*Barry* v. *Lowry*, I. R. 11 C. L. 483; compare *Davies* v. *Stephens*, 7 C. & P. 570). As to claim to private rights of way under the Prescription Act, 1832, see *ante*, pp. 8, 9.

custom.

A custom that every inhabitant of a certain village shall have a way over certain land, either to church or to market, is good, because it is only an easement, but not a profit (6 Rep. 60 b.; Co. Litt. 110 b.; Cro. Eliz. 180; see 2 H. Bl. 393; *ante*, p. 32). See, as to a church way, *Batten* v. *Gedye*, 41 Ch. D. 507.

(d) Acquisition by statute.

By an inclosure act, all ways over West Field, allotted to B., were extinguished, with a proviso that nothing in the act should deprive A. of the right of ingress, egress, and regress, to and from a watercourse, for the purpose of rebuilding, or to cleanse the same; this reserved to A. his right of way for the purposes mentioned (*Adeane* v. *Mortlock*, 5 Bing. N. C. 236). A private estate act authorizing the appropriation of land as a way for the general improvement of the estate and the accommodation of tenants and occupiers, was held to authorize the creation of exclusive private rights of way (*White* v. *Leeson*, 5 H. & N. 53). Commissioners of partition may award a right of way over the lands of one party to the lands of another party (*Lister* v. *Lister*, 3 Y. & C. 140).

(3) Nature and extent of rights of way acquired by express grant.

Primâ facie, the grant of a right of way is the grant of a right of way having regard to the nature of the *locus in quo* over which it is granted and to the purpose for which it is intended to be used. Both these circumstances may be called in aid in determining whether it is a general right of way, or a footway, or a driftway (*Cannon* v. *Villars*, 8 Ch. D. 421; see *Osborn* v. *Wise*, 7 C. & P. 761, *ante*, p. 62). On this principle, a way was held to be a footway in *Cousens* v. *Rose*, 12 Eq. 366; and a way for all purposes in *Watts* v. *Nelson*, 6 Ch. 166; see also *Wood* v. *Stourbridge Co.*, 16 C. B. N. S. 222. A way over a private road to land abutting on the private road was not limited to a way through gates which existed at the time of the grant (*South Metropolitan Co.* v. *Eden*, 16 C. B. 42; compare the wide construction placed upon the grants of ways in *Cooke* v. *Ingram*, 68 L. T. 671; *Sketchley* v. *Berger*, 69 L. T. 754).

Where there is an express grant of a private right of way to particular land, to the unrestricted use of which land the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant (*Finch* v. *G. W. R. Co.*, 5 Ex. D. 254; *United Land Co.* v. *G. E. R. Co.*, 10 Ch. 586; *Newcomen* v. *Coulson*, 5 Ch. D. 133). In *Allan* v. *Gomme* (11 Ad. & E. 759), the grantee of a right of way was limited to the use of a way to a place which should be in the same predicament as it was at the time of the grant. This ruling, however, was not approved of by *Parke*, B. (*Hening* v. *Burnett*, 8 Exch. 192), and the case was treated by *Stephen*, J., as turning on the construction of the particular deed (*Finch* v. *G. W. R. Co.*, 5 Ex. D. 259). The grant of a footway was not so limited (*Sketchley* v. *Berger*, 69 L. T. 754). On the construction of a lease the grant of a right of way was restricted to the way existing at the date of the lease (*Collins* v. *Slade*, 23 W. R. 199). Where a lease reserved to the lessor and his assigns a right of way for the purpose of rebuilding erections on adjoining premises which belonged to the lessor, and the defendants, who claimed under the lessor, had erected a dispensary on those premises, the user of the way as an access to such dispensary was restrained (*Ardley* v. *St. Pancras*, 1870, W. N. 203; 39 L. J. Ch. 871; see *Sloan* v. *Holliday*, 30 L. T. 757). Compare the ruling as to the extent of an easement to discharge drainage over another's land (*Wood* v. *Saunders*, 10 Ch. 582).

Under a grant of a free and convenient horse and foot way, and for carts, &c., "to carry stones, timber, coals, and other things whatsoever," the

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grantee may lay a framed way across the land for carrying coals as being most convenient (*Senhouse* v. *Christian*, 1 T. R. 560). In 1630 land was granted excepting and reserving out of the grant all mines of coal with sufficient way-leave to the said mines. It was questioned whether under this reservation the coal-owner had now a right to make a railway. It was held, however, that the right was not confined to such ways as were in use at the time of the grant (*Dand* v. *Kingscote*, 6 M. & W. 174; see *Newcomen* v. *Coulson*, 5 Ch. D. 139). Where a lease reserved minerals with authority to work and carry away the same with free way-leave to and from the same or to or from any other mines, the reservation only included way-leave for the purpose of getting the excepted minerals, and a railway having been made, the proper question for the jury was whether when the road was formed it had become necessary or expedient to make a road for the purpose of getting the excepted minerals; and, if so, whether the road was a proper one for that purpose (*Durham R. Co.* v. *Walker*, 2 Q. B. 940; *Farrow* v. *Vansittart*, 1 Ry. Cas. 614). Where, however, A. granted land excepting and reserving a waggon or cart road of the width of eighteen feet, to be at all times thereafter kept in repair at his own cost, this reservation did not enable A. to lay down a railroad for carrying coals raised from his neighbouring colliery (*Bidder* v. *North Staffordshire R. Co.*, 4 Q. B. Div. 412). Where a lease of premises described them as abutting on an intended way, thirty feet wide, not then set out, the soil of which was the property of the lessor: and the lessee granted an underlease, describing the premises as abutting on an intended way, without specifying the breadth: the sub-lessee was entitled to a *convenient* way only (*Harding* v. *Wilson*, 2 B. & C. 96; see *Espley* v. *Wilkes*, L. R. 7 Ex. 298). The grant of a right of way which did not express the intention was rectified (*Cowen* v. *Truefitt*, 1899, 2 Ch. 309). Where a way was granted for a particular purpose, but the land had never been, and was not likely to be, used for that purpose, a declaration of right to the way was refused (*Metropolitan R. Co.* v. *G. W. R. Co.*, 84 L. T. 333).

Reasonable user.

A grant of a right of way over a private road only confers a right to a reasonable use of such road, and not necessarily over the whole surface of the road (*Clifford* v. *Hoare*, L. R. 9 C. P. 362; see *Sketchley* v. *Berger*, 69 L. T. 754). So in the case of a private way over waste land (*Hulton* v. *Hamboro*, 2 F. & F. 218). Where premises are conveyed with a right of way thereto, it may be a question for the jury what is a reasonable use of such right (*Hawkins* v. *Carbine*, 27 L. J. Exch. 44). Where a right of way was expressed to be "through the gateway of the plaintiff" (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load, but through alterations of the premises could not do so without slightly trenching upon the plaintiff's premises: it was held that, in the reasonable use of the right of way, the defendant had a right to do this (*Ib.*). As to the construction of "the exclusive use of the gateway," see *Reilly* v. *Booth* (44 Ch. Div. 12). Where a right of way is granted for the occupation of a dwelling-house, the grantee ought to have everything needful for the occupation of the house. Such a grantee was held entitled to put down a flagstone in front of a door opened by him out of his house into the land over which the right existed (*Gerrard* v. *Cooke*, 2 Bos. & P. N. R. 109).

(4) Nature and extent of rights of way acquired by user.

Where there is a right of way proved by user, the extent of the right must be measured by the extent of the user (*Finch* v. *G. W. R. Co.*, 5 Ex. D. 258; see *Williams* v. *James*, L. R. 2 C. P. 577; *Wimbledon Conservators* v. *Dixon*, 1 Ch. D. 362; *Bradburn* v. *Morris*, 3 Ch. D. 812). Evidence of an user of a road with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of road for all purposes, but the extent of the right is a question for the jury under all the circumstances. If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, the jury may be warranted in finding a way for all (*Cowling*

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v. *Higginson*, 4 M. & W. 245; see *Dare* v. *Heathcote*, 25 L. J. Ex. 245; 26 *Ib.* 164; *Hawkins* v. *Carbines*, 27 L. J. Ex. 44; *Ballard* v. *Dyson*, 1 Taunt. 279; *Jackson* v. *Stacey*, Holt, N. P. C. 455; *Higham* v. *Rabbett*, 5 Bing. N. C. 622). When a way to a dwelling-house had been acquired by user, it was held there was no excess of user by reason of a small shop having been opened in the house (*Sloan* v. *Holliday*, 30 L. T. 757). The defendant, being entitled by user to a right of way over the plaintiff's land from field N., used the way for the purpose of carting from field N. some hay stacked there, which had been grown partly on the land adjoining. The jury found that the defendant had used the way *bonâ fide*, and for the ordinary and reasonable use of field N. as a field. Held, that there was no excessive user (*Williams* v. *James*, L. R. 2 C. P. 577).

(5) Right to deviate.

A person having a private way over the land of another cannot, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although such land, as well as the land over which the way runs, belongs to the grantor of the way (*Taylor* v. *Whitehead*, 2 Dougl. 475; *Bullard* v. *Harrison*, 4 M. & S. 387; 1 Wms. Saund. 322 a, n. (3); *Duncombe's case*, Cro. Car. 366; see *Robertson* v. *Gauntlett*, 16 M. & W. 289). But where a private way has been obstructed by the grantor, the grantee may deviate over the grantor's land (*Selby* v. *Nettlefold*, 9 Ch. 111).

(6) Repair of way.

The grantee of a way has a right to repair it, as incident to the grant (Com. Dig. Chimin (D. 6); Godb. 53; *Gerrard* v. *Cooke*, 2 Bos. & P. N. R. 108; Vin. Abr. Incidents (A.); *Newcomen* v. *Coulson*, 5 Ch. D. 143), and the grantor is not bound to repair (Com. Dig. Chimin (D. 6)), unless by prescription or stipulation, express or implied (1 Saund. 322 a, n.; *Rider* v. *Smith*, 3 T. R. 766; *Miller* v. *Hancock*, 1893, 2 Q. B. 181). The grantee of a private way is to make it (*Osborn* v. *Wise*, 7 C. & P. 764). By common law he who has the use of a thing ought to repair it, unless the grantor has bound himself to do so (*Taylor* v. *Whitehead*, 1 Doug. 720; *Pomfret* v. *Ricroft*, 1 Wms. Saund. 557; *Miller* v. *Hancock*, *sup.*). Although at common law the grantee of a way ought to repair it, that is not a condition incident by law to the grant of a right of way; it is not even an obligation to which the grantee is subject; it is no more than this, that if he wants the way to be repaired he must repair it himself (*Duncan* v. *Louch*, 6 Q. B. 909, 910; see *Ingram* v. *Morecraft*, 33 Beav. 49). As to rebuilding a bridge, see *Campbell Davys* v. *Lloyd*, 1901, 2 Ch. 518.

Liability for negligence.

Where an owner of the soil permits others to pass over it, he is liable for an accident caused by the negligence of himself or his servants to a person lawfully availing himself of such permission, though he would not be liable for an accident caused by the ordinary risks attaching to the nature of the place, or the business there carried on (*Gallagher* v. *Humphrey*, 10 W. R. 664). Where an owner of land, having a private road to his house, gave permission to a builder to place materials upon the road, and the builder placed a quantity of slates there in such a manner that the plaintiff in using the road sustained damage: the builder was liable to an action (*Corby* v. *Hill*, 4 C. B. N. S. 556; *Belch* v. *Smith*, 7 H. & N. 736). The possessors of a cutting, and a bridge over the cutting, who allowed the public to use the bridge, were held not liable for the death of a person who fell into the cutting through the defective condition of the bridge (*Gautret* v. *Egerton*, L. R. 2 C. P. 371; see *Gwinnell* v. *Eames*, L. R. 10 C. P. 658; *Tarry* v. *Ashton*, 1 Q. B. D. 314).

(7) Extinction of rights of way: by unity of seisin;

Where a person having a right of way over the land of another purchases such land, the right of way is extinguished by the unity of seisin and possession (*Heigate* v. *Williams*, Noy, R. 119; see *James* v. *Plant*, 4 Ad. & El. 761, *ante*, p. 62).

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A long forbearance to exercise a right of way may reasonably be accounted for by supposing a release of the right (*Doe* v. *Hilder*, 2 B. & Ald. 791; see *Moore* v. *Rawson*, 3 B. & C. 339). But a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it (*Crossley* v. *Lightowler*, 2 Ch. 482; *James* v. *Stevenson*, 1893, A. C. 162). It is the nature of the act done, or of the adverse act acquiesced in by the owner of the easement, and the intention thereby indicated, which are material (*R.* v. *Chorley*, 12 Q. B. 519; *Mulville* v. *Fallon*, I. R. 6 Eq. 458). by abandonment;

It was laid down in another case, that where a right of way has been once established by clear evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in; an unsuccessful attempt on the part of the occupiers of the land, over which the way ran, from time to time to interrupt such right, will not be sufficient to get rid of it (*Harvie* v. *Rogers*, 3 Bligh, N. S. 444—447; see *Hillary* v. *Waller*, 12 Ves. 265; *Norbury* v. *Meade*, 3 Bligh, 211, 241).

The discontinuance for upwards of twenty years of the use of an immemorial right of way to a close, because the occupiers had a more convenient access to it over another close, is not evidence of an intention to abandon the right (*Ward* v. *Ward*, 21 L. J. Exch. 334; cf. *Cooke* v. *Ingram*, 68 L. T. 671). In the former case *Alderson*, B., observed, "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user." A parol agreement for the substitution of a new way for an old prescriptive way, and the consequent discontinuance to use the old highway, afford no evidence of the abandonment thereof (*Lovell* v. *Smith*, 3 C. B. N. S. 120). In this case *Willes*, J., said, "I do not think that this court means to lay down that there can be an abandonment of a prescriptive easement like this without a deed or evidence from which the jury can presume a release of it" (*Ib.* pp. 126, 127). A right of way may be abandoned, and it is always a question of fact, to be ascertained by a jury or by the court from the surrounding circumstances, whether the act amounts to an abandonment or was intended as such (*Cook* v. *Bath*, 6 Eq. 179). The right to use a level crossing was abandoned by severance of ownership of land on either side of the line (*Midland R. Co.* v. *Gribble*, 1895, 2 Ch. 827).

by alteration of dominant tenement;

Where the mode of enjoyment of an easement has been more or less altered, and where an attempt has been made to usurp a greater right than the party was entitled to, it appears that in the case of those easements which depend upon repeated acts of man and require no permanent alteration in the dominant tenement as rights of way, the previously-existing right will not be affected by acts of usurpation (Gale on Easements, 514, 6th ed.; and see *Luttrell's case*, 4 Rep. 86 a). There does not appear to be any direct authority to show whether, if the use of a place, to and from which a way is by express words reserved or granted, be completely changed, the way can still be continued to be used. It has been held, that if a man has a right of way to a close called A., he cannot justify using the way to go to A., and from thence to another close of his own adjoining to A. (1 Roll. Abr. 391, pl. 3; *Howell* v. *King*, 1 Mod. 191; *Lawton* v. *Ward*, 1 Ld. Raym. 75; and 1 Lutw. 111; *Skull* v. *Glenister*, 16 C. B. N. S. 81). If a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered (*Henning* v. *Burnet*, 8 Exch. 192; see *Sloan* v. *Holliday*, 30 L. T. 757).

by statute.

By the 10th section of the Inclosure (Consolidation) Act, 1801, the commissioners are directed to set out private roads; and by the 11th section of that act it is declared that all roads, ways, and paths, over, through and upon such lands and grounds, which shall not be set out, shall be extinguished. Where a private inclosure act does vary

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the terms of the above act, if the commissioners in their award do not notice a road running over the inclosed lands, it is, by the operation of that act, extinguished, and the proprietor of the lands over which it runs may stop it up (*White* v. *Reeves*, 2 B. Moore, 23; *Holden* v. *Tilley*, 1 F. & F. 650); compare sect. 68 of the Inclosure Act, 1845, *Turner* v. *Crush*, 4 App. Cas. 221. As to the construction of local inclosure acts giving powers to stop up roads, see *Logan* v. *Burton* (5 B. & C. 513); *Harber* v. *Rand* (9 Price, 58); *R.* v. *Hatfield* (4 Ad. & Ell. 156).

(8) Remedy for disturbance: by abatement.

It would seem that the owner of a right of way may, after proper notice requesting the removal of an obstruction, himself remove it, even if the obstruction is a house which is inhabited (*Lane* v. *Capsey*, 1891, 3 Ch. 411). The refusal by the court to grant a mandatory injunction would not interfere with such a right (*Ib*); and leave was given to exercise the right where the house was in the possession of a receiver appointed by the court (*Ib*). It is doubtful whether the right to abate exists in the case of nonfeasance (*Campbell Davys* v. *Lloyd*, 1901, 2 Ch. 518).

Remedy by action;

An action lies for the disturbance of a right of way, created either by reservation, grant, or prescription (Com. Dig. Action on the Case for Disturbance (A. 2); 1 Roll. Abr. 109); and such disturbances may be either by absolutely stopping up the way, or by ploughing up the land through which the way passes (2 Roll. Abr. 140), or by damaging the way with carriages, so that it is of no use (*Lawton* v. *Ward*, 1 Lutw. 111). A

action by reversioner;

reversioner cannot sue for the obstruction of a right of way unless the obstruction be such as either permanently injures the estate, or operates in denial of the right (*Hopwood* v. *Scholfield*, 2 M. & Rob. 34; see *Young* v. *Spencer*, 10 B. & C. 145; *Baxter* v. *Taylor*, 4 B. & Ad. 72; *Jackson* v. *Pesked*, 1 M. & S. 234; *Alston* v. *Scales*, 2 M. & Scott, 5; *Mott* v. *Shoolbred*, 20 Eq. 22; *Kidgill* v. *Moor*, 9 C. B. 364). Where the plaintiff had, under the special act of a railway company, acquired the use of a siding, which he leased to tenants, and the company denied the plaintiff's right, and obstructed the siding by carriages constantly kept there, the obstruction was sufficiently permanent to give the plaintiff a right of action as reversioner (*Bell* v. *Midland R. Co.*, 10 C. B. N. S. 287).

companies;

The Railway Clauses Act, 1845, s. 53, takes away the common law right of action for an interference by a railway company under its powers with a private right of way, except when special damage has been sustained (*Watkins* v. *G. N. R. Co.*, 16 Q. B. 961). As to compensation under the Lands Clauses Act, 1845, see *London School Board* v. *Smith*, 1895, W. N. 37.

pleading;

In all cases for disturbance of a way, the obstruction ought to be alleged as occurring in the way itself to which the party has a right (*Tebbutt* v. *Selby*, 6 Ad. & Ell. 786). Where in an action for wrongfully stopping up a way the precise locality of the way is material to the defence, the defendant is bound to show it in his pleadings (*Ellison* v. *Iles*, 11 Ad. & Ell. 665).

In an action brought since the Jud. Acts for obstructing a private way the pleading should, under the R. S. C., show the termini of the way and its course; and whether the plaintiff claims by prescription or grant (*Harris* v. *Jenkins*, 22 Ch. D. 481). And where the defendant in an action of trespass pleads that the *locus in quo* was a highway, he must now state how it became a highway (*Spedding* v. *Fitzpatrick*, 38 Ch. Div. 410; see under the old law, *Williams* v. *Wilcox*, 8 Ad. & El. 331). As to variances under the old law, see *Duncan* v. *Louch* (6 Q. B. 904); *Colchester* v. *Roberts* (4 M. & W. 769).

actions in the Chancery Division.

Where a bill was filed by a lessee to establish a right of way, an objection for want of parties, because the plaintiff's lessor was not before the court, was allowed under the Chancery practice before the Jud. Acts (*Poore* v. *Clark*, 2 Atk. 515). As to the certainty required in such bills, see *Gell* v. *Hayward* (1 Vern. 312); *Cresset* v. *Mittm* (3 Bro. C. C. 481; 1 Ves. jun. 449). Agreements as to right of way were enforced by injunc-

tion in *Newmarch* v. *Brandling* (3 Swan. 99); *Phillips* v. *Treeby* (3 Giff. 632); *Collins* v. *Slade* (23 W. R. 199). **Rights of Way.**

As to the remedy in equity, in the case of a licence for a right of way which has been executed, and where expense has been incurred, see *Mold* v. *Wheatcroft* (27 Beav. 510), and the cases quoted *ante*, p. 23.

As to the obstruction of a right of way by the acts of several persons, see *Thorpe* v. *Brumfitt*, 8 Ch. 650, and other cases quoted p. 108, *post*. Injunctions have been granted to restrain interference with the private access of the owner of property abutting on the highway to and from the highway (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 713; see *Fritz* v. *Hobson*, 14 Ch. D. 542). In a proper case a mandatory injunction will be granted (*Krehl* v. *Burrell*, 7 Ch. D. 551; 11 Ch. Div. 146). The remedy of a parishioner in respect of a churchway is in the Ecclesiastical Court (*Batten* v. *Gedye*, 41 Ch. D. 507). See further the forms of injunctions, Seton, 6th ed. 585 *et seq.*

V.—Watercourses and Rights in Relation to Water.

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(1) Origin of law governing natural streams.

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long-continued —in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law (which would seem to be the opinion of *Fleta* and of *Blackstone*), the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice *Story*, in his judgment in the case of *Tyler* v. *Wilkinson* (4 Mason's American Rep. 401), in the courts of the United States, as "an incident to the land; and that whoever seeks to found an

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exclusive use must establish a rightful appropriation in some manner known and admitted by the law" (*Acton* v. *Blundell*, 13 M. & W. 349, 350).

Natural right of riparian proprietor to the use and to the flow of water in natural streams.

"*Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations. No proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above" (*Wright* v. *Howard*, 1 Sim. & Stu. 203; adopted by Lord *Tenterden*, C. J., *Mason* v. *Hill*, 3 B. & Ad. 312, 313; and see *Mason* v. *Hill*, 5 B. & Ad. 18; *Ennor* v. *Barwell*, 2 Giff. 426, 427; *Embrey* v. *Owen*, 6 Exch. 369). Nor is he entitled to increase the flow of water except by reasonable drainage operations (*Young* v. *Bankier Co.*, 1893, A. C. 697). "The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality" (*Gaved* v. *Martyn*, 19 C. B. N. S. 732). "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle; and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, for what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury" (*Per* Lord *Kingsdown*, *Miner* v. *Gilmour*, 12 Moo. P. C. 156; adopted in *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; see *A. G.* v. *G. E. R. Co.*, 6 Ch. 572; *Buccleuch* v. *Metropolitan Board*, L. R. 5 H. L. 418; *Young* v. *Bankier Co.*, 1893, A. C. 696, 699). The question what is an "extraordinary use" may depend on the development of trade in the neighbourhood, and on the use to which the water of rivers is put in the adjoining district (*Ormerod* v. *Todmorden Co.*, 11 Q. B. Div. 168). As to "sensible injury" see the case p. 81, *post*, deciding that proof of actual damage is not necessary in actions for diversion and obstruction. Every riparian proprietor is entitled to the water of his stream in its natural flow without sensible diminution or increase, and without sensible alteration in its character or quality; any invasion of this right, causing actual damage or calculated to found a claim which may ripen into an adverse right, entitling the party injured to the intervention of the court (*Young* v. *Bankier Co.*, 1893, A. C. 698).

Appropriation not necessary.

In *Williams* v. *Morland* (2 B. & C. 910), *Bayley*, J., said: "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it: subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public." The same doctrine of appropriation was laid down in the earlier cases (*Rutland* v. *Bowler*, Palm. 290; *Bealey* v. *Shaw*, 6 East, 208; *Saunders* v. *Newman*, 1 B. & Ald. 258; *Liggins* v. *Inge*, 7 Bing. 692; *Frankum* v. *Falmouth*, 6 C. & P. 529). Lord *Denman*, however, said: "It appears to us that there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant, though he may be the proprietor of the land above, has any right by diverting the stream to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein" (*Mason* v. *Hill*, 5 B. & Ad. 24). In *Arkwright* v. *Gell* (5 M. & W. 220), *Parke*, B.,

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said: "The object of the judgment in *Mason* v. *Hill*, was to set right the mistaken notion which had got abroad in consequence of certain *dicta* in *Williams* v. *Morland* (2 B. & C. 910), that flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it." And in *Sampson* v. *Hoddinott* (1 C. B. N. S. 590), it was said: "It appears to us that all persons having land on the margin of a flowing stream have by nature certain rights to use the water of the stream, whether they exercise their rights or not" (adopted by *Wood*, V.-C., in *Crossley* v. *Lightowler*, 3 Eq. 296; see *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 854).

Channel must be defined.

The right of a riparian owner to the lateral tributaries or feeders of the main stream applies only to water flowing in a defined and natural channel or watercourse, and does not extend to water flowing over or soaking through land previous to its arrival at such watercourse (*Broadbent* v. *Ramsbottom*, 11 Ex. 602). The owner of land has an unqualified right to drain it for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular definite course (*Rawstron* v. *Taylor*, 11 Exch. 369; see *Van Breda* v. *Silberbauer*, L. R. 3 P. C. 84). As to what is a defined channel, see *Briscoe* v. *Drought* (11 Ir. C. L. R. N. S. 250; *Ennor* v. *Barwell*, 2 Giff. 410).

Springs.

On the other hand, where a natural defined stream issued from a springhead, it was held that the "stream" began at the springhead, and that the owner of the land could only take such water from either as was incident to his right as riparian owner (*Dudden* v. *Clutton Union*, 1 H. & N. 627; *Bunting* v. *Hicks*, 70 L. T. 458; *Ewart* v. *Belfast*, 9 L. R. Ir. 172). The same principle applied even where at some remote period the springhead had been built round (*Mostyn* v. *Atherton*, 1899, 2 Ch. 360).

Artificial channel.

In the case of a natural stream flowing through an artificial channel, the riparian proprietors may possess rights similar to those which they would have possessed if the channel had been a natural one (*Holker* v. *Parritt*, L. R. 8 Ex. 116; *Roberts* v. *Richards*, 44 L. T. 271; *Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136; *Baily* v. *Clark*, 1902, 1 Ch. 649; see also *Nield* v. *L. & N. W. R. Co.*, L. R. 10 Ex. 4; and *post*, p. 76).

Stream changing its course.

In a case where a stream had from time to time changed its course, it was laid down that the accustomed course of a natural stream which a riparian owner is entitled to have preserved is the natural and apparently permanent course existing when the right is asserted or called in question (*Withers* v. *Purchase*, 60 L. T. 819).

(2) Natural rights with regard to subterranean water:

where course is known and defined;

If the course of a subterranean stream be well known, as is the case with many, which sink underground, pursue for a short space a subterraneous course and then emerge again, the owner of the soil under which the stream flowed could maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground (*Dickenson* v. *Grand Junction Co.*, 7 Ex. 300; *Chasemore* v. *Richards*, 7 H. L. C. 349; see also *Dudden* v. *Clutton Union*, 1 H. & N. 630).

where course is undefined.

The owner of land, through which underground water flows with no certain course or defined limits, has no natural right in it which will enable him to maintain an action against a landowner, who, in mining on his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry (*Acton* v. *Blundell*, 12 M. & W. 353; *Chasemore* v. *Richards*, 7 H. L. C. 374; *Jordeson* v. *Sutton Co.*, 1899, 2 Ch. 248). And no action will lie against a man who, by digging or cutting drains in his own land, thereby drains his neighbour's land either by intercepting the flow of the water percolating through the pores of the soil, and which but for such digging or draining would have reached his neighbour's land, or by causing the water already collected, in fact, on his neighbour's soil to percolate away from and out of it (*New River Co.* v. *Johnson*, 6 Jur. N. S. 374; 7 W. R. 179; see also *South Shields Co.* v. *Cookson*, 15 L. J. Ex. 315; *R.* v. *Metropolitan Board*, 3 B. & S. 710; *Ballacorkish Co.* v. *Harrison*, L. R. 5 P. C. 60; *Bradford* v.

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Pickles, 1895, A. C. 587). The ultimate decision in *Dickenson* v. *Grand Junction Co.* (7 Exch. 282), and the *dictum* of Lord *Ellenborough* in *Balston* v. *Benstead* (1 Camp. 463), have been overruled by *Chasemore* v. *Richards*, 7 H. L. C. 349. On the other hand, a landowner will be restrained from making a drain in his own land by which water flowing in a defined surface channel through adjoining land is withdrawn (*Grand Junction Co.* v. *Shugar*, 6 Ch. 483).

(3) Natural right of riparian proprietors to divert flood water.

A proprietor of land adjoining a river has a right to raise the banks upon his own land, so as to prevent the water from overflowing his land, with this restriction, that he does not occasion injury to the property of others (*R.* v. *Trafford*, 1 B. & Ad. 874; 8 Bing. 204; 2 Cr. & Jerv. 265; *Menzies* v. *Breadalbane*, 3 Bligh, N. S. 414, 418; *A. G.* v. *Lonsdale*, 7 Eq. 377). Compare the easement of opening locks acquired by a corporation for the protection of their land (*Simpson* v. *Godmanchester*, 1897, A. C. 696). If, however, an extraordinary flood is seen to be coming on land, the owner may protect his land from it without being responsible for consequences, although his neighbour may be injured (*Nield* v. *L. & N. W. R. Co.*, L. R. 10 Ex. 4; see *Whalley* v. *Lancashire R. Co.*, 13 Q. B. Div. 136, 140. Compare the similar right on the sea-shore: *R.* v. *Pagham*, 8 B. & C. 355). But if the flood has already come, the owner must not, for the purpose of getting rid of the mischief, injure his neighbour (*Whalley* v. *Lancashire R. Co.*, *sup.*). As to the duties in respect of a river-wall incumbent on the owner of land on a tidal navigable river, see *Nitro-Phosphate Co.* v. *London and S. Katharine's Docks*, 9 Ch. Div. 524; *Burt* v. *Victoria Co.*, 47 L. T. 378.

Natural right of riparian proprietor to purity of water of natural stream.

A riparian proprietor has a right to the natural stream of water flowing through the land in its natural state; and if the water is polluted by a proprietor higher up the stream so as to occasion damage in law, though not in fact, to the inferior proprietor, it gives him a good cause of action against the superior proprietor, unless the latter has gained by long enjoyment or grant a right to pollute (*Wood* v. *Waud*, 3 Ex. 748; see *Weeks* v. *Heward*, 10 W. R. 557). The same rule applies, if the character of the water be altered (*Young* v. *Bankier Co.*, 1893, A. C. 691). The natural right to purity extends to subterranean water when appropriated (*Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Turner* v. *Mirfield*, 34 Beav. 390; *Ballard* v. *Tomlinson*, 29 Ch. Div. 115).

(4) Acquired rights with regard to water; in natural stream;

Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream. By usage he may acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up or lower down the stream, unless the user by which it was acquired affects the use such landowner has of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above or below a servient tenement (*Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Bealey* v. *Shaw*, 6 East, 208). Before the Prescription Act, 1832, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it, derived from grant or act of parliament (*Bealey* v. *Shaw*, 6 East, 208; *Cox* v. *Matthews*, 1 Vent. 237; 2 Wms. Saund. 113 b; see *Dewhirst* v. *Wrigley*, 1 C. P. Coop. 329).

in subterranean water.

No right to the uninterrupted flow of subterranean water which percolates in an undefined course can be acquired by prescription, for no grant can be presumed in the case of such water (*Chasemore* v. *Richards*, 7 H. L. C. 349). The owner of land containing such water may divert or appropriate the same, even from a malicious motive (*Bradford* v. *Pickles*, 1895, A. C. 587; see *ante*, p. 73). Where, however, a grant was made of all streams of water that might be found in certain closes, it was held that the grantor and those claiming under him could not work mines under

adjoining land so as to divert underground water from wells in the closes (*Whitehead* v. *Parkes*, 2 H. & N. 870).

Prescriptive right acquired by user; to divert;

In *Prescott* v. *Phillips* (cited *Bealey* v. *Shaw*, 6 East, 213; *Mason* v. *Hill*, 5 B. & Ad. 23) it was ruled, "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious; and that a possession of above nineteen years, which was shown in that case, was not sufficient (see *Cox* v. *Matthews*, 1 Ventr. 237, cited *Mason* v. *Hill*, 5 B. & Ad. 25). The right of diverting water, which in its natural course would flow over or along the land of a riparian owner, and of conveying it to the land of the party diverting it, can be created according to the law of England only by grant, or by long-continued enjoyment from which the existence of a former grant may be reasonably presumed, or by statute. Such an easement exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment (*per Cockburn*, C.J., *Mason* v. *Shrewsbury R. Co.*, L. R. 6 Q. B. 587). Previously to the Prescription Act, 1832, the acquiescence of lessees would not bind the landlord; similarly, the uninterrupted possession of the water for over fifty years, with the acquiescence of tenants for life, did not affect the reversioner (*Bradbury* v. *Grinsell*, 2 Wms. Saund. 516). Evidence of user for twenty years of a head-stock to pen up a rivulet was held insufficient evidence for raising the presumption of a grant to warrant its continuance to the injury of church land; for if the preceding vicar had made such a grant, it would not have bound his successor (*Wall* v. *Nixon*, 3 Smith's R. 316; see *Barker* v. *Richardson*, 11 East, 372). As to enjoyment since the Prescription Act during a life tenancy, see *Bright* v. *Walker*, 1 C. M. & R. 211, *ante*, p. 8. As between absolute owners, the right to pen back a stream may be acquired by prescription (*Cooper* v. *Barber*, 3 Taunt. 99). Again, the right to a fishing weir may be acquired in non-navigable rivers by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657; see *Barker* v. *Faulkner*, 1898, W. N. 69); and even in a navigable river a riparian proprietor can acquire an interest in its water power as derived from a reservoir artificially formed by a dam across its channel (*Hamelin* v. *Bannerman*, 1895, A. C. 237).

to pen back;

to obstruct;

to discharge water upon adjoining land;

An action may be maintained for the erection of a roof with eaves projecting over another's land, and discharging rain water on to it, without proof that rain has actually fallen (*Fay* v. *Prentice*, 1 C. B. 828). The reversioner may sue (*Tucker* v. *Newman*, 11 Ad. & Ell. 40). Although, however, every one in building is bound so to construct his house as not to overhang his neighbour's property, and to construct his roof in such a manner as not to throw the rain water upon the neighbouring land (11 Hen. 7, f. 257), yet a right by user for twenty years and upwards for the owner to project his wall or eaves over the boundary line of his property, or to discharge the rain running from the roof of his house upon the adjoining land, has been recognised (*Thomas* v. *Thomas*, 2 C. M. & R. 34; see *Wright* v. *Williams*, 1 M. & W. 77; *Lady Browne's case*, cited in *Slaney* v. *Pigott*, Palm. 446; Com. Dig. Action on Case for Nuisance (A.); *Baten's case*, 9 Rep. 50, n. (*b*); Vin. Abr. Nuisance (G. 5)). Such a right will not be lost by raising the house (*Harvey* v. *Walters*, L. R. 8 C. P. 162). The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land, cannot put up spouts to collect that rain and discharge it upon such land in a body (*Reynolds* v. *Clarke*, Ld. Raym. 1399). If one had a right to enter into the yard of another, and he fixed a spout there to discharge water upon the plaintiff's land, trespass would not lie, but case (*Reynolds* v. *Clarke*, 1 Str. 634; 8 Mod. 272; Fort. 212). The flow of water for twenty years from the eaves of a house will not give a right to the neighbour to insist that the house shall not be pulled down or altered so as to diminish the quantity of water flowing from the roof

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(*Wood* v. *Waud*, 3 Exch. 748; *Greatrex* v. *Hayward*, 8 Exch. 293, 294; *Arkwright* v. *Gell*, 5 M. & W. 233). A legal origin was presumed for the right of discharging water from a highway through a pipe on to adjoining land (*A. G.* v. *Copeland*, 1902, 1 K. B. 690).

to pollute water;

A right to pollute a stream can be acquired by prescription (*Baxendale* v. *McMurray*, 2 Ch. 790; see *Eastwood* v. *Henley Council*, 1901, 1 Ch. 645), but only through the continuance of perceptible injury for twenty years (*Goldsmid* v. *Tunbridge Commrs.*, 1 Ch. 349; see *Millington* v. *Griffiths*, 30 L. T. 65; *Murgatroyd* v. *Robinson*, 7 E. & B. 391; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 611; *O'Brien* v. *Enright*, I. R. 1 Ch. 718). And there can be no prescriptive right to justify a public nuisance (*A. G.* v. *Barnsley*, 1874, W. N. 37).

to discharge sewage.

A right to discharge sewage through a drain can be acquired by prescription (*A. G.* v. *Dorking*, 20 Ch. Div. 601; *Brown* v. *Dunstable*, 1899, 2 Ch. 378; see *Wright* v. *Williams*, 1 M. & W. 77). As to such a right being binding on a local authority, see *R.* v. *Staines*, 60 L. T. 261; *Ogilvie* v. *Blything*, 65 L. T. 338.

Artificial watercourses: of a permanent character;

The natural rights of a riparian proprietor are limited to natural streams, and do not attach in the case of artificial watercourses (*Sampson* v. *Hoddinott*, 1 C. B. N. S. 590). Prescriptive rights, however, may be acquired in artificial watercourses of a permanent character (*Rameshur* v. *Koonj*, 4 App. Cas. 121; *Wood* v. *Waud*, 3 Exch. 777; *Blackburne* v. *Somers*, 5 L. R. Ir. 1; see *Bunting* v. *Hicks*, 70 L. T. 455; *Baily* v. *Clark*, 1902, 1 Ch. 648). The enjoyment must be as of right (*Chamber* v. *Hopwood*, 32 Ch. Div. 549; see also *Beeston* v. *Weate*, 5 El. & Bl. 986; *Gaved* v. *Martyn*, 19 C. B. N. S. 732; *Ivimey* v. *Stocker*, 1 Ch. 396; *Powell* v. *Butler*, I. R. 5 C. L. 309, and *ante*, p. 9; and compare *Bankart* v. *Tennant*, 10 Eq. 141).

of a temporary character;

no right to uninterrupted flow can be acquired by prescription against creator of stream;

Where the enjoyment of an artificial watercourse depends on temporary circumstances, no right to the uninterrupted flow of water can be acquired by prescription against the creator of the stream. Thus, a party receiving water drained from a mine had no right to compel the owners of the mine to continue such discharge (*Arkwright* v. *Gell*, 5 M. & W. 203; see *Magor* v. *Chadwick*, 11 Ad. & Ell. 571). So in the case of a watercourse constructed for the purpose of a mill (*Burrows* v. *Lang*, 1901, 2 Ch. 502). A watercourse is constructed for a temporary purpose when it is constructed for a purpose which may within the reasonable contemplation of the parties come to an end (*Ib.* 508). The right of a party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created. The flow of water from a drain, made for the purpose of agricultural improvements, does not give a right to the neighbour so as to preclude the proprietor from altering the level of his drain for the improvement of his land (*Greatrex* v. *Hayward*, 8 Exch. 291; see *Hanna* v. *Pollock*, 1900, 2 Ir. R. 664). Further, it is more difficult to presume an agreement as to enjoyment when a watercourse is constructed entirely over the land of the creator than in the case of water pumped over another's land (*Burrows* v. *Lang*, 1901, 2 Ch. 508; see *M'Evoy* v. *G. N. R.*, 1900, 2 Ir. R. 325).

nor against a superior proprietor.

Where the owners of a colliery had suffered the water pumped out of their colliery to flow along an artificial channel, it was held, that in the absence of any grant or prescriptive title, no action lay by the owner of land through which the water had been so accustomed to flow against an owner of land above, and through whose land the sough likewise passed, for diverting such water; for the owners of a colliery thus getting rid of a nuisance to their works, by discharging the water into such sough, could not be considered as giving it to one more than to others of the proprietors of the land through which such sough had been constructed, but that each might take and use what passed through his land, and the proprietor of the land below had no right to any part of that water until it had reached his own land, nor had he any right to compel the owners above to permit the water to flow through their land for his benefit (*Wood* v. *Waud*, 3 Exch. 748; see *Wardle* v. *Brocklehurst*, Ell. & Ell. 1058; *Mason* v. *Shrewsbury R. Co.*, L. R. 6 Q. B. 584).

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Where mine owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had during that time used it for brewing; it was held, that he thereby gained a right to the enjoyment of the water in an unpolluted state (*Magor* v. *Chadwick*, 11 Ad. & El. 586; *Blackburne* v. *Somers*, 5 L. R. Ir. 1).

Right to purity of water in artificial watercourse.

(5) Modes of acquisition of rights with regard to water.

Grant presumed from enjoyment.

Before the Prescription Act, 1832, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it derived from grant or act of parliament (*Bealey* v. *Shaw*, 6 East, 208). The long enjoyment of a watercourse is the best evidence of right and raises a presumption of an agreement: and proof of a special licence, or that it was limited in point of time, must come from the party who opposes the right (*Finch* v. *Resbridger*, 2 Vern. 390; Gilb. Eq. C. 3). In *Deeble* v. *Lineham*, 12 Ir. C. L. N. S. 1, there was sufficient evidence of enjoyment to support the presumption of a grant. If, however, such a grant would be void by statute, it cannot be presumed (*Rochdale Co.* v. *Radcliffe*, 18 Q. B. 287; where the supposed grantor was a canal company incorporated by statute). The enjoyment of water drawn from a brook along an artificial channel, and acts done by the owner of the dominant tenement upon the servient tenement, which, without the existence of an easement, would be tortious and actionable, may be evidence of a right in the owner of the dominant tenement to the use of the water (*Beeston* v. *Weate*, 5 El. & Bl. 986).

The owner of a house can acquire (as an easement) the right to bring water thereto through pipes over the adjoining land (*Goodhart* v. *Hyett*, 25 Ch. D. 182).

Acquisition under Prescription Act.

For the nature of the enjoyment requisite for obtaining under the Prescription Act acquired rights with regard to water, see the note to the Prescription Act, 1832, s. 2, *ante*, p. 7.

Acquisition by custom.

As to the acquisition by custom of a right to divert water in Devonshire, see *Bastard* v. *Smith* (2 M. & Rob. 129); and in Cornwall, *Gaved* v. *Martyn* (19 C. B. N. S. 732; 14 W. R. 62). For a customary right to pollute water, see *Carlyon* v. *Lovering* (1 H. & N. 784); and for a customary right to the use of water, see *Harrop* v. *Hirst* (L. R. 4 Ex. 43).

Acquisition by express grant;

Water rights may be acquired by express grant. The grant of a "watercourse" may mean (1) the right to the running of water; or (2) the drain which contains the water; or (3) the land over which the water flows (*Taylor* v. *S. Helens*, 6 Ch. Div. 271; where the effect of the grant of an artificial watercourse was considered). The reservation of right to make a watercourse included the right to divert water and to use the water diverted (*Remfry* v. *Natal Surveyor-General*, 1896, A. C. 538). A "spring of water" means a natural source of water of a definite and well-marked extent (*Taylor* v. *S. Helens*, 6 Ch. Div. 273). A "stream" is water which runs in a defined course, so as to be capable of diversion (*Ib.*). The word did not include either the spring or water soaking through marshy ground (*M'Nab* v. *Robertson*, 1897, A. C. 129). In *Northam* v. *Hurley* (1 El. & Bl. 665), it was held on the construction of the grant of a watercourse from the land of the grantor to the land of the grantee, that the grantor could not alter the channel on his own land although no damage had occurred to the grantee. The effect of special words in an express grant or reservation of water was also considered in *Rawstron* v. *Taylor*, 11 Exch. 369; *Lee* v. *Stevenson*, 27 L. J. Q. B. 263; *Finlinson* v. *Porter*, L. R. 10 Q. B. 188. The privilege of a watercourse may be vested in a corporation; as where there was a grant to the corporation of Carlisle of water, for the purpose of turning the city mills (8 East, 487). As to conveyances of land since 1881 carrying rights of water and watercourses, see Conv. Act, 1881, s. 6, *post*.

If land with a run of water upon it be sold, the water passes with the land (*Canham* v. *Fisk*, 2 Cr. & Jer. 126; see *Hamelin* v. *Bannerman*, 1895, A. C. 237). The rights, however, of a riparian proprietor cannot

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be granted apart from the land, so as to entitle the grantee as against the other riparian proprietors, even to the rights in respect of the ordinary use of water possessed by the grantor. The only right acquired by the grantee would be as against the grantor himself (*Ormerod* v. *Todmorden Co.*, 11 Q. B. Div. 155; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; *Stockport Co.* v. *Potter*, 3 H. & C. 300; *Jones* v. *Dorothea Co.*, 58 L. T. 80; see *Insole* v. *James*, 1 H. & N. 243; and compare the licence to a stranger given in *Mostyn* v. *Atherton*, 1899, 2 Ch. 360).

by implied grant;

By the grant of part of a tenement, there will pass by implication to the grantee all those continuous and apparent easements over the other part which are necessary to the enjoyment of the part granted and have been hitherto used therewith (*Wheeldon* v. *Burrows*, 12 Ch. Div. 31. Compare the cases as to light, *post*, p. 100. This principle has been applied to a watercourse (*Watts* v. *Kelson*, 6 Ch. 166; see *Pullan* v. *Roughfort*, 21 L. R. Ir. 73). As a general rule, however, there is no corresponding implication in favour of the grantor (*Wheeldon* v. *Burrows*, *sup.*, disapproving of *Pyer* v. *Carter*, 1 H. & N. 916, in which case the grant of a right to a drain by the grantee of land had been implied in favour of the grantor). *Pyer* v. *Carter* had been approved in *Ewart* v. *Cochrane*, 4 Macq. H. L. C. 117; *Watts* v. *Kelson*, *sup.*; but had been disapproved by Lord *Westbury* in *Suffield* v. *Brown*, 33 L. J. Ch. 249. A grant of the right to pollute a stream was implied in *Hall* v. *Lund* (1 H. & C. 676).

by licence.

As a general rule, it requires a deed to create a right and title to have a passage for water (*Fentiman* v. *Smith*, 4 East, 107; *Hewlins* v. *Shippam*, 5 B. & C. 233). As to creating rights with regard to water by parol licence, see *Liggins* v. *Inge* (7 Bing. 682), and the note on licences, p. 22, *ante*.

(6)

Extent and mode of enjoyment of rights with regard to water.

Irrigation, &c.

Whether a riparian proprietor may use the water of a stream for the purpose of irrigation, if he again return it into the river with no other diminution than that caused by the absorption and evaporation attendant on the irrigation, depends on the circumstances of each particular case. The right of taking water for such a purpose is a question of degree, and it is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application. If the irrigation take place not continuously but only at intermittent periods, when the river is full, and no damage is done thereby to the working of a mill on the stream, and the diminution of water is not perceptible to the eye, it is such a reasonable use of the water as is not prohibited by law (*Embrey* v. *Owen*, 6 Exch. 372; see *Sampson* v. *Hoddinott*, 1 C. B. N. S. 603; *Wood* v. *Waud*, 3 Exch. 748). As to the circumstances which may be taken into account in determining a reasonable user, see *Ormerod* v. *Todmorden, &c. Co.*, 11 Q. B. Div. 168.

Where one riparian proprietor had by means of a water-wheel diverted about one-fortieth part of the volume of a stream, it was for the jury to con-ider whether he had thereby inflicted on the other any sensible or material injury (*Norbury* v. *Kitchin*, 3 F. & F. 292). The diversion of the water of a river by means of pipes, for the use of a lunatic asylum and county gaol, was a user more extensive than that to which a riparian proprietor as such was entitled (*Medway Co.* v. *Romney*, 9 C. B. N. S. 575). So also where a waterworks company collected water in a permanent reservoir for the supply of an adjacent town (*Swindon, &c. Co.* v. *Wilts, &c. Co.*, L. R. 7 H. L. 697; see *Owen* v. *Davies*, 1874, W. N. 175; *Roberts* v. *Gwyrfai Council*, 1899, 2 Ch. 608). The taking by a railway company of water to supply their locomotives was restrained where such abstraction interfered with navigation (*A. G.* v. *G. E. R. Co.*, 6 Ch. 572); but was permitted where it interfered very slightly with an inferior riparian proprietor (*Sandwich* v. *G. N. R. Co.*, 10 Ch. D. 707). See also as to reasonable user, *Belfast Co.* v. *Boyd* (21 L. R. Ir. 560).

Where land and buildings were demised, together with the free passage of water and soil to a cesspool, the easement was restricted to a reasonable

use for the purposes of the premises in the condition in which they were at the time of the demise, and was not extended to buildings subsequently erected (*Wood* v. *Saunders*, 10 Ch. 582; see *New Windsor* v. *Stovell*, 27 Ch. D. 665; *Metropolitan Board* v. *L. & N. W. R. Co.*, 17 Ch. Div. 246). When a lease reserved the free running of water and soil through the demised premises from other contiguous lands, the reservation was extended to water and soil coming from contiguous lands whether arising thereon or not, but was not extended to the refuse of tan pits (*Chadwick* v. *Marsden*, L. R. 2 Ex. 285). **Of Watercourses.**

Where by an inclosure award drains were set out, the occupiers of the land to keep the same of sufficient depth to carry off the water, the plaintiff was not thereby authorised to make an underdrain so as to cause increased water to pass into one of the awarded drains (*Sharpe* v. *Hancock*, 8 Scott, N. R. 46). An inclosure act empowering commissioners to make ditches in the lands to be inclosed: and also to alter and improve any existing ditches: held, not to empower the commissioners to alter the drains in the common lands, so as to overload an ancient drain from another township (*Dawson* v. *Paver*, 5 Hare, 415).

Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people (*Crossley* v. *Lightowler*, 2 Ch. 478; *McIntyre* v. *McGavin*, 1893, A. C. 268). Where sewage of a town had for years been drained into a stream passing through the plaintiff's land, without perceptibly polluting it, but for some time before action, in consequence of the increase of the town, the stream became perceptibly polluted; an injunction was granted, restraining the pollution (*Goldsmid* v. *Tunbridge Commissioners*, 1 Ch. 349; *A. G.* v. *Barnsley*, 1874, W. N. 37). Defendant, owner of a paper mill, introduced a new material. For more than twenty years before the change refuse had been discharged into a stream which ran past the plaintiffs' house. The defendant was held entitled to foul the stream by washings produced by the manufacture of paper in proper course, using any proper materials, but not increasing the pollution; and the onus lay upon the plaintiffs to prove any increase (*Baxendale* v. *M'Murray*, 2 Ch. 790). But the discharge of the refuse of a different business was held unjustifiable (*Clark* v. *Somersetshire*, 36 W. R. 890; see *Wood* v. *Saunders*, 10 Ch. 582; compare *Metropolitan Board* v. *L. & N. W. R. Co.*, 17 Ch. Div. 249; *A. G.* v. *Acton Board*, 22 Ch. D. 221). **Extent of right to pollute.**

(7) **Alteration in mode of enjoyment.**

If one has ancient pits which are supplied by a rivulet, he may cleanse them, but cannot change or enlarge them (*Brown* v. *Best*, 1 Wils. 174; see *Wood* v. *Saunders*, 10 Ch. 582; *New Windsor* v. *Stovell*, 27 Ch. D. 665), nor change the channels from a river to the prejudice of another owner (*Duncombe* v. *Randall*, Hetl. 32). It is not necessary that the mode of enjoying a watercourse should always have been precisely the same (*Saunders* v. *Newman*, 1 B. & Ald. 258). In which case it was said by *Abbott*, J., that the owner is not bound to use the water in the same precise manner, or to apply it at the same mill; if he were, it would stop all improvement in machinery. If indeed the alterations made prejudiced the right of the lower mill, the case would be different (*Ib.*; see *Luttrell's case*, 4 Rep. 87 a; *Frechette* v. *La Compagnie*, 9 App. Cas. 170. A riparian owner cannot by scouring remove gradual accretions to the bed of a river so as to restore its original flow (*Withers* v. *Purchase*, 60 L. T. 819).

A right to a watercourse is not destroyed by the owners slightly altering the course of the stream (*Hall* v. *Swift*, 4 Bing. N. C. 381). There must be an additional or different servitude, and the change must be material either in the nature or in the quantum of the servitude imposed (*Harvey* v. *Walters*, L. R. 8 C. P. 166). Compare the increased burden of support for a railway (*G. W. R.* v. *Cefn Co.*, 1894, 2 Ch. 157). A right to a watercourse which had been used to supply cattle sheds was held not to be lost by the erection of cottages in the place of cattle sheds (*Watts* v. *Kelson*, 6 Ch. 166). Where a person, who had a right to send down clean water through a gutter, sent down foul water, so that it was impossible to stop

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the nuisance without altogether interfering with his enjoyment, the whole enjoyment might be obstructed (*Cawkwell* v. *Russell*, 26 L. J. Ex. 34; see *Hill* v. *Cock*, 26 L. T. 185).

(8) **Repair of drains, &c.**

The cleansing and repairing of drains and sewers is *primâ facie* the duty of him who occupies the premises, and does not devolve upon the owner merely as such (*Brent* v. *Haddon*, Cro. Jac. 555; *Cheetham* v. *Hampson*, 4 T. R. 319; *Boyle* v. *Tamlyn*, 6 B. & C. 329; *Russell* v. *Shenton*, 3 Q. B. 449; see *R.* v. *Kerrison*, 1 M. & S. 435; *Bullard* v. *Harrison*, 4 M. & S. 387; *Tenant* v. *Goldwin*, 1 Salk. 21, 360; 2 Salk. 770; *Payne* v. *Rogers*, 2 H. Bl. 349; *R.* v. *Pedly*, 1 Ad. & E. 822; see *Smith* v. *Archibald*, 5 App. Cas. 512). If the owner of land, on which is a house, construct on other part of the land a sewer, and let the house, and afterwards by reason of the original faulty construction of the sewer, and the continued use of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed (*Alston* v. *Grant*, 3 Ell. & Bl. 128). If a lease be made of a house and piece of land, except the land on which a pump stands, with the use of the pump, the lessee may repair the pump, but an action of covenant does not lie against the lessor for not repairing it (*Pomfret* v. *Ricroft*, 1 Wms. Saund. 320; see *ante*, p. 68; *Buckley* v. *Buckley*, 1898, 2 Q. B. 608). Where an easement exists giving the owner of a house a right to bring water to his house through a pipe over adjoining land, such owner may go on the adjoining land to repair the pipe (*Goodhart* v. *Hyett*, 25 Ch. D. 182; see *Smith* v. *Archibald*, 5 App. Cas. 512). As to the obligation to repair drains, see further Tudor, L. C. Conv. 4th ed. 791.

(9) **Extinction: by abandonment;**

If an ancient ditch has at one end anciently opened into a stream, and the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years and more, without interruption, that would give the mill-owner such a right to keep it shut up, that the owner of the land adjoining the ditch would not be justified in reopening the communication, although it might appear that the communication between the ditch and stream was ancient (*Drewett* v. *Sheard*, 7 C. & P. 465). If the owner of a mill, formerly worked by a breast-shot wheel, which requires a high head of water, for twenty years discontinues the use of the breast-shot wheel, and uses a ground-shot wheel, he will lose his right to the high head of water (*Ib.*). The right to the overflow of water into an old pond is not lost by discontinuing the use of such pond, and obtaining the same or a greater advantage from the use of three new ponds; a substitution of such a nature not being an abandonment of the right (*Hale* v. *Oldroyd*, 14 M. & W. 789). The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right without some evidence of an intention to abandon it: but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin, it was held that any right of fouling a stream attached to them was lost (*Crossley* v. *Lightowler*, 2 Ch. 478). As to non-user of a well, see *Millington* v. *Griffith*, 30 L. T. 65. In a case depending on Roman Dutch law a prescriptive right to water was held not lost by the owner applying for a licence (*Commrs. of French Hoek* v. *Hugo*, 10 App. Cas. 336).

by unity of ownership.

It seems that nothing of necessity to a building, *e.g.* a gutter *in alieno solo*, to carry off water, &c., is extinguished by unity of ownership (*Pheysey* v. *Vicary*, 16 M. & W. 484). In *Shury* v. *Piggott* (3 Bulstr. 339; Poph. 166; W. Jones, 145), which was an action on the case for stopping a watercourse, the court held, that the right to the flow of water in a natural stream is not extinguished by unity of ownership, in which respect it is distinguished from a way. *Whitlock*, J., says (3 Bulstr. 340), "There is a difference between a way, a common, and a watercourse. Bracton (lib. 4, fol. 221-2) calls them *servitutes prœdiales;* those which begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land. This is extinct

by unity, because the greater benefit shall drown the less. A watercourse does not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted" (see *Pyer* v. *Carter*, 1 H. & N. 916). The acquisition of a right to an artificial watercourse may be prevented by unity of possession (*Outram* v. *Maude*, 17 Ch. D. 391). **Of Watercourses.**

(10) Remedies for disturbance of rights with regard to water; Abatement.

A party entitled to a watercourse may legally enter the land of a person who has occasioned a nuisance to a watercourse, to abate it (2 Smith's R. 9; Com. Dig. Pleader, 3 M. 41). Where there is excessive user by the owner of the dominant tenement, the owner of the servient tenement, if he abates the nuisance, is bound to do so in the most reasonable manner (*Hill* v. *Cock*, 26 L. T. 185). An abatement was held reasonable in *Roberts* v. *Rose*, L. R. 1 Ex. 82. An individual cannot abate a nuisance if he be not otherwise injured by it than as one of the public (*Colchester* v. *Booke*, 7 Q. B. 339).

Indictments.

When the injury from a nuisance in respect of water is an injury to all the King's subjects, the remedy is by indictment (*R.* v. *Bristol Dock Co.*, 12 East, 429), or by information (*Stoke Council* v. *Price*, 1899, 2 Ch. 277). When, however, the inhabitants of a district had by custom a right to water, one inhabitant could sue without proving individual damage, on the ground of interference with right (*Harrop* v. *Hirst*, L. R. 4 Ex. 47); but such an action cannot be brought by a parish council suing alone (*Stoke Council* v. *Price*, 1899, 2 Ch. 277. As to local authorities suing, see *Tottenham Council* v. *Williamson*, 1896, 2 Q. B. 353).

Action:

Proof of actual damage is not necessary to enable a riparian proprietor to maintain an action for the obstruction or diversion of a natural stream (*Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Harrop* v. *Hirst*, L. R. 4 Ex. 43; *Ormerod* v. *Todmorden, &c. Co.*, 11 Q. B. D. 159). For the older law, see *Palmer* v. *Keblethwaite*, 1 Show. 64; *Glynne* v. *Nicholas*, 2 Show. 507; *Mason* v. *Hill*, 5 B. & Ad. 26; *Williams* v. *Morland*, 2 B. &. C. 915. Whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to show the violation of the right, and the law will presume damage (*Embrey* v. *Owen*, 6 Ex. 353; compare *Young* v. *Bankier Co.*, 1893, A. C. 691). In the absence of actual damage, however, it is necessary to prove interference with the right; and where water was taken from a river and afterwards returned unpolluted and undiminished, it was held that the right of a lower riparian proprietor had not been interfered with, and an injunction was refused (*Kensit* v. *G. E. R. Co.*, 27 Ch. Div. 122).

for diversion;

Diversion of water is actionable without proof of actual damage where the defendant might thereby acquire a right injurious to the plaintiffs (*Wilts Co.* v. *Swindon Co.*, 9 Ch. 961; *Roberts* v. *Gwyrfai Council*, 1899, 2 Ch. 608), and will be restrained (*Ib.*).

for obstruction;

Obstruction is also actionable irrespective of actual damage (*Norbury* v. *Kitchin*, 15 L. T. 501; *McGlone* v. *Smith*, 22 L. R. Ir. 559); and will be restrained (*Dewhirst* v. *Wrigley*, 1 C. P. Coop. 319; see *Elwell* v. *Crowther*, 31 Beav. 163; *Belfast Co.* v. *Boyd*, 21 L. R. Ir. 560).

The owner of both banks of a non-tidal river may build on the bed provided he do not alter the natural flow of the water above or below his property, nor, in the case of a navigable river, interfere with the navigation (*Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839). But the owner of one bank only is not entitled to build on his moiety of the bed in such a manner as to interfere with the natural flow of the stream; and was restrained, although there was no proof that damage had been sustained or was likely to be sustained (*Birkett* v. *Morris*, L. R. 1 H. L. Sc. 47); and this principle has been extended to tidal navigable rivers (*A.-G.* v. *Lonsdale*, 7 Eq. 377; *A.-G.* v. *Terry*, 9 Ch. 423; see *Exeter* v. *Devon*, 10 Eq. 232). It would seem that a riparian owner may erect a post for a ferry or for mooring a boat, or plant stakes to prevent poaching (*Withers* v. *Purchase*, 60 L. T. 821; compare *A.-G.* v. *Wright*, 1897, 2 Q. B. 318).

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by reversioner;

If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner as well as by the tenant in possession, each of them being entitled to recover his respective loss (*Bedingfield* v. *Onslow*, 3 Lev. 209; *Queen's College* v. *Hallett*, 14 East, 489; 1 Wms. Saund. 567, ed. 1871; *Jesser* v. *Gifford*, 4 Burr. 2141; Com. Dig. Action on the case for Nuisance (B.); see *Brown* v. *Mallett*, 5 C. B. 599; *Bell* v. *Twentyman*, 1 Q. B. 766; *Peter* v. *Daniel*, 5 C. B. 568; *Egremont* v. *Pulman*, 1 Moo. & M. 403).

for continuance of nuisance;

An action will lie for the continuance of a nuisance (*Todd* v. *Flight*, 9 C. B. N. S. 377; *R.* v. *Bradford Navigation*, 6 B. & S. 631); but the owners of the soil of a stream were not liable for the continuance of an obstruction which had been erected by another without their authority and against their will, and where they had offered permission to the plaintiff to remove it (*Saxby* v. *Manchester R. Co.*, L. R. 4 C. P. 198).

damages and costs;

A right to take water from a well by reason of the occupation of a dwelling-house is an interest in land; and nominal damages having been recovered in an action for disturbing such a right, which was certified to be under forty shillings, the plaintiff was entitled to his full costs under 43 Eliz. c. 6, s. 2 (*Tyler* v. *Bennett*, 4 Ad. & E. 377; see 3 & 4 Vict. c. 24; *Shuttleworth* v. *Cocker*, 2 Sc. N. R. 47; *Thompson* v. *Gibson*, 5 Jur. 390). The expenses of the surveying in order to ascertain whether a weir had been improperly used to the prejudice of the plaintiff's water-mill will not be allowed on taxation (*Ormerod* v. *Thompson*, 16 M. & W. 860).

relief in the Chancery Division;

Before the Jud. Acts, it was held that a bill in equity would lie for the establishment of the enjoyment of a watercourse, and for the performance of a covenant to cleanse it (*Holmes* v. *Buckley*, 1 Eq. Cas. Abr. 27, pl. 4; 2 Vern. 390; Gilb. Eq. C. 3; *New River Co.* v. *Graves*, 2 Vern. 431). And it was held, that a man who had been in possession of a watercourse sixty years might bring a bill against a mortgagee, who foreclosed the equity of redemption, to be quieted in the possession, although he had not established his right at law (*Bush* v. *Western*, Prec. Ch. 530; see *Dorset* v. *Girdler*, *Ib.* 531). The diversion of watercourses, or the pulling down their banks, and causing inundation, were nuisances against which a court of equity would protect parties by injunction (*Martin* v. *Stiles*, Mos. 144; see *Anon.*, 1 Ves. sen. 476; *Whitchurch* v. *Hide*, 2 Atk. 391; *Birch* v. *Holt*, 3 Atk. 726; *Anon.*, 1 Vern. 120, 129). An injunction might be granted on the ground of danger to property (*Robinson* v. *Byron*, 1 Br. C. C. 588; see *Anon.*, 1 Ves. jun. 140; *Crowder* v. *Tinkler*, 19 Ves. 620; or on account of the irreparable injury (*Chalk* v. *Wyatt*, 3 Mer. 688). Forms of injunctions as to water rights are given, Seton, 6th ed. 591.

interlocutory application for mandatory injunction;

The object of an interlocutory injunction is to keep matters *in statu quo* until trial. An injunction, therefore, which directs the defendant to perform an act, will not, except under special circumstances, be granted before trial (*Blakemore* v. *Glamorganshire Navigation*, 1 M. & K. 154). Such orders have been made before trial in actions relating to light (see p. 105, *post*). In actions relating to water they have been made before trial to enforce a covenant (*Mexborough* v. *Bower*, 7 Beav. 127); or to prevent irreparable damage (*Westminster Co.* v. *Clayton*, 36 L. J. Ch. 476). Formerly such orders were made in an indirect form (*Lane* v. *Newdigate*, 10 Ves. 192), but should now be made in a direct mandatory form (*Jackson* v. *Normanby Co.*, 1899, 1 Ch. 438).

laches and acquiescence.

As to the effect of laches and acquiescence in depriving parties of their remedy by injunction, see *Weller* v. *Smeaton* (1 Br. C. C. 572; 1 Cox, 102); *Birmingham Canal Co.* v. *Lloyd* (18 Ves. 515; Coop. C. C. 77, 193); *Blakemore* v. *Glamorganshire Navigation* (1 M. & K. 154).

Lord Cairns' Act.

Whenever the Court of Chancery had jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it might award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance (21 & 22

Vict. c. 27, s. 2). This act has been repealed by 46 & 47 Vict. c. 49, but the repeal has not affected the jurisdiction of the Chancery Division (*Sayers* v. *Collier*, 28 Ch. Div. 103); as to which see now *Elmore* v. *Pirrie*, 57 L. T. 333, and the cases quoted p. 106, *post*. **Of Water-courses.**

(11)

A riparian proprietor has a right of action for pollution of the water of a stream, except a right to pollute has been acquired by user (*Wood* v. *Waud*, 3 Exch. 748; *Magor* v. *Chadwick*, 11 Ad. & Ell. 571; see *Moore* v. *Webb*, 1 C. B. N. S. 673). And it is no defence that the pollution arises from a trade carried on in a reasonable and proper manner (*Stockport Co.* v. *Potter*, 7 H. & N. 160; see *Bamford* v. *Turnley*, 3 B. & S. 66). As to whether a person having permission from an owner of land on the bank of an artificial watercourse to take water thereout, can sue for pollution, see *Whaley* v. *Laing* (2 H. & N. 476; 3 H. & N. 675). The grantee of a right of fishing can obtain an injunction to restrain pollution (*Fitzgerald* v. *Firbank*, 1897, 2 Ch. 96). Pollution. Action for damages.

An action may be maintained for the pollution of underground water (*Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Ballard* v. *Tomlinson*, 29 Ch. Div. 115).

Having regard to the nature of the injury caused by pollution of water, an injunction, rather than damages, is the appropriate remedy (*Pennington* v. *Brinsop, &c. Co.*, 5 Ch. D. 769). For the general grounds upon which such an injunction will be granted, see the remarks of *Kindersley*, V.-C., in *Wood* v. *Sutcliffe*, 2 Sim. N. S. 165. A *quia timet* action to restrain an apprehended pollution may be maintained on proof of imminent danger of a substantial kind, or that the apprehended injury would be irreparable (*Fletcher* v. *Bealey*, 28 Ch. D. 688). Applications to the court to restrain the pollution of a stream should not be made upon trivial matters; but, on the other hand, it does not appear that anything like large or heavy damages must be recovered before the plaintiff can be assisted (*Lingwood* v. *Stowmarket Co.*, 1 Eq. 79; see *Elmhirst* v. *Spencer*, 2 Mac. & G. 45). Injunctions to restrain pollution;

A riparian proprietor can maintain a suit to restrain the fouling of the water of the river without showing that the fouling is actually injurious to him (*Crossley* v. *Lightowler*, 2 Ch. 478). The fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one (*Crossley* v. *Lightowler*, 2 Ch. 478; *Blair* v. *Deakin*, 57 L. T. 522; see *Wood* v. *Waud*, 3 Exch. 748; *A.-G.* v. *Leeds*, 5 Ch. 583). actual injury not necessary; previous pollution no justification;

Where there is jurisdiction to grant an injunction damages in substitution therefor may be given for injury which has occurred, whether before or since the commencement of the action (*Chapman* v. *Auckland Union*, 23 Q. B. Div. 298; *Warwick Co.* v. *Burman*, 63 L. T. 673).

A public body exercising its statutory powers so as to create or increase a nuisance by means of the sewage of a town may be made liable in damages or restrained by injunction in the same manner as an individual, unless it can show a statutory justification (*Goldsmid* v. *Tunbridge Commissioners*, 1 Ch. 349; *Holt* v. *Rochdale*, 10 Eq. 354; *A.-G.* v. *Basingstoke*, 24 W. R. 817; *A.-G.* v. *Acton*, 22 Ch. D. 221; and see *Glossop* v. *Heston Board*, 12 Ch. Div. 111). And where the plaintiff has proved his right the court will grant an injunction at once, it being the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to. But the operation of the injunction may be suspended (*A.-G.* v. *Colney Hatch*, 4 Ch. 146; *A.-G.* v. *Birmingham*, 4 K. & J. 528; and see the orders made in *A.-G.* v. *Richmond*, 2 Eq. 306; *A.-G.* v. *Acton*, 22 Ch. D. 221; *Islington* v. *Hornsey*, 1900, 1 Ch. 695). An injunction against a local authority may be enforced by sequestration (R. S. C., Ord. XLII. r. 31; see *Selous* v. *Croydon Board*, 53 L. T. 209; *Spokes* v. *Banbury*, 1 Eq. 42; *A.-G.* v. *Walthamstow*, 1878, W. N. 90). An injunction to restrain pollution by the sewage of a town will not be granted, unless serious injury is proved (*A.-G.* v. *Kingston*, 34 L. J. Ch. 481; *Lillywhite* v. *Trimmer*, 15 W. R. 763; *A.-G.* v. *Gee*, 10 Eq. 131; *A.-G.* v. *Cockermouth*, 18 Eq. 172). In determining whether the injury is serious or not, regard must be had to all the consequences which may public bodies liable.

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flow from it (*Goldsmid* v. *Tunbridge Commissioners*, 1 Ch. 355). Where, however, no serious damage was proved injunctions were granted, on the ground that the defendants, by their pleading, claimed a right to continue a wrongful act (*A.-G.* v. *Acton*, 22 Ch. D. 221); or that they were acting in violation of a statute (*A.-G.* v. *Cockermouth*, 18 Eq. 172; see *A.-G.* v. *Shrewsbury Co.*, 21 Ch. D. 752).

Where a sewage nuisance has been created by the acts of others, and a local authority is subsequently constituted, but does no act to create or increase the nuisance, it cannot be made liable in damages or restrained by injunction (*Glossop* v. *Heston Board*, 12 Ch. Div. 102; *A.-G.* v. *Dorking*, 20 Ch. Div. 595; *A.-G.* v. *Clerkenwell*, 1891, 3 Ch. 527). But as soon as the local authority begin to alter the sewers the jurisdiction to grant an injunction and give damages arises (*Warwick Co.* v. *Burman*, 63 L. T. 673). The court will not interfere by injunction to compel a local authority to perform its statutory duty of effectual drainage (*Glossop* v. *Heston Board*, 12 Ch. Div. 115; *A.-G.* v. *Clerkenwell*, 1891, 3 Ch. 527; compare *Stretton's Co.* v. *Derby*, 1894, 1 Ch. 431; as to the appropriate remedy in such a case, see *Robinson* v. *Workington*, 1897, 1 Q. B. 67; *Pasmore* v. *Oswaldtwistle Council*, 1898, A. C. 387). Nor will the court interfere by injunction to compel a local authority to take proceedings against others (*A.-G.* v. *Dorking*, 20 Ch. D. 609; *A.-G.* v. *Clerkenwell*, *sup.*).

Where a nuisance arises from connections with the sewer of a local authority, made in the past by third parties, and which the local authority has no right to stop up, no injunction will be granted against the authority (*A.-G.* v. *Acton*, 22 Ch. D. 232; *A.-G.* v. *Clerkenwell*, 1891, 3 Ch. 527; *Brown* v. *Dunstable*, 1899, 2 Ch. 378); *secus*, in the case of connections which the authority has the right to stop up (*Charles* v. *Finchley*, 23 Ch. D. 767). As regards connections to be made in the future which the authority has no right to prevent, injunctions have been granted restraining the authority from "directing or authorizing" them (*A.-G.* v. *Acton*, *sup.*; *Brown* v. *Dunstable*, *sup.*), but not from permitting them (*Ib.*)

Under the Public Health Act, 1875, local authorities have statutory powers of discharging their sewers into streams (sects. 15, 16, and 17; see *Durrant* v. *Branksome Council*, 1897, 2 Ch. 291).

Several forms of injunctions in the case of pollution of water are given in Seton, 6th ed. 615.

The right of a riparian proprietor to immediate relief by injunction is not interfered with by the month's notice required by Metropolis Management Act, 1862, s. 106 (*A.-G.* v. *Hackney*, 20 Eq. 626; *Bateman* v. *Poplar Board*, 33 Ch. Div. 360); or Public Health Act, 1875, s. 264 (*Flower* v. *Low Leyton*, 5 Ch. Div. 347; *Chapman* v. *Auckland Union*, 23 Q. B. Div. 294, where damages were given in substitution).

Statutory remedies.

The doctrine of acquiescence, as applied to the right of riparian proprietors to restrain the pollution of a stream by sewage, was considered in *A.-G.* v. *Halifax* (17 W. R. 1088); and as to delay in such a case, see *A.-G.* v. *Bradford Canal* (2 Eq. 71); *A.-G.* v. *Leeds* (5 Ch. 583). A public body was not bound by acquiescence where their acts were held to have been *ultra vires* (*Islington* v. *Hornsey*, 1900, 1 Ch. 695).

The Rivers Pollution Act, 1876, provides a summary means of preventing the pollution of rivers (see *Yorkshire Council* v. *Holmfirth*, 1894, 2 Q. B. 842; *River Ribble* v. *Halliwell*, 1899, 2 Q. B. 385; see also Public Health Act, 1875, ss. 68—70).

Commissioners of sewers.

The commissioners of sewers have not such a possession in their works as to enable them to maintain an action of trespass against the commissioners of a harbour for pulling down a dam erected by the former across a navigable stream (*Newcastle* v. *Clark*, 8 Taunt. 602). Commissioners of sewers may now acquire the legal interest and constructive possession of land and works under the Sewers Act, 1833, for amending the laws relating to sewers (see sects. 24, 38, 47, 57; *Stracey* v. *Nelson*, 12 M. & W.

535). The laws relating to sewers are further amended by the Sewers Act, 1849, and 24 & 25 Vict. c. 133.

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(12) Action for escape of water.

Where in the ordinary and proper working of the defendant's mine water, which was naturally present there, flowed from his mine into the plaintiff's, the defendant was not liable (*Smith* v. *Kenrick*, 7 C. B. 564; *Clegg* v. *Dearden*, 12 Q. B. 576; compare *Wilson* v. *Waddell*, 2 App. Cas. 95; *West Cumberland, &c. Co.* v. *Kenyon*, 11 Ch. Div. 782). On the other hand, where the defendant, the owner of an upper mine, pumped water into his mine which flooded a lower mine belonging to the plaintiff, it was held, that the defendant was liable (*Baird* v. *Williamson*, 15 C. B. N. S. 376; see *Young* v. *Bankier Co.*, 1893, A. C. 691). These decisions were followed by the House of Lords in a case which arose as to liability for the escape of water from a mine; and it was laid down, that where the owner of land without wilfulness or negligence uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned (*Rylands* v. *Fletcher*, L. R. 3 H. L. 330; see *Carstairs* v. *Taylor*, L. R. 6 Ex. 217; *Nichols* v. *Marsland*, 2 Ex. Div. 1; *Box* v. *Jubb*, 4 Ex. D. 78; *Hurdman* v. *N. E. R. Co.*, 3 C. P. D. 168; *Whalley* v. *Lancashire & Yorkshire R. Co.*, 13 Q. B. D. 131; *Snow* v. *Whitehead*, 27 Ch. D. 588). Where a landowner brought water upon his land in a goit, and his neighbour subsequently acquired from him a right to use the water in the goit (and to repair the goit for that purpose), this did not affect the original obligation of the landowner to keep the goit in repair (*Buckley* v. *Buckley*, 1898, 2 Q. B. 608). For the case, however, where the neighbour assents to the water being on the landowner's premises, see further *Gill* v. *Edouin*, 72 L. T. 579, and *Blake* v. *Woolf*, 1898, 2 Q. B. 426.

The occupier of the upper floor of a house was held not liable to the occupier of the lower floor for escape of water (*Ross* v. *Fedden*, L. R. 7 Q. B. 661).

(13) Actions in respect of water rights arising by contract.

A contract was entered into between a canal company and the plaintiffs, the owners of paper mills, as to the mode of enjoyment of the waters by which both were supplied. The company did acts in violation of the contract, and proposed to continue them, and a bill was filed for an injunction. Held, that it was no answer to say that the acts proposed would not be injurious, or even to prove that they were beneficial to the plaintiffs; and the court, although no evidence was given of any actual damage done, granted an injunction (*Dickenson* v. *Grand Junction Co.*, 15 Beav. 260). In a case where an injunction was granted against heating water contrary to agreement, it was laid down that where the construction of a contract is clear and the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction. And, *semble*, the court may so interfere whether the breach has or has not been actually committed, provided the defendant claims and insists on a right to do the act which would constitute such breach (*Tipping* v. *Eckersley*, 2 K. & J. 264). "There is a manifest distinction between cases depending on nuisance and those depending on contract. It is shown by the case of *Rochdale Co.* v. *King* (2 Sim. N. S. 78), and many other authorities, that where there is a contract the court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance; but that the main point is whether the contract has been broken" (*A.-G.* v. *Mid Kent R. Co.*, 3 Ch. 104; and see, as to damages, *Lord Manners* v. *Johnson*, 1 Ch. D. 679; *Richards* v. *Revitt*, 7 Ch. D. 224). Injunctions were granted to restrain breaches of agreements as to sewage in *Wood*

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v. *Harrogate*, 1874, W. N. 132, 225; *Nuneaton* v. *General Sewage Co.*, 20 Eq. 127. As to specific performance of a contract to purchase the right to divert the water of a river, see *Wright* v. *Howard*, 1 S. & Stu. 190; *Shackelton* v. *Sutcliffe*, 1 De G. & S. 609; and of a contract to erect a pump and reservoir and supply water, see *Cooke* v. *Chilcott*, 3 Ch. D. 694.

(14) Statutory powers.

Persons obtaining from the legislature powers to interfere with the rights of property are bound strictly to adhere to these powers, and to do no more than the legislature has pointed out (*Liverpool* v. *Chorley Co.*, 2 D. M. & G. 852; *Dawson* v. *Paver*, 5 Hare, 415). Further, if a public body, which has powers given it by a statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute (*A.-G.* v. *Colney Hatch*, 4 Ch. 146; *Metropolitan Asylum District* v. *Hill*, L. R. 6 H. L. 193; *Truman* v. *L. B. & S. C. R. Co.*, 29 Ch. Div. 108; compare *Vernon* v. *St. James'*, 16 Ch. Div. 449; *A.-G.* v. *Hackney*, 20 Eq. 626; *Ogston* v. *Aberdeen Tramways Co.*, 1897, A. C. 111). A corporation empowered by statute to improve the navigation of the river were not liable to clear away weeds, which were no detriment to navigation (*Parrett Co.* v. *Robins*, 10 M. & W. 593; *Cracknell* v. *Thetford*, L. R. 4 C. P. 629). But the statutory powers may be so framed as to throw on the corporation an obligation to take care that no injury shall be caused to adjoining lands (*Gaddis* v. *Bann Reservoir*, 3 App. Cas. 430).

Where water is diverted in a manner, or to an extent not authorized by statutory powers, the diversion will not be restrained except at the instance of the A.-G. (who need not prove damage), or of an individual who can show special damage (*Liverpool* v. *Chorley Co.*, 2 D. M. & G. 852; *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212; *London Association* v. *London & India Docks Committee*, 1892, 3 Ch. 270). As to the duty of the A.-G. in such a case, see *A.-G.* v. *G. E. R. Co.* (11 Ch. Div. 449), and as to private injury, see *Pudsey Co.* v. *Bradford* (15 Eq. 167).

A penalty for suffering washings to flow into and foul a well was held recoverable from a gas company in *Pipkins* v. *Birmingham Gas Co.* (5 H. & N. 74; 6 H. & N. 250). A power for a navigation company to alter a dam was held to continue, although the compensation commission had become extinct (*Kennet Co.* v. *Witherington*, 18 Q. B. 581). The funds of conservators of river banks were allowed to be applied in opposing a bill for a project likely to be injurious to the banks (*Bright* v. *North*, 2 Ph. 216).

Waterworks companies.

The Waterworks Clauses Act, 1847, consolidates the provisions usually contained in acts authorizing the making of waterworks for supplying towns with water. This act places the taking of streams upon the same footing as the taking lands under the L. C. C. Act, 1845; and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first paying compensation for the same, or making deposit, and giving a bond, in accordance with the provisions of the latter act (*Ferrand* v. *Bradford*, 21 Beav. 412; see *Purnell* v. *Wolverhampton Co.*, 10 C. B. 576; *Hildreth* v. *Adamson*, 8 W. R. 470; *Busby* v. *Chesterfield Co.*, 1 El. Bl. & El. 176). As to compensation, see *Bush* v. *Trowbridge Co.*, 10 Ch. 459. A waterworks company was restrained from polluting a river, its act not authorizing the pollution (*Clowes* v. *Staffordshire Co.*, 8 Ch. 125). The Waterworks Clauses Act, 1863, consolidates additional clauses frequently inserted in acts relating to waterworks.

(15) Navigable rivers.

In general, a riparian proprietor on a navigable river has (subject to the public right of navigation) the same rights of access to the river as such a proprietor on a non-navigable river (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 673; *North Shore R. Co.* v. *Pion*, 14 App. Cas. 612). This right of access extends over a portion of the bed left dry even when vested in another (*Hindson* v. *Ashby*, 1896, 2 Ch. 30). As to acquiring prescriptive

rights in a navigable river, see *Hamelin* v. *Bannerman*, 1895, A. C. 237. Whether a river be navigable or not is a question of fact for the jury (*Vooght* v. *Winch*, 2 B. & Ald. 662). The test in French law is, the possible use of the river for transport in some practical and profitable manner (*Bell* v. *Quebec*, 5 App. Cas. 84). The flux or reflux of the tide is evidence of a navigable river (*Miles* v. *Rose*, 5 Taunt. 705; *Colchester* v. *Brooke*, 7 Q. B. 373; see *Ilchester* v. *Raishleigh*, 61 L. T. 477). A judgment disaffirming an exclusive right to a river, is strong evidence in another action trying the same right, but not conclusive. On a question whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river (*Miles* v. *Rose*, 1 Marsh. 313; 5 Taunt. 705; 4 M. & S. 101).

Right of navigation.

The public right over a navigable river is a right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or footpath through a private estate (*Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839; *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 713; *Blount* v. *Layard*, 1891, 2 Ch. 689, n.). Windermere is a public highway (*Dixon* v. *Curwen*, 1877, W. N. 4); as to public rights on the Norfolk broads, see *Micklethwaite* v. *Vincent*, (67 L. T. 225). As to a piece of water which is a *cul de sac*, see *Bourke* v. *Davis* (44 Ch. D. 110). The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. It is, therefore, no trespass if a vessel, which cannot reach her place of destination in a single tide, remains aground till the tide serves, although, by custom or agreement, a fine may be payable to the lord of the soil for such grounding (*Colchester* v. *Brooke*, 7 Q. B. 339). Such right is not strictly an easement (*Hawkins* v. *Rutter*, 1892, 1 Q. B. 668). There is also a public right to fix moorings in the soil of navigable waters, such being an ordinary incident of navigation (*A.-G.* v. *Wright*, 1897, 2 Q. B. 318). The same right, if enjoyed immemorially in a locality, might also be supported by presuming a grant from the Crown subject to the right (*Ib.*). The public right of navigating a river may be connected with a right of access to a particular part of the bank, which latter is a private right (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *Bell* v. *Quebec*, 5 App. Cas. 84). As to the reasonable limits of the right of a riparian owner to moor a vessel alongside his wharf, see *Original Hartlepool Co.* v. *Gibb* (5 Ch. D. 713). The public have a right to use steam power in navigating public canals, provided it occasions no more than the ordinary injury to it (*Case* v. *Midland R. Co.*, 27 Beav. 247).

An artificially navigable river may be dedicated as a public highway (*A.-G.* v. *Simpson*, 1901, 2 Ch. 709, 716).

Extinction of right of navigation.

Although an adverse enjoyment for the space of twenty years is, as against a private individual, evidence of a grant by him, yet it is otherwise in the case of a public river navigable by all the King's subjects: for no obstruction for twenty years will bar a public right (*Vooght* v. *Winch*, 2 B. & Ald. 662; *Weld* v. *Hornby*, 7 East, 195). A public right of navigation may be extinguished either by an act of parliament, a writ *ad quod damnum* and inquisition, or, under certain circumstances, by commissioners of sewers, or by natural causes, such as the recess of the sea, or accumulation of silt or mud. And where a public road, obstructing a channel once navigable, has existed for so long a time that the state of the channel when the road was made cannot be proved, it is to be presumed that the right of navigation was legally extinguished (*R.* v. *Montague*, 4 B. & C. 598). The law has made no provision for the clearing of such a highway in the case of accumulation of silt or any other natural cause by which the channel becomes choked up; and in such cases the river ceases to be navigable, at least until such causes are by some means counteracted (*Colchester* v. *Brooke*, 7 Q. B. 374).

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Obstructions to navigation.

A corporation, being the conservators of a river, and the owners of the soil between high and low water mark, cannot authorize their lessee to erect a wharf there which produces inconvenience to the public in the use of the river for the purposes of navigation (*R.* v. *Grosvenor*, 2 Stark. N. P. C. 511). An action will lie for the special damage occasioned to a party conveying goods along a navigation, by its obstruction by a barge moored across, whereby he was compelled to unload and carry his goods overland (*Rose* v. *Miles*, 4 M. & S. 101). Where the defendant wrongfully placed timber in a navigable river, whereby the access to the plaintiff's public-house was obstructed, an action lay for the particular injury (*Rose* v. *Groves*, 5 M. & G. 613; *Dobson* v. *Blackmore*, 9 Q. B. 991).

A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the Crown before the commencement of the reign of Edward the First. Such a grant may be inferred from evidence of its having existed before that time. If the weir when so first granted obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Where the Crown had no right to obstruct the whole passage of a navigable river it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere (*Williams* v. *Wilcox*, 8 Ad. & Ell. 314; *Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657). It is not competent, either to the Crown or to a subject, to use the soil of a navigable river for any purpose amounting to a nuisance (*A.-G.* v. *Johnson*,, 2 Wils. C. C. 87). If property (as oysters) be placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property, by running his vessel against it if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. And, therefore, the fact that such property was a nuisance is no excuse for running upon it negligently (*Colchester* v. *Brooke*, 7 Q. B. 339; see *Hawkins* v. *Rutter*, 1892, 1 Q. B. 668). Where the defendant, as grantee of the Crown, was entitled to the soil of a navigable river, such ownership did not justify him in constructing a jetty which interfered with the navigation (*A.-G.* v. *Lonsdale*, 7 Eq. 377). As to moorings fixed in the soil, see *A.-G.* v. *Wright*, 1897, 2 Q. B. 324.

Conservators empowered by statute to remove obstructions to navigation were held not liable for damage to a barge injured by an obstruction, on the ground that they were unpaid trustees appointed for public purposes and with a discretionary power, but no compulsory duty of removing obstructions (*Forbes* v. *Lea Board*, 4 Ex. D. 116; see also *Jolliffe* v. *Wallasey Board*, L. R. 9 C. P. 62, where a public body was held guilty of negligence in the performance of a public duty with regard to navigation).

Where a vessel is sunk by accident, and without any default in the owner or his servant, in a navigable river, and remains there under water, no duty is ordinarily cast upon the owner to use any precaution, by placing a buoy or otherwise, to prevent other vessels from striking against it (*Brown* v. *Mallett*, 5 C. B. 599).

An owner of land at the side of a public navigable river cannot erect on the bed of the river, for the benefit of his own trade, any structure, whether an actual obstruction to navigation or not (*A.-G.* v. *Terry*, 9 Ch. 423; see *Booth* v. *Ratte*, 15 App. Cas. 188). One who erects on the shore of a navigable river, between high and low water mark, a work for the more convenient use of his wharf adjoining, which presents a dangerous obstruction to navigation, is responsible for an injury thereby occasioned to a barge coming to the wharf, without any default on the part of the persons in charge (*White* v. *Phillips*, 15 C. B. N. S. 245). As to the liability of wharfingers in respect of the bed of a navigable river adjoining their jetty, see *The Moorcock* (14 P. Div. 64; *The Calliope*, *Id.* 138; and 1891, A. C. 11). As to the right of persons entitled to land from

a navigable river on the bank adjoining, to pass over permanent obstructions, see *Eastern Counties R. Co.* v. *Dorling* (5 C. B. N. S. 821); *Marshall* v. *Ulleswater Co.* (L. R. 7 Q. B. 166). Of Watercourses.

A corporation empowered by statute to improve navigation was held entitled to sue in respect of abstraction of water without proof of actual damage to navigation (*Medway Co.* v. *Romney*, 9 C. B. N. S. 575). The Att.-Gen. can restrain interference with the public right of navigation without showing actual injury (*A.-G.* v. *Shrewsbury Co.*, 21 Ch. D. 752). As to purpresture and the remedy in that case, see *A.-G.* v. *Johnson* (2 Wils. C. C. 87).

(16) Ownership of soil of tidal waters.

The presumption as to the ownership of the soil of rivers depends on whether they are tidal or non-tidal (see *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 847). In the case of navigable tidal waters (including rivers, estuaries, and arms of the sea), the presumption is that the soil is vested in the Crown (*Gann* v. *Free Fisheries of Whitstable*, 11 H. L. C. 192: *A.-G.* v. *Tomline*, 14 Ch. Div. 69; *A.-G.* v. *Emerson*, 1891, A. C. 649). But the soil of tidal waters may be vested in a subject (*A.-G.* v. *Emerson*, *sup.*; *Neil* v. *Devonshire*, 8 App. Cas. 135). So the City of London has been stated to own the soil of the Thames (Dav. 56, b; Com. Dig. Navigation (B.); see, however, *A.-G.* v. *London*, 2 Mac. & G. 247; *A.-G.* v. *Johnson*, 2 J. Wils. C. C. 87). See further as to the bed of the Thames and the powers of the conservators, *Thames Conservators* v. *Port of London*, 1894, 1 Q. B. 647; *Thames Conservators* v. *Smeed*, 1897, 2 Q. B. 334. A title to the foreshore on a tidal navigable river was held established as against the Crown by acts of possession on the part of an adjoining owner, subject however to the public right of navigation (*Lord Adv.* v. *Blantyre*, 4 App. Cas. 770; see *A.-G.* v. *Emerson*, *sup.*). As to the duties of an owner of land abutting on a tidal navigable river, in respect of a river wall, see *Nitro-Phosphate Co.* v. *London and St. Katharine's Docks* (9 Ch. Div. 524); *Burt* v. *Victoria Co.* (47 L. T. 378).

Soil of non-tidal waters (whether navigable or non-navigable);

In the case of a non-tidal navigable lake, the Crown has no *de jure* right to the soil (*Bristowe* v. *Cormican*, 3 App. Cas. 641). It is, however, doubtful whether the riparian owners are entitled *ad medium filum* (*Ib.* 666). In the case of non-tidal navigable rivers, the presumption is that the soil is the property of the owners on each side to the middle of the river, and if a man owns the land on both sides, the presumption is that the whole bed of the river belongs to him (*Blount* v. *Layard*, 1891, 2 Ch. 689, n.). And the same presumptions apply in the case of a non-navigable river (Hale, De Jure Maris, Cap. I.; *Carter* v. *Murcot*, 4 Burr. 2162; Harg. L. Tracts, 5; Davies, R. 155; *R.* v. *Wharton*, 12 Mod. 510; *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 58). But in each case it is a question of fact, and the owner of the land on one side of a river only may be entitled to the whole bed (*Jones* v. *Williams*, 2 M. & W. 326). See the evidence of acts of ownership in the last-mentioned case, and in *Smith* v. *Andrews*, 1891, 2 Ch. 678; *Blount* v. *Layard*, *Ib.* 681, n.; *Lord Adv.* v. *Blantyre*, 4 App. Cas. 770, 791.

As to the relation of the ownership of the soil to the ownership of the fishery, see cases quoted *ante*, p. 44.

when river bed passes by conveyance of bank;

The right of ownership of the moiety of the bed of such a river passes, according to a legal presumption, under a conveyance of land on one bank, whether the land is freehold, copyhold, or leasehold (*Tilbury* v. *Silva*, 45 Ch. Div. 98); and this even where the conveyance points to a boundary which would not include any part of the bed (*Crossley* v. *Lightowler*, 3 Eq. 279); or where the quantity specified in the deed and the colouring on the map, excludes the bed (*Micklethwait* v. *Newlay Co.*, 33 Ch. Div. 133); or where the river is of more than ordinary breadth (*Dwyer* v. *Rich*, I. R. 6 C. L. 144). The presumption applies also where the grantor is owner of both banks of the river (*Micklethwait* v. *Newlay Co.*, *sup.*). The presumption may be rebutted by surrounding circumstances (*Devonshire* v. *Pattinson*, 20 Q. B. Div. 263); but not by reason of subsequent circumstances not contemplated at the time of the grant (*Mickle-*

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thwait v. *Newlay Co.*, *sup.*). It is doubtful whether the presumption applies when the bank is acquired by statutory award made under an Inclosure Act (*Ecroyd* v. *Coulthard*, 1897, 2 Ch. 567; *Hindson* v. *Ashby*, 1896, 2 Ch. 9. See the cases quoted *ante*, pp. 44, 57, 58).

navigation rights;

An act of parliament, passed for the purpose of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose the mere privilege of scouring and cleansing it, which is a mere easement (*R.* v. *Mersey Navigation*, 9 B. & C. 114; *R.* v. *Thomas*, *Ib.* 95). The proprietors of a navigation have no property either in the soil over which the water flows or in the adjoining banks under an act of parliament allowing them the use of the land through which the river passes (*Hollis* v. *Goldfinch*, 1 B. & C. 221). A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water (*Lord* v. *Sydney*, 12 Moo. P. C. C. 473).

rights in banks;

The fee simple in the towing-path by the River Lee remains in the adjoining owner, subject to the rights of the conservators in connection with navigation (*Lee Conservators* v. *Button*, 6 App. Cas. 685). As to the liability of conservators for the condition of a towing-path, see *Winch* v. *Thames Conservators* (L. R. 9 C. P. 378). The public are not entitled at common law to tow on the banks of ancient navigable rivers; the right must be founded on statute or on usage (*Ball* v. *Herbert*, 3 T. R. 256; see 1 Lord Raym. 725; Bull. N. P. 90; 6 Mod. 163, *contra*; see also *Pierce* v. *Falconberge*, 1 Burr. 292).

The use of the banks of the river for more than twenty years by fishermen, who have occasionally sloped and levelled them, is evidence of a grant of a right of landing by the owner of the soil, although both the fishery and landing-place once belonged to the same person, and there was no evidence to show that the former owner, or those who claimed under him, knew that the shore had been so used (*Gray* v. *Bond*, 2 Brod. & Bing. 667).

(17) Rights as to the seashore.

In the absence of all evidence of particular usage, the extent of the right of the Crown to the seashore landwards is *primâ facie* limited by the line of the medium high tide between the springs and the neaps (*A.-G.* v. *Chambers*, 4 D. M. & G. 206; *Lowe* v. *Govett*, 3 B. & Ad. 863; *Ilchester* v. *Raishleigh*, 61 L. T. 479). The effect of a lease by the Crown of minerals below low-water mark was considered (*Lord Adv.* v. *Wemyss*, 1900, A. C. 48). The foreshore is vested in the Crown subject to an obligation to protect the realm from the inroads of the sea by maintaining natural barriers, and neither the Crown nor a subject claiming under the Crown can remove shingle so as to destroy a natural barrier (*A.-G.* v. *Tomline*, 14 Ch. Div. 58). The ownership, however, of a several fishery over the foreshore raises a presumption that the soil of the foreshore is vested in such owner (*A.-G.* v. *Emerson*, 1891, A. C. 649).

The seashore between high and low water mark may be parcel of the adjoining manor (*Constable's case*, 5 Rep. 107; Harg. L. Tracts, 12; *A.-G.* v. *Hanmer*, 27 L. J. Ch. 837); and where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible in evidence to show that such seashore is parcel of the manor (*Beaufort* v. *Swansea*, 3 Exch. 413; *A.-G.* v. *Jones*, 2 H. & C. 347; *Calmady* v. *Rowe*, 6 C. B. 861; see *A.-G.* v. *Emerson*, 1891, A. C. 649). As to the entries on the court rolls, which may be used as evidence in support of the lord's title, see *Ex p. Tomline* (21 W. R. 475). In a dispute between a lord of the manor and the corporation of an adjoining port as to the right of foreshore, a decision between the parties in an action tried 150 years before, followed by a long enjoyment on the part of the winner, and long acquiescence on the part of the loser, was held to be *primâ facie* binding on the latter (*Ib.*). Similarly, usage may explain a grant of wreck (*Chad* v. *Tilsed*, 2 Brod. & Bing. 403).

A grant by the Crown (as lord of a manor adjoining an estuary) of

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minerals within the waste was held to pass minerals under the foreshore (*A.-G.* v. *Hanmer*, 27 L. J. Ch. 837). As to what words in a grant will pass the soil of the foreshore, see *Scratton* v. *Brown* (4 B. & C. 485).

A person in possession of foreshore may maintain trespass against a wrongdoer without displacing the Crown's title (*Hastings* v. *Ivall*, 19 Eq. 558).

The owner of a tenement adjoining the sea was held to have the same right of access to the sea as a riparian proprietor has to a tidal river (*A.-G. Straits Settlement* v. *Wemyss*, 13 App. Cas. 192).

The public have no right at common law to enter on the shore when dry, except for the purposes of navigation or fishing (*Llandudno* v. *Woods*, 1899, 2 Ch. 708). The right of fishing was held to include in the case of oysters the right to deposit them on the foreshore (*Truro* v. *Rowe*, 1901, 2 K. B. 870). As to drawing up fishing-boats on the shore, see *Ilchester* v. *Raishleigh*, 61 L. T. 478. There is no common law right to bathe in the sea, and as incident thereto of crossing the shore on foot or with bathing machines (*Blundell* v. *Catterall*, 5 B. & Ald. 268; see *Mace* v. *Philcox*, 15 C. B. N. S. 600; 12 W. R. 670). So there is no common law right of entering seashore to take seaweed (*Howe* v. *Stowell*, 1 Alcock & Napier, 348).

Where a parish lies on the seashore or extends up to a tidal river, the land between medium high water and low water mark is *primâ facie* extra-parochial (*Bridgwater* v. *Bootle-cum-Linacre*, L. R. 2 Q. B. 4; see *Smart* v. *Suva*, 1893, A. C. 301).

(18) Alluvium.

Gradual accretions of land from the sea belong to the owner of the land gradually added to (*R.* v. *Yarborough*, 3 B. & C. 91; 5 Bing. 163; 2 Bligh, N. S. 147; *Doe* v. *East India Co.*, 10 Moo. P. C. 140; see *Scratton* v. *Brown*, 4 B. & C. 485, where a grant of foreshore was held to pass the foreshore as it shifted from time to time). Similarly in the case of gradual accretions from a non-navigable river (*Ford* v. *Lacey*, 30 L. J. Ex. 351). Conversely land gradually encroached upon by water ceases to belong to the former owner (*Re Hull and Selby R. Co.*, 5 M. & W. 327). This law is based on the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water (see *Foster* v. *Wright*, 4 C. P. D. 446). In the case of a river, it was doubted whether the doctrine of accretion would apply where the original bank remained clearly defined (*Hindson* v. *Ashby*, 1896, 2 Ch. 27, 28).

The title to alluvium, arising from artificial causes, does not differ as to the rights of landowners from the title to alluvium arising from natural causes, where the artificial causes arise from a fair use of the land adjoining the seashore, and not from acts done with a view to the acquisition of the seashore. Where the acts of ownership relied on consisted merely of turning cattle upon a marsh which crossed the invisible line of boundary separating the marsh from the seashore, and the cattle were allowed to stray without interruption, Lord *Chelmsford*, C., said, "The effect of acts of ownership must depend partly upon the acts themselves, and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground, and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it; there, mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition" (*A.-G.* v. *Chambers*, 4 De G. & J. 65; and see *Re Hainault Forest Act*, 9 C. B. N. S. 648, and Lord *Blackburn's* remarks in *Lord Adv.* v. *Blantyre*, 4 App. Cas. 791; *Hindson* v. *Ashby*, 1896, 2 Ch. 24; *Hanbury* v. *Jenkins*, 1901, 2 Ch. 421; *Re Vernon*, 1901, 1 Ir. R. 1).

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(19) Ferries.

A ferry is the exclusive right to carry passengers across a river or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another, and not a servitude imposed upon a large area of land, and is wholly unconnected with the ownership or occupation of land (*Newton* v. *Cubitt*, 12 C. B. N. S. 32; see *R.* v. *Matthews*, 5 El. & Bl. 546). All common ferries have their origin in royal grant or in prescription which presumes such grant (*Letton* v. *Goodden*, 2 Eq. 131). A custom of keeping a ferry boat was alleged by a parish (3 Mod. 294). Thirty-five years' exercise of the usage was sufficient to show a legal origin (*Trotter* v. *Harris*, 2 Y. & J. 285). In an action for an evasion of a ferry, by carrying passengers across the river near thereto, the defendant cannot plead that from the altered neighbourhood public convenience required that which the defendant has done (*Newton* v. *Cubitt*, 5 C. B. N. S. 627). See further as to evasion of a ferry, *Huzzey* v. *Field*, 2 C. M. & R. 432; *Anon.*, 1 Ves. sen. 476. A right of ferry is a matter in which the public are interested, and of which, therefore, reputation is evidence; and so also is a verdict or judgment of a court of competent jurisdiction touching the same right, although between other parties (*Pim* v. *Currell*, 6 M. & W. 234). A ferry forms part of the king's highway, and its owner is bound, under pain of indictment, to maintain the ferry at all times for the use of the public (*Letton* v. *Goodden*, 2 Eq. 131; see *A.-G.* v. *Simpson*, 1901, 2 Ch. 692).

VI.—Right of Support.

(1) *Support for Land in its Natural Condition*....92.
(2) *Support for Incumbered Land or Excavated Land*...93.
(3) *Support for one Building by another*...94.
(4) *When Right of Action arises*...94.

Rights in respect of support having been held to be easements within sect. 2 of the Prescription Act, 1832 (*Dalton* v. *Angus*, 6 App. Cas. 798; *Lemaitre* v. *Davis*, 19 Ch. D. 291; see *Simpson* v. *Godmanchester*, 1897, A. C. 709), a short note is here added as to support.

(1) Support for land in its natural condition: from land. *Primâ facie* rules.

First, as to land in its natural condition, unincumbered by building and unexcavated.

Questions as to support arise where the title to land A. has been severed from the title to land B., which is subjacent to land A. vertically; or from the title to land C., which is adjacent to land A. laterally. It is settled that, independently of the result of any facts or documents connected with the severance, and also of custom, the owner of land A. is of common right entitled to have it supported vertically by land B. (*Humphries* v. *Brogden*, 12 Q. B. 739), and laterally by land C. (*Hunt* v. *Peake*, John. 705; *Dalton* v. *Angus*, 6 App. Cas. 808); the right to lateral support extending only over "that portion of land the existence of which in its natural state is necessary for the support of" land A. (*Birmingham* v. *Allen*, 6 Ch. Div. 289).

Further, as regards documents effecting the severance. Where the owner of the surface and subsoil severs them, and the document contains no provision bearing on support, the *primâ facie* rule is, that the right of support is attached as of common right to the surface not only where the surface is granted and the subsoil retained (*Proud* v. *Bates*, 34 L. J. Ch. 412), but also where the surface is retained and the subsoil is granted (*Davis* v. *Treharne*, 6 App. Cas. 460). The fact that the document granting the subsoil is a mining lease is an element to be considered in seeing whether the right of support to the surface is taken away by the

grant, but is not enough of itself to decide the question (*Ib.* 467; see *New Sharlston Co.* v. *Westmorland*, 82 L. T. 725). Right of support.

The *primâ facie* rule may, however, be altered by the express words of a document, or necessary intendment therefrom (*Aspden* v. *Seddon*, 10 Ch. 401). Exceptions to *primâ facie* rule.

Again, where the title to the surface and the underlying minerals is severed in pursuance of an inclosure act, while the above rule giving the surface owner a right to support ordinarily applies (*Love* v. *Bell*, 9 App. Cas. 297), the right may be expressly or impliedly limited by the act (*Bell* v. *Dudley*, 1895, 1 Ch. 186; see *Consett Co.* v. *Ritson*, 22 Q. B. Div. 318, 702; 43 W. R. 122). Words of document. Inclosure Act.

Again, the *primâ facie* rule may, in the case of a purchase by a railway company, be altered by the provisions of the Railways Clauses Act, 1845. For where under that act a railway company purchases the surface without the underlying minerals, the owner of the minerals, when not compensated therefor, may after notice so work them (working properly) as to let down the surface (*Pountney* v. *Clayton*, 11 Q. B. Div. 820); even in the case of minerals gotten by open workings (*M. R. Co.* v. *Robinson*, 15 App. Cas. 19; see *G. W. R.* v. *Blades*, 1901, 2 Ch. 625). See, generally, as to the statutory provisions which limit or extend the *primâ facie* right, *L. & N. W. R. Co.* v. *Evans*, 1893, 1 Ch. 16; and *Bell* v. *Dudley*, 1895, 1 Ch. 182, and cases there referred to. Railway Clauses Act, 1845.

Again, the *primâ facie* rule may be altered by custom, *e.g.* a custom that the lord may, by working his own subjacent minerals, let down the surface of a copyholder, making, however, compensation (*Aspden* v. *Seddon*, 1 Ex. Div. 510). Custom.

It has been said that at common law there is no right of support from subterranean water (*Popplewell* v. *Hodgkinson*, L. R. 4 Ex. 248; *Elliot* v. *N. E. R. Co.*, 10 H. L. C. 333; see, however, the judgments in *Jordeson* v. *Sutton Co.*, 1899, 2 Ch. 217). But where land is supported by a bed of wet sand or running silt, an adjoining owner who, by excavating and pumping, withdraws this support is liable in damages (*Jordeson* v. *Sutton Co.*, *sup.*). So also in the case of a bed of semi-fluid pitch (*Trinidad Asphalte Co.* v. *Ambard*, 1899, A. C. 594). See also the Brine Pumping (Compensation for Subsidence) Act, 1891. Support from subterranean water.

Secondly, as to land incumbered by buildings, &c.

(2)

Where the title to land A., on which a building has been or is about to be erected, is severed from the title to the subjacent or adjacent land, the right to have such building supported by the subjacent or adjacent land is not of common right, but must be acquired (*Dalton* v. *Angus*, 6 App. Cas. 792, 809). When acquired the right is precisely the same as that of support for land (*Ib.*). The right may be acquired by grant, whether express (*Ib.*) or implied (*Ib.*). And the implication may be made not only where at the time of the severance land A. had buildings standing on it (*Dalton* v. *Angus*, 6 App. Cas. 792), but also where it was conveyed expressly with a view to the erection of buildings (*Caledonian Co.* v. *Sprot*, 2 Macq. H. L. C. 449; *Rigby* v. *Bennett*, 21 Ch. Div. 559). A reservation of such a right will not generally be implied in favour of the grantor (*Union Co.* v. *London Dock Co.*, 1901, 2 Ch. 300). Support for incumbered land. Right may arise under grant: express; or implied;

When a statute gives the right to make and maintain something requiring support, *e.g.* a canal, and provision is made for compensation to landowners, the requisite right of support is also given (*L. & N. W. R. Co. v. Evans*, 1893, 1 Ch. 16). or under statute;

The right of support may be acquired by enjoyment for buildings which have in fact been standing for twenty years (*Dalton* v. *Angus*, 6 App. Cas. 740; see *Jordeson* v. *Sutton Co.*, 1898, 2 Ch. 625). And even where buildings are in an infirm condition damages may be recovered from the owner of the servient tenement, if the injury has resulted from his acts (*Dodd* v. *Holme*, 1 A. & E. 506). The enjoyment, however, must not be *clam.* Thus, no right of support for dock sides from underground or by enjoyment;

Right of Support.

rods was acquired by twenty years' enjoyment which had not been open and visible (*Union Co.* v. *London Dock Co.*, 1901, 2 Ch. 300).

Where buildings have been standing for less than twenty years, damages may be recovered on proof that the unincumbered land would have sunk (*Hamer* v. *Knowles*, 6 H. & N. 454; 30 L. J. Ex. 102; see *A.-G.* v. *Conduit Co.*, 1895, 1 Q. B. 301).

by lost grant.

Apparently, the right of support for buildings may also be acquired by lost grant (*Dalton* v. *Angus*, 6 App. Cas. 811).

Excavated land.

As regards acquiring a right of support for excavated land, see *Partridge* v. *Scott*, 3 M. & W. 220; *Birmingham* v. *Allen*, 6 Ch. Div. 284.

(3) Support for one building by another.

Further, as to support for one building by an adjoining building. This right is similar to the right of support for a building by land (*Lemaitre* v. *Davis*, 19 Ch. D. 290). The right may be claimed by implied grant or reservation on the severance of two houses erected by the same owner (*Richards* v. *Rose*, 9 Ex. 218; see *Howarth* v. *Armstrong*, 77 L. T. 62). In the case of houses belonging to different owners, the right may be claimed by prescription (*Lemaitre* v. *Davis*, 19 Ch. D. 281; see *Waddington* v. *Naylor*, 60 L. T. 480); in which case the enjoyment must have been as of right (see *Tone* v. *Preston*, 24 Ch. D. 739), and therefore open (*Lemaitre* v. *Davis*, 19 Ch. D. 281; *Solomon* v. *Vintners' Co.*, 4 H. & N. 601—603; *Gately* v. *Martin*, 1900, 2 Ir. R. 269; see *Dalton* v. *Angus*, 6 App. Cas. 740). As to adjoining buildings in London, see *London Building Act*, 1894.

(4) When right of action arises.

The right called the right of support is not a right on the part of the landowner to have the adjoining soil remain in its natural state (*Dalton* v. *Angus*, 6 App. Cas. 808), but a right to have his own land remain in its natural condition unaffected by any act done in the neighbouring land (*Bonomi* v. *Backhouse*, E. B. & E. 657; 28 L. J. Q. B. 381). Accordingly, if on the working of the subjacent soil a subsidence can be prevented by the use of artificial means of support, no cause of action arises (*Bower* v. *Peat*, 1 Q. B. D. 327); but if an actual subsidence takes place, a cause of action arises by reason of the injury to the right, even though there is no pecuniary loss (*A.-G.* v. *Conduit Co.*, 1895, 1 Q. B. 311; *Mitchell* v. *Darley Main Co.*, 14 Q. B. Div. 137).

The Statute of Limitations only runs from the date of the subsidence (*Backhouse* v. *Bonomi*, 9 H. L. C. 503; see *Spoor* v. *Green*, L. R. 9 Ex. 99); and each successive subsidence gives rise to a separate cause of action (*Darley Main Co.* v. *Mitchell*, 11 App. Cas. 127; *Crumbie* v. *Wallsend*, 1891, 1 Q. B. 503). A lessee of mines, however, is not liable for subsidence occurring during his lease, but caused by the acts of his predecessors (*Greenwell* v. *Low Beechburn Co.*, 1897, 2 Q. B. 165; *Hall* v. *Norfolk*, 1900, 2 Ch. 493).

In addition to damages, a person whose right to support is infringed may claim an injunction (*Mundy* v. *Rutland*, 23 Ch. Div. 81; see Seton, 6th ed. 574).

VII.—Of the Right to Pews and Vaults.

(1) *Rights in regard to Pews*...94.
(2) *Proof of Prescriptive Rights to Pews*...95.
(3) *Voting in respect of Pews and Mortgage of Pew Rents*...97.
(4) *Chancels*...97.
(5) *Remedies for Disturbance of Pews*...97.
(6) *Vaults*...98.

(1) General right with regard to pews.

Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it, common to the

parishioners; and the disposing of the seats therein the right of the ordinary (Hob. 69; Gibs. Cod. tit. 9, c. 4). **Of the Right to Pews.**

According to the common law the rector, whether endowed or spiritual only, is entitled to the chief seat in the chancel, unless some other person be in a condition to prescribe for it from time immemorial. The ecclesiastical court, in the exercise of its ordinary authority, would allot to him such sitting and protect him against the disturbance of such right (*Spry* v. *Flood*, 2 Curt. 357). By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use *in common* of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, subject to the control of the ordinary (12 Rep. 105; 3 Inst. 202; *Halliday* v. *Phillips*, 23 Q. B. Div. 53; *Blake* v. *Usborne*, 3 Hagg. Eccl. R. 733). The churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated (*Reynolds* v. *Monkton*, 2 M. & Rob. 384; *Asher* v. *Calcraft*, 18 Q. B. D. 607); and, in allotting seats in a church built under the Church Building Acts, may give preference to subscribers to church expenses (*St. Saviour, Westgate on Sea, Vicar of*, 1898, P. 217).

The general right then being in the parish and the ordinary, any particular rights in derogation of these are *stricti juris;* it is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish that the occupation of pews should be altered from time to time, according to circumstances. Mere possession is not good against the churchwardens and the ordinary (*Halliday* v. *Phillips*, 23 Q. B. Div. 53). The churchwardens may displace, and make new arrangements, but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them: the possession therefore will have its weight,—the ordinary would give a person in possession, *cæteris paribus*, the preference over a mere stranger (1 Phill. R. 324). The churchwardens are not justified in dispossessing any one of a sitting which he has enjoyed for a time, without giving notice of their intention, and offering an opportunity for explanation (*Horsfall* v. *Holland*, 6 Jur. N. S. 278). Mere possession, however, is sufficient to maintain a suit against a mere disturber (*Spry* v. *Flood*, 2 Curt. 356). The fact of possession implies either the actual or virtual authority of those having power to place. The disturber may show that he has been placed there by this authority, or must justify his disturbance by showing a paramount right,—a right paramount to the ordinary himself; namely, a faculty by which the ordinary has parted with the right; or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty (1 Phill. R. 324). Such a grant may be presumed although there may be evidence that the pew was originally acquired under circumstances which would not confer a legal right (*Halliday* v. *Phillips*, 1891, A. C. 228). Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession (*Morgan* v. *Curtis*, 3 M. & R. 389). On the expiration of a faculty, as where one was granted for ninety-nine years, the right of the parishioners to the use of the pew revives (3 Hagg. Eccl. R. 733). A faculty (for annexing a pew to a messuage) obtained by surprise and undue contrivance may be revoked (2 Hagg. Eccl. R. 417). **Particular rights.**

Lord *Penzance* expressed an opinion that a prescriptive right to a pew in the nave of a parish church cannot be claimed under sect. 2 of the Prescription Act (*Crisp* v. *Martin*, 2 P. D. 15; see *Halliday* v. *Phillips*, 23 Q. B. Div. 54; *Proud* v. *Price*, 62 L. J. Q. B. 490). **(2) Prescriptive right to pews, how proved.**

It was laid down in 1 Phillim. 325, that a *prescriptive right* must be clearly proved; the facts must not be left equivocal; and they must be such as are not inconsistent with the general right. In the first place, it

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is necessary to show that the use and occupation of the seat have been from time immemorial appurtenant to a certain messuage, not to lands; the ordinary himself cannot grant a seat appurtenant to lands. Secondly, it must be shown that if any acts have been done by the inhabitants of such messuage they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right (compare *Crisp* v. *Martin*, 2 P. D. 15). The *onus* and *beneficium* are supposed to go together. The possession must be ancient, and going beyond memory, though on this subject the high legal memory, even before the Prescription Act, 1832, was not required (1 Hagg. Cons. R. 322). As against the ordinary, mere occupancy of the pew does not prove the right (*Proud* v. *Price*, 63 L. J. Q. B. 61; *Stileman Gibbard* v. *Wilkinson*, 1897, 1 Q. B. 749). But the uniform and exclusive possession of the pew by the inhabitants of a particular messuage connected with the burthen of maintaining and repairing the seat is evidence sufficient to establish a prescriptive title. To exclude the jurisdiction of the ordinary, the strongest evidence is the building and repairing time out of mind; but mere repairing for thirty or forty years will not exclude the ordinary (*Stocks* v. *Booth*, 1 T. R. 428; *Walter* v. *Gunner*, 1 Hagg. 322). The evidence was considered (*Halliday* v. *Phillips*, 23 Q. B. Div. 54; 1891, A. C. 228). Evidence of repair to a pew claimed by prescription is not absolutely necessary, as no repair may have been within the period of anyone living (*Knapp* v. *Willesden*, 2 Rob. Ec. Rep. 358; see *Stileman Gibbard* v. *Wilkinson*, 1897, 1 Q. B. 759, where evidence of other acts of user was held sufficient). Twenty years' adverse possession seems to bar the right to a pew (1 Phill. R. 328).

Where the members of a corporation have as such occupied a particular pew in the parish church, the repairs of it may be properly charged on the borough fund (*R.* v. *Warwick*, 10 Jur. 262; 15 L. J. Q. B. 306).

Extra-parochial persons.

Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title (*Byerly* v. *Windus*, 5 B. & C. 1; as to prohibition against granting a faculty, see *Hallack* v. *Cambridge*, 1 Q. B. 593). A pew in an aisle or chancel may belong to a non-parishioner, for the case of an aisle or chancel depends upon, and is governed by, other considerations (2 Addams, R. 427). A pew in the body of the church may be prescribed for as appurtenant to a house out of the parish (*Davis* v. *Witts*, Forr. R. 14; *Lonsley* v. *Hayward*, 1 Y. & J. 583). A man may prescribe for a chancel or for an aisle, or for a pew in an aisle, or even in the nave of a church, if he prescribes for that he and those whose estate he has, have always had it, and have always repaired it, even though the estate or house in question be out of the parish (*per Kindersley*, V.-C., *Churton* v. *Frewen*, 2 Eq. 656).

Prescriptive right to pew cannot be severed from occupancy of messuage.

A pew annexed by prescription to a certain messuage cannot be severed from the occupancy of the house, but passes with the messuage to the tenant for the time being (1 Hagg. Cons. R. 319; *Stocks* v. *Booth*, 1 T. R. 430; 3 M. & R. 334; 2 Ad. 428); and the pew cannot be sold nor let without a special act of parliament (1 Hagg. Eccl. R. 319, 321); or under the provisions of the Church Building Acts (see 58 Geo. 3, c. 45, ss. 65, 66, 75—79; 59 Geo. 3, c. 134, ss. 26, 32; 8 & 9 Vict. c. 70, s. 11). Where an occupier of a pew ceases to be an inhabitant of the parish, he cannot let the pew with and thus annex it to his house, but it reverts to the disposal of the churchwardens (1 Hagg. Eccl. R. 34). A person who has permission from the churchwardens to sit in a pew temporarily, and in order to carry into effect the conditions of sale of a house with a pew, cannot bring a suit for perturbation of seat against a mere intruder, such permission being illegal, as confirming the sale of the pew (*Blake* v. *Usborne*, 3 Hagg. Eccl. R. 726). Customs pleaded, "that pews are appurtenant to certain houses, and are let by the owners to persons who are not inhabitants of the parish," are bad (1 Hagg. Cons. R. 317). Custom, "that persons who had not pews appurtenant pay rent for seats, which is applied in payment of the parish rate," is a practice which has been con-

stantly reprehended by the ecclesiastical courts, and discouraged as often as set up (1 Hagg. Cons. R. 317). But if a house to which a pew is appurtenant be let to a *parishioner*, in that character he is clearly entitled to the pew (2 Add. 428). **Of the Right to Pews.**

32 & 33 Vict. c. 94, contains provisions for the surrender of pews which are private property, or subject to any trust, to the bishop of the diocese or the ecclesiastical commissioners. And by 35 & 36 Vict. c. 49, provision is made for the free use of seats in certain churches.

(3) **Right to vote in respect of pews.**

On the construction of private acts it was held that the proprietors of pews did not acquire such a freehold interest in the soil of the church as entitled them to a county vote; but only a right to sit in it to hear divine service, which right was of the nature of an easement (*Hinde* v. *Chorlton*, L. R. 2 C. P. 104; *Brumfitt* v. *Roberts*, L. R. 5 C. P. 224; *Greenway* v. *Hockin*, *Ib.* 235).

Mortgage of pew rents.

A mortgage of pew rents made by a vicar of a district church is void under 13 Eliz. c. 20 (*Ex p. Arrowsmith*, 8 Ch. Div. 96), where it was said that the pew rents resembled the payment which the lord of a manor received for stallage in a market.

(4) **Chancels.**

The rector is entitled to the principal pew in the chancel, but the ordinary may grant permission to other persons to have pews there (*Clifford* v. *Wicks*, 1 B. & A. 498; see *Stileman Gibbard* v. *Wilkinson*, 1897, 1 Q. B. 749). A pew in a chancel may legally belong to a party in respect of the ownership of a house (*Parker* v. *Leach*, 4 Moore, P. C. C. 180). The above rules as to claiming pews by prescription were applied in the case of a pew in the chancel (*Stileman Gibbard* v. *Wilkinson*, *sup.*).

Immemorial repair of a chapel or lesser chancel, which is part of a parish church, coupled with other acts of ownership, is evidence of a freehold of inheritance in it. Such a freehold may be vested in a private person; and the enjoyment of such a chapel or chancel, and the right to its exclusive use is not necessarily annexed to a dwelling-house (*Chapman* v. *Jones*, L. R. 4 Ex. 273). Immemorial occupation, coupled with reparation, may entitle the lord of the manor to the exclusive use of the chancel without the freehold, and such a right may be appendant to an estate or house not situate in the parish (*Churton* v. *Frewen*, 2 Eq. 634). On the question whether a building forms part of the chancel of a parish church, or is private property, see *Norfolk* v. *Arbuthnot*, 5 C. P. Div. 390.

(5) **Remedy for disturbance of pews by action.**

Where a pew is claimed as annexed to a house by faculty or prescription, the courts of common law exercised jurisdiction, on the ground of the pew being an easement to the house, and the proper remedy for a disturbance is an action (*Mainwaring* v. *Giles*, 5 B. & Ald. 361). So where the pew is in a chancel, the freehold of an individual (*May* v. *Gilbert*, 2 Bulstr. 151). The ecclesiastical court has jurisdiction in all suits respecting pews; but where prescriptive rights come in question, prohibition will be granted on the application of either party, for the purpose of having the prescription tried by a jury (Report of Eccl. Commrs., p. 49; see *Re Bateman*, 9 Eq. 660). So if a man claim title by prescription to an aisle, chancel, &c., as his freehold (see 1 Burn's Eccl. Law, 8th ed., 366, 367; *Witcher* v. *Cheslam*, 1 Wils. 17; *Corwen* v. *Pym*, 12 Rep. 105; *Jacob* v. *Dalton*, 2 Raym. 1755; *Boothby* v. *Bailey*, Hob. 69; *Francis* v. *Lee*, Cro. Jac. 366; *Day* v. *Beddingfield*, Noy's Rep. 104; *Buxton* or *Bunton* v. *Bateman*, 1 Sid. 89; *S. C.*, 1 Lev. 71; Sir T. Raym. 52; *Crook* v. *Sampson*, 2 Keb. 92; *Brabin* v. *Tradum*, Poph. 140; 2 Roll. Abr. 287, 288).

Evidence.

The uninterrupted possession of a pew in a church for twenty years affords presumptive evidence of a legal title by prescription, or by a faculty against a wrongdoer (*Darwin* v. *Upton*, 2 Wms. Saund. 506, ed.

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1871). But if the right was claimed as appurtenant to an ancient messuage the claim would, before the Prescription Act, 1832, be rebutted by proof that the pew began to exist within time of legal memory (*Griffith* v. *Matthews*, 5 T. R. 296; see *Crisp* v. *Martin*, 2 P. D. 15). In an action for disturbing the possession of a pew of which there had been uninterrupted enjoyment for thirty-six years, but which had been an open pew before that period; the jury were directed to presume a title after so long a possession (*Rogers* v. *Brookes*, 1 T. R. 431, n.; see *Halliday* v. *Phillips*, 1891, A. C. 228; see, however, *Morgan* v. *Curtis*, 3 M. & R. 389). A pew in a parish church was claimed in respect of an ancient messuage; and it was proved that, so far as living memory extended, the pew had been one of three pews adjoining all claimed under one and the same claim of right, viz., in respect of the said ancient messuage: it was held, that proof of repairs done to one of the pews, not that in question, was evidence as to all (*Pepper* v. *Barnard*, 12 L. J. Q. B. 361). The pew must be claimed as appurtenant to a messuage in the parish, otherwise a bare possession of the pew for sixty years and more is not sufficient title to maintain an action for disturbing the enjoyment thereof, but a prescriptive right or faculty must be proved (*Stocks* v. *Booth*, 1 T. R. 428). Where the action is brought against a stranger, the plaintiff is not bound to state in his declaration that he has repaired the pew, though it is otherwise when the action is brought against the ordinary; in which case a title or consideration must be shown in the declaration and proved, as the building or repairing of the pew (*Kenrick* v. *Taylor*, 1 Wils. 326; *Ashley* v. *Freckleton*, 3 Lev. 73; see *Fiske* v. *Rovitt*, Lofft, 423; Com. Dig. Action upon the Case for Disturbance (A. 3); Gibs. 197, 198).

Who can sue.

The grant of part of the chancel of a church by a *lay impropriator* to A., his heirs and assigns, is not valid in law, and therefore such grantee cannot maintain trespass for pulling down his pews there erected (*Clifford* v. *Wicks*, 1 B. & Ald. 498). But the churchwardens have not, as against the incumbent of a church, a joint possession of it, so as to disable him from maintaining trespass against them for pulling down pews; and a chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate (*Jones* v. *Ellis*, 2 Y. & J. 265). The perpetual curate of an augmented parochial chapelry may maintain trespass for breaking and entering the chapel and destroying the pews (*Ib.*).

Priority in a pew.

As well priority in a seat as a seat itself in the body of a church may be claimed by prescription, as belonging to a house, by the inhabitants of it, who have repaired the seat time out of mind (*Carleton* v. *Hutton*, Noy, 78; Gibs. 221). The right to sit in a pew may be apportioned (*Harris* v. *Drewe*, 2 B. & Ad. 164). As to a licence by a pew owner to the churchwarden to divide the pew, see *Adams* v. *Andrews* (15 Q. B. 284).

Remedy in the Chancery Division.

It seems that a bill in equity would not lie to be quieted in the possession of a pew, though there was a decree for it before the ordinary (*Baker* v. *Child*, 2 Vern. 226). See *Cardinall* v. *Molyneux* (7 Jur. N. S. 854), as to proceedings against an incumbent who removed pews and substituted chairs in the church.

(6) Vaults.

A man may prescribe that he is tenant of an ancient messuage, and ought to have a separate burial in a particular vault within the church (Com. Dig. Cemetery (B.)). It seems that the same rules are applicable to vaults as to pews (*Bryan* v. *Whistler*, 8 B. & C. 293; see *Francis* v. *Ley*, Cro. Jac. 366; Gibs. Cod. 542).

VIII.—Rights to Light.

(1) *Acquisition of Right to Light*...99.
(2) *Nature and Extent of Right to Light*...101.
(3) *Effect of Alteration of Ancient Lights and of Unity of Ownership*...102.
(4) *Abandonment of Right to Light*...102.
(5) *Remedies for Disturbance of Right to Light*...103.
(6) *Privacy and Prospect*...106.

(1) Acquisition of right to light. By prescription.

Before the Prescription Act, 1832, the modes of acquiring by user the easement of light were (1) by prescription at common law, (2) by presuming a lost grant. The act has provided an additional mode, but the former modes still exist (*Aynsley* v. *Glover*, 10 Ch. 283). With regard to the mode of claiming light under the Prescription Act, see the note to sect. 3 (*ante*, p. 11), and as to claiming light by presuming a lost grant, see the note, *ante*, pp. 21, 24.

Prescription at common law.

With regard to prescription at common law, the enjoyment of lights for twenty years, without any obstruction from the party entitled to object, has been long held to be a sufficient foundation for raising the presumption of an agreement not to obstruct them (*Cross* v. *Lewis*, 2 B. & C. 686; *Darwin* v. *Upton*, cited 3 T. R. 159; 2 Wms. Saund. 175). The doctrine has been thus stated:—Every man on his own land has a right to all the light and air which will come to him; and he may erect, even on the extremity of his own land, buildings with as many windows as he pleases, without any consent from the owner of the adjoining lands. After he has erected his building, the owner of the adjoining land may, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy his light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period (*Moore* v. *Rawson*, 3 B. & C. 240; see *Blanchard* v. *Bridges*, 4 Ad. & Ell. 192).

The acquisition of a prescriptive right may be prevented by the servient owner erecting a hoarding during the period of enjoyment. Such a hoarding may be erected by a railway company (*Bonner* v. *G. W. R. Co.*, 24 Ch. Div. 1; disapproving on this point of *Norton* v. *L. & N. W. R. Co.*, 9 Ch. D. 623; see *Myers* v. *Catterson*, 43 Ch. Div. 470).

By express grant.

A right to light may be acquired by express grant (*Booth* v. *Alcock*, 8 Ch. 667). A verbal agreement for such a right may be enforced when there has been part performance (*McManus* v. *Cooke*, 35 Ch. D. 681).

Where a landlord had demised premises including lights to A. and subsequently granted a lease of the adjoining premises to B., it was held, that the landlord could not have blocked up the lights, and that B. could stand in no better position (*Davies* v. *Marshall*, 1 Dr. & Sm. 557). The words of a grant, however, must be restricted to what a grantor has power to grant at the time; thus, where A. demised a house with lights to B. for 21 years having at the time an adjoining house for a shorter term, and subsequently acquired the fee of the adjoining house, he was held entitled after the expiration of the shorter term to obstruct B.'s lights (*Booth* v. *Alcock*, 8 Ch. 663; *Godwin* v. *Schweppes*, 1902, 1 Ch. 932). Where a house is demised to a person known to sustain a special character (*e.g.*, a diamond merchant), the landlord cannot obstruct any light necessary to the tenant's enjoyment of the house in that

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character (*Herz* v. *Union Bank*, 2 Giff. 691; compare *Aldin* v. *Latimer*, 1894, 2 Ch. 437; *Grosvenor Hotel* v. *Hamilton*, 1894, 2 Q. B. 836). A special right to light may be created by covenant, in which case an injunction will be granted without regard to amount of damage (*Leech* v. *Schweder*, 9 Ch. 463); but the ordinary covenant for quiet enjoyment accompanying a grant of light does not enlarge the rights of the grantee (*Ib.*; see *Potts* v. *Smith*, 6 Eq. 311). The effect of a grant of light contained in a lease was controlled by a collateral agreement (*Salaman* v. *Glover*, 20 Eq. 444). As to the grant by a railway company on a sale of its surplus lands, see *Myers* v. *Catterson* (43 Ch. Div. 470).

Implied grant of right to light upon sale of house by owner of adjoining land;

As a man cannot derogate from his own grant, it is well established, that where the same person possesses a house, having certain lights, and also the adjoining land, and sells the house retaining the land, there, although the lights be new, neither the vendor nor any one claiming under him can build upon the adjoining land, so as to obstruct those lights (*Palmer* v. *Fletcher*, 1 Lev. 122; *Robinson* v. *Grave*, 29 L. T. 7; compare *Wheeldon* v. *Burrows*, 12 Ch. Div. 31, *ante*, p. 78; and *Aldin* v. *Latimer*, 1894, 2 Ch. 437, *post*, p. 107). The principle was applied where the vendor was a mortgagee selling under his statutory power of sale (*Born* v. *Turner*, 1900, 2 Ch. 211). The same principle applies where at the time of the grant the erection of a particular building is contemplated by both parties, though no building has been actually erected (*Bailey* v. *Icke*, 64 L. T. 789); but not where there is merely an intention on the part of the purchaser to build which is known to the vendor (*Blanchard* v. *Bridges*, 4 Ad. & Ell. 176; see *Robinson* v. *Grave*, 29 L. T. 9). The principle was held not to apply where the vendor had contracted to sell the adjoining land before the sale of the house (*Beddington* v. *Atlee*, 35 Ch. D. 317, 328; see *Davies* v. *Thomas*, 1899, W. N. 244). A., the owner of two adjoining houses, granted a lease of one of them to B., and afterwards leased the other to C., there then existing in it certain windows. After that B. accepted a new lease of the house from A.: it was held, that B. could not alter his tenement, so as to obstruct the windows existing in C.'s house at the time of his lease from A.: though the windows were not twenty years old at the time of the alteration (*Coutts* v. *Gorham*, 1 M. & M. 396; see *Cox* v. *Matthews*, 1 Ventr. 237; *Jacomb* v. *Knight*, 11 W. R. 585; *Warner* v. *Macbride*, 36 L. T. 360; *Riviere* v. *Bower*, 1 Ry. & M. 24). The extent of the implied grant of light must be measured by circumstances existing at date of the lease and known to both parties (*Birmingham Banking Co.* v. *Ross*, 38 Ch. Div. 295; *Corbett* v. *Jonas*, 1892, 3 Ch. 137; *Godwin* v. *Schweppes*, 1902, 1 Ch. 926). And where A. on taking a lease of a building knew that the adjoining land was being laid out for building and stipulated for a passage twenty feet wide adjoining the demised building, there was no implied grant (*Birmingham Banking Co.* v. *Ross*, *sup.*). But the mere reference in A.'s conveyance to the adjoining land as "building land" would not alone prevent an implied grant. The burden of setting limits to the right lies on the grantor (*Broomfield* v. *Williams*, 1897, 1 Ch. 602; see *Pollard* v. *Gare*, 1901, 1 Ch. 834; and see note to sect. 6 of the Conveyancing Act, 1881, *post*).

On a sale by a railway company of surplus land with a house thereon, the company can only obstruct the lights by railway constructions, not by a hoarding (*Myers* v. *Catterson*, 43 Ch. Div. 470). So in the case of a lease of part of a building estate, the lessor's right of obstructing lights on the demised premises is confined to building on the adjoining land. He cannot erect a hoarding (*Wilson* v. *Queen's Club*, 1891, 3 Ch. 522).

Sale of land by owner of adjoining house;

Where a person owning a house with ancient lights looking over the adjoining land, and also owning the adjoining land, sells the land retaining the house, the purchaser may obstruct the lights, there being no implied reservation in favour of the vendor (*Curriers' Co.* v. *Corbet*, 2 Dr. & Sm. 360; *White* v. *Bass*, 7 H. & N. 722; see *Tenant* v. *Goodwin*, 2 Ld. Raym. 1093; *Rosewell* v. *Prior*, 6 Mod. 116; *Canham* v. *Fisk*, 2 Cr. & J. 128; *Ellis* v. *Manchester, &c. Co.*, 2 C. P. D. 13; *Master* v. *Hansard*, 4 Ch. D. 718; *Wheeldon* v. *Burrows*, 12 Ch. Div. 31). If, however, on a

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sale of land adjoining a house to be built by the vendor, it is agreed that an outer wall of the house may stand within the verge of the lands sold and shall have in it windows overlooking such lands, and if the house be erected accordingly, the purchaser cannot afterwards obstruct those windows (*Russell* v. *Watts*, 10 App. Cas. 602).

Where a person owning a house with lights looking over adjoining land and also owning such land, at the same time sells the house to A. and the land to B., both purchasers being aware of the simultaneous conveyances, B. cannot obstruct the lights of A. (*Allen* v. *Taylor*, 16 Ch. D. 355; see *Rigby* v. *Bennett*, 21 Ch. D. 567; *Compton* v. *Richards*, 1 Price, 27; *Swansborough* v. *Coventry*, 9 Bing. 305). The same principle was applied to the devise in a will of the house to A., and the adjoining land to B. (*Phillips* v. *Low*, 1892, 1 Ch. 47; *Barnes* v. *Loach*, 4 Q. B. D. 494); and to successive mortgages of plots of land comprised in one building scheme, the mortgagees having notice of the scheme (*Russell* v. *Watts*, 10 App. Cas. 590).

simultaneous sale of land and house.

An equitable right to light claimed under a contract did not bind a purchaser for value without notice of the servient tenant (*Prinsep* v. *Belgravian Estate*, 1896, W. N. 39). The mere fact of there being windows in an adjoining house which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them (*Allen* v. *Seckham*, 11 Ch. Div. 790). A contract for the sale of a house with windows looking over the land of a third person implies no representation that the windows are entitled to light over that land (*Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324).

Cases as to contracts.

(2)

Nature and extent of right to light.

The access of light referred to in the statute "may be described as being the freedom with which light may pass through a certain space over the servient tenement; and whenever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left free so long as the light passing through it is used for or by the dominant tenement. The opening in the dominant tenement is the limit which defines the boundaries of the space over the servient tenement" (*per Fry*, J., *National Co.* v. *Prudential Co.*, 6 Ch. D. 765; see *Scott* v. *Pape*, 31 Ch. Div. 554). "The right conferred or recognized by the statute 2 & 3 W. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence unless he had shown that for whatever purpose the plaintiffs might wish to employ the light, there would be no material interference with it" (*per* Lord *Cranworth*, *Yates* v. *Jack*, 1 Ch. 298; approved by *Jessel*, M. R., *Aynsley* v. *Glover*, 18 Eq. 549; and by Lord *Chelmsford*, *Calcraft* v. *Thompson*, 15 W. R. 387. See also *Moore* v. *Hall*, 3 Q. B. D. 182; *Warren* v. *Brown*, 1902, 1 K. B. 15; *Home Stores* v. *Colls*, 1902, 1 Ch. 302; and the rulings stated p. 104, *post*). There is no distinction between the right to light in town and country (*Martin* v. *Headon*, 2 Eq. 425). Skylights will be protected (*Harris* v. *Kinloch*, 1895, W. N. 60).

Light for special purpose.

The doctrine as to the acquisition by prescription of an extraordinary amount of light laid down in *Lanfranchi* v. *Mackenzie* (4 Eq. 421), and *Dickinson* v. *Harbottle* (28 L. T. 186), and referred to by *Field*, J., in *Dalton* v. *Angus* (6 App. Cas. 760), has been disapproved of in the C. A. (*Warren* v. *Brown*, 1902, 1 K. B. 15). See further *Mackey* v. *Scottish Widows Co.*, I. R. 11 Eq. 541 (case of a seed merchant); *Cartwright* v. *Last*, 1876, W. N. 60 (a dentist); *Theed* v. *Debenham*, 2 Ch. D. 165 (a sculptor); *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282 (a photographer). *Moore* v. *Hall* (3 Q. B. D. 178) decides that a prescriptive right to light cannot be protected for a special purpose, unless the light has been used for that or a like purpose or there is a reasonable

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probability of its being hereafter applied to such purpose. But it is not necessary that there should have been a user of the light for the special purpose during the prescriptive period (*A.-G.* v. *Queen Anne's Co.*, 60 L. T. 761; *Lazarus* v. *Artistic Co.*, 1897, 2 Ch. 214; *Warren* v. *Brown*, 1902, 1 K. B. 15). As regards implied grants of special light, see the case where the court protected a special light for a diamond merchant so described in his lease (*Herz* v. *Union Bank*, 2 Giff. 686); but not for a woolbroker, a business not immediately contemplated at time of grant (*Corbett* v. *Jonas*, 1892, 3 Ch. 137).

(3) **Alterations of ancient lights.**

The owner of an ancient light may pull down the building with a view to restoration without interfering with his right to light (*Eccl. Commrs.* v. *Kino*, 14 Ch. D. 213); and may change the purpose for which the building is to be used (*Scott* v. *Pape*, 31 Ch. Div. 569). Such an owner may also make alterations in the framework and glazing of his windows without losing his right (*Turner* v. *Spooner*, 1 Dr. & Sm. 467). With regard to an alteration in the plane of the window it has been laid down by the C. A. that no such alteration will destroy the right so long as the owner of the dominant tenement can show that he is using through the new apertures in the new building the same or a substantial part of the same light which passed through the old apertures into the old building (*Scott* v. *Pape*, 31 Ch. Div. 554; see *Newson* v. *Pender*, 27 Ch. Div. 71; see further *National Co.* v. *Prudential Co.*, 6 Ch. D. 757; *Blanchard* v. *Bridges*, 4 Ad. & Ell. 176; *Barnes* v. *Loach*, 4 Q. B. D. 494; *Bullers* v. *Dickinson*, 29 Ch. D. 155). In the case of an alteration, accurate evidence as to the position, &c., of the old light should be preserved (*Fowlers* v. *Walker*, 42 L. T. 356; 51 L. J. Ch. 443; *Scott* v. *Pape*, 31 Ch. Div. 554; see *Pendarves* v. *Monro*, 1892, 1 Ch. 611). But evidence of the owner's intention to preserve ancient lights is not necessary (*Smith* v. *Baxter*, 1900, 3 Ch. 138).

For the older doctrine as to the effect of an alteration of ancient lights, see *Chandler* v. *Thompson* (3 Camp. 80); *Garratt* v. *Sharpe* (3 Ad. & Ell. 325); *Martin* v. *Goble* (1 Camp. 322); *Cherrington* v. *Abney* (2 Vern. 646).

Where there is an ancient light and other lights are added, and an obstruction is raised against the added lights, which from their position cannot be obstructed without also obstructing the ancient light, the House of Lords has decided that such obstruction is illegal (*Tapling* v. *Jones*, 11 H. L. C. 290; see *Frechette* v. *La Compagnie*, 9 App. Cas. 185). This decision overrules the older cases to the contrary effect (*Renshaw* v. *Bean*, 18 Q. B. 112; *Hutchinson* v. *Copestake*, 9 C. B. N. S. 863; *Binckes* v. *Pash*, 11 C. B. N. S. 324; *Davies* v. *Marshall*, 1 Dr. & Sm. 557; *Cooper* v. *Hubbuck*, 30 Beav. 160; *Weatherley* v. *Ross*, 1 H. & M. 349).

The doctrine of *Tapling* v. *Jones* applied to an injunction as well as to damages (*Staight* v. *Burn*, 5 Ch. 163; see *contra*, *Heath* v. *Bucknall*, 8 Eq. 1).

Unity of ownership.

An union of the ownership of the dominant and of the servient tenements for different estates does not extinguish an easement of this description, but merely suspends it so long as the union of ownership continues; and upon a severance of the ownership the easement revives (*Simper* v. *Foley*, 2 J. & H. 555).

(4) **Abandonment of right.**

The intention to abandon a right to light must be clearly established (*Greenwood* v. *Hornsey*, 33 Ch. D. 471). Non-user, which would not establish abandonment, may prevent the acquisition of a right (*Smith* v. *Baxter*, 1900, 2 Ch. 146). Completely shutting up windows with bricks and mortar for above twenty years will destroy the privilege of light (*Lawrence* v. *Obee*, 3 Campb. 514). And the right may be lost by non-user for a less period than twenty years, unless an intention of resuming the right within a reasonable time be shown when it ceased to be used. As where a person, entitled to ancient lights, pulled down his house, and erected a blank wall in the place of a wall in which there had been

windows, and suffered such blank wall to remain about seventeen years (*Moore* v. *Rawson*, 3 B. & C. 336; see *Cook* v. *Bath*, 6 Eq. 177). So if a man pulls down a house, and does not make any use of the land for two or three years, or converts it into tillage (*Moore* v. *Rawson*, 3 B. & C. 341). After a building is pulled down, the right exists as before, until it is shown to be abandoned (*Eccl. Commrs.* v. *Kino*, 14 Ch. Div. 223. It was questioned whether the manifestation of an intention to abandon the windows communicated to the owner of the land would destroy the right, until the owner of the land altered his position in reliance thereon (*Stokoe* v. *Singers*, 8 El. & Bl. 31). **Rights to Light.**

(5) **Remedies for disturbance of right to light.**

As a general rule, a person who is injured by a private nuisance may abate it (Jenk. Cent. 260, Cent. 6, Case 57; *Penruddock's case*, 5 Rep. 100 b); but no more of a house which is erected as a nuisance can be pulled down than is necessary to abate such nuisance (*James* v. *Hayward*, 1 W. Jones, 221, 222). If a person builds a house so near that of another that it stops his lights, or shoots water upon his house, the person injured may enter upon the owner's soil and pull the house down, provided no person be therein (*R.* v. *Rosewell*, 2 Salk. 459; see *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Lane* v. *Capsey*, 1891, 3 Ch. 411; *Thompson* v. *Eastwood*, 8 Exch. 69). **Abatement.**

When a party has acquired a right to the use of light, an action lies for obstructing it (9 Rep. 59 a; *Boury* v. *Pope*, 1 Leon. 168). A reversioner may maintain an action (*Shadwell* v. *Hutchinson*, 1 Mood. & Malk. 350; see 3 Taunt. 139). The ground upon which a reversioner is allowed to bring his action for obstruction to lights and other easements is, that if acquiesced in, they would become evidence of a renunciation and abandonment (*Bower* v. *Hill*, 1 Bing. N. C. 555; see 1 Wms. Saund. 346 b, n.; *Raine* v. *Alderson*, 4 Bing. N. C. 702). And in *Young* v. *Spencer*, Lord *Tenterden* said that if anything be done to destroy the evidence of title, an action is maintainable by the reversioner (10 B. & C. 145), who may in all cases bring an action where a stranger does an act injurious to the inheritance, and rendering it of less value (*Jesser* v. *Gifford*, 4 Burr. 2141; see *Metropolitan Association* v. *Petch*, 5 C. B. N. S. 504). And if the obstruction be continued, a new action may be maintained, notwithstanding the former recovery (2 B. & Ad. 97). A reversioner can obtain an injunction (*Mercers' Co.* v. *Auction Mart Co.*, 2 Eq. 238); but he cannot sue for a trifling injury (*Cooper* v. *Crabtree*, 20 Ch. Div. 589; *Perkins* v. *Slater*, 35 L. T. 356). **Action: by whom actions may be brought;**

The court will restrain the interference with ancient lights, although the plaintiff is not the occupier of the house interfered with, and may have no intention of occupying it (*Wilson* v. *Townend*, 1 Dr. & Sm. 324). A tenant from year to year may apply for an injunction (*Simper* v. *Foley*, 2 J. & H. 555; compare *Inchbald* v. *Robinson*, 4 Ch. 395); but the injunction will be limited to his tenancy (*Simper* v. *Foley*, *sup.*). A tenant from year to year under notice to quit may apply (*Jacomb* v. *Knight*, 11 W. R. 812). And a tenant whose lease had expired, but who had agreed for a renewal (*Gale* v. *Abbott*, 10 W. R. 748). But where a tenant under an agreement for a lease filed a bill to restrain his lessor from obstructing ancient lights, but did not ask to have the agreement specifically performed, an injunction was refused (*Fox* v. *Pursell*, 3 Sm. & Giff. 242). An injunction will not be granted where the title to the property sought to be protected has not been accepted by the plaintiff (*Heath* v. *Maydew*, 13 W. R. 199). An executor was held entitled to recover damages for an obstruction to the light of a house of his testatrix (*Jones* v. *Simes*, 43 Ch. D. 607).

The owner of the inheritance of a house may maintain an action against his own lessee for obstructing lights (*Thomlinson* v. *Brown*, Say. R. 215; see also 4 Burr. 2141; 3 Leon. 109). Such an action may be brought not only against the party who first erected the nuisance, but also against his lessee or assignee for continuing it (*Rosewell* v. *Prior*, 12 Mod. 635; *S. C.*, 2 Salk. 460; 1 Ld. Raym. 713; see also Carth. 456; 1 Keb. 994); but **against whom actions may be brought;**

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after damages have been recovered from the lessor the right of action against the lessee will be barred, as but one satisfaction will be given (12 Mod. 640; Carth. 455) unless there is a continuance of the nuisance. Not only the person who erected the obstruction, and the occupier of the premises where it is erected, but even the workmen and the clerk who superintended the works are liable to an action (*Wilson* v. *Peto*, 6 B. Moore, 47). As to making occupiers defendants, see *White* v. *Jameson* (18 Eq. 303); *Broder* v. *Saillard* (2 Ch. D. 692). Under the Civil Procedure Act, 1833, s. 2 (*post*, p. 214), an action may be maintained against the executors of the person obstructing (*Jenks* v. *Clifden*, 1897, 1 Ch. 694).

corporations;

Compensation can be recovered, under the Lands Clauses Act, 1845, from corporations for diminution of light (*Eagle* v. *Charing Cross R. Co.*, L. R. 2 C. P. 638; *Badham* v. *Marris*, 45 L. T. 579; *R.* v. *Poulter*, 20 Q. B. Div. 132; as to compensation for inchoate rights to light, see *Barlow* v. *Ross*, 24 Q. B. Div. 381; *Re London, Tilbury, &c. R. Co.*, *Ib.* 326); and injunctions against corporations were accordingly refused (*Clark* v. *London School Board*, 9 Ch. 120; *Bedford* v. *Dawson*, 20 Eq. 353; *Wigram* v. *Fryer*, 36 Ch. D. 87; see *London School Board* v. *Smith*, 1895, W. N. 37). On the construction of a railway act it was held that the company was liable in damages for obstructing light, the plaintiff not being bound to come in under the compensation clause (*Turner* v. *Sheffield, &c. R. Co.*, 10 M. & W. 425).

when an action can be brought.

"In order to give a right of action and sustain an issue there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done" (Ruling of *Best*, C. J., *Back* v. *Stacey*, 2 C. & P. 465, altered by *Wood*, V.-C., *Dent* v. *Auction Mart Co.*, 2 Eq. 245, and adopted as altered, *Aynsley* v. *Glover*, 18 Eq. 522; *Eccl. Commrs.* v. *Kino*, 14 Ch. D. 224; *Home Stores* v. *Colls*, 1902, 1 Ch. 311). Compare the ruling of *James*, L. J., *Kelk* v. *Pearson*, 6 Ch. 811; adopted by Lord *Selborne*, *City of London Brewery* v. *Tennant*, 9 Ch. 218; see *Warren* v. *Brown*, 1902, 1 K. B. 15; and the older rulings in *Cotterell* v. *Griffiths*, 4 Esp. N. P. C. 69; *Pringle* v. *Wernham*, 7 C. & P. 777; *Wells* v. *Ody*, *Ib.* 410; *Parker* v. *Smith*, 5 C. & P. 438.

Possible future use of dominant tenement.

In estimating injury to light "the matter to be considered is whether there is any diminution of light for any purpose for which the dominant tenement may be reasonably considered available." . . . . There is to be considered "not only the actual present use of the rooms, but any purpose to which it may reasonably be expected that in the future they may be applicable" (Ruling of *Cockburn*, C. J., *Moore* v. *Hall*, 3 Q. B. D. 182, in which case *Martin* v. *Goble*, 1 Camp. 320, was dissented from. See opinion of *Jessel*, M. R., to the same effect in *Aynsley* v. *Glover*, 18 Eq. 548—551; *Jackson* v. *Newcastle*, 3 D. J. & S. 275, to the contrary effect being disapproved; *Younge* v. *Shaper*, 21 W. R. 135; *Dicker* v. *Popham*, 63 L. T. 379; *Warren* v. *Brown*, 1902, 1 K. B. 15; *Home Stores* v. *Colls*, 1902, 1 Ch. 302.

Lateral obstructions.

As to lateral obstructions, see *Clarke* v. *Clark* (1 Ch. 16); *City of London Brewery* v. *Tennant* (9 Ch. 212); *Kino* v. *Rudkin* (6 Ch. D. 160); *Dicker* v. *Popham* (63 L. T. 379).

Rule as to 45 degrees.

There is no conclusion of law that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than forty-five degrees from the vertical. The amount of obstruction is always a question of fact which depends upon the evidence (*Parker* v. *First Avenue Co.*, 24 Ch. D. 282). It was said that the fact that forty-five degrees are left unobstructed might be *primâ facie* evidence that there was not likely to be material injury (*City of London Brewery* v. *Tennant*, 9 Ch. 220). But this is doubtful (*Home Stores* v. *Colls*, 1902, 1 Ch. 302). The supposed rule was derived from the Metropolitan Building Acts, being there laid down for a different purpose (*Eccl. Commrs.* v. *Kino*, 14 Ch. Div. 228; *Theed* v. *Debenham*, 2 Ch. D. 168).

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An injunction to restrain obstruction to light will not be granted unless substantial damage be proved (*Kino* v. *Rudkin*, 6 Ch. D. 160; see *Aynsley* v. *Glover*, 18 Eq. 553; *A.-G.* v. *Nichols*, 16 Ves. 343; *Johnson* v. *Wyatt*, 2 D. J. & S. 25). The damage may be such as is likely to accrue in respect of possible future user (*Dicker* v. *Popham*, 63 L. T. 379).

Injunctions to restrain obstruction to light:

As to the considerations of convenience and otherwise which affect the granting of an interlocutory injunction, see *Newson* v. *Pender*, 27 Ch. Div. 43. On every such injunction the plaintiff should give an undertaking as to damages (*Graham* v. *Campbell*, 7 Ch. D. 494), on which the defendant may obtain an inquiry even where the plaintiff has been guilty of no default in obtaining the injunction (*Griffith* v. *Blake*, 27 Ch. Div. 474; see *Smith* v. *Day*, 21 Ch. Div. 421). As to the effect of the undertaking where the action is subsequently dismissed, see remarks of *Jessel*, M. R. (Memorandum, 1879, W. N. 74).

interlocutory injunction;

injunction refused where no evidence of substantial injury;

An injunction was refused on the ground that the plaintiff had not proved substantial injury, in *Radcliffe* v. *Portland* (3 Giff. 702); *Johnson* v. *Wyatt* (2 D. J. & S. 18); *Jacomb* v. *Knight* (11 W. R. 812); *Curriers' Co.* v. *Corbett* (13 W. R. 1056); *Clarke* v. *Clark* (1 Ch. 16); *Robson* v. *Whittingham* (*ib.* 442); *Lanfranchi* v. *Mackenzie* (4 Eq. 421); *Sparling* v. *Clarson* (17 W. R. 518). Injunctions have been granted upon evidence being given of substantial injury in *Gale* v. *Abbott* (10 W. R. 748); *Stokes* v. *City Offices Co.* (11 Jur. N. S. 560); *Yates* v. *Jack* (1 Ch. 295); *Dent* v. *Auction Mart Co.* (2 Eq. 238); *Maguire* v. *Grattan* (16 W. R. 1189). And a plaintiff who obscured the light and air to his own dwelling was held not to be thereby disentitled to an injunction (*Arcedeckne* v. *Kelk*, 2 Giff. 683; *Staight* v. *Burn*, 5 Ch. 163; *Bourke* v. *Alexandra Co.*, 1877, W. N. 30; see also *Dyers' Co.* v. *King*, 9 Eq. 438).

injunction granted where evidence of substantial injury;

inspection by judge;

report by surveyor;

In *Leech* v. *Schweder* (22 W. R. 292), *Jessel*, M. R., gave reasons for refusing to inspect, as a judge, an alleged obstruction to light (see also *Jackson* v. *Newcastle*, 3 D. J. & S. 275). At the trial a surveyor was appointed to report (*Leech* v. *Schweder*, 9 Ch. 463; *Kelk* v. *Pearson*, 6 Ch. 810; *Cartwright* v. *Last*, 1876, W. N. 60); but the appointment was refused (*Home Stores* v. *Colls*, 1902, 1 Ch. 302). The appointment of a surveyor before trial was refused in *Stokes* v. *City Offices* (13 W. R. 537); *Baltic Co.* v. *Simpson* (24 W. R. 390). See now R. S. C. Ord. 50, r. 4; Ord. 55, r. 19.

form of injunction;

The form of injunction usually adopted by *Jessel*, M. R., is given in *Jacobs* v. *M'Sheehan*, 1877, W. N. 86. See also the forms given in Seton, 6th ed. 562 *et seq.* The order should not refer to the angle of incidence of light (as in *Hackett* v. *Baiss*, 20 Eq. 494), unless there is special evidence (*Parker* v. *First Avenue Co.*, 24 Ch. Div. 282).

mandatory injunction.

A mandatory injunction may be granted ordering the pulling down of anything erected after the commencement of an action, or after notice given to the defendant that his erecting it will be objected to (*Smith* v. *Day*, 13 Ch. Div. 651; *Kelk* v. *Pearson*, 6 Ch. 809), even where the erection was completed before writ issued (*Lawrence* v. *Horton*, 62 L. T. 749), and may be granted on interlocutory application (*Daniel* v. *Ferguson*, 1891, 2 Ch. 27; *Von Joel* v. *Hornsey*, 1895, 2 Ch. 774). An undertaking in such a case is not essential (*Smith* v. *Day*, *sup.*; *Mackey* v. *Scottish Widows*, I. R. 10 Eq. 113). On the question of granting such an injunction it is important to see if the defendant knew he was doing wrong (see remarks of *Jessel*, M. R., *Smith* v. *Smith*, 20 Eq. 503—505). But there must be no acquiescence on the part of the plaintiff (*Gaskin* v. *Balls*, 13 Ch. Div. 324; *Baxter* v. *Bower*, 23 W. R. 805). Mandatory injunctions were granted in *Myers* v. *Catterson* (43 Ch. Div. 470); *Dicker* v. *Popham* (63 L. T. 379); *Home Stores* v. *Colls* (1902, 1 Ch. 302). A mandatory injunction was refused where unsubstantial damages had been awarded (*Webster* v. *Whewall*, 42 L. T. 868). In the earlier cases it was laid down that a mandatory injunction would only be granted to prevent extreme or very serious damage (*Durell* v. *Pritchard*, 1 Ch. 244; *Isenberg* v. *East India Co.*, 3 D. J. & S. 263; *Sparling* v. *Clarson*, 17 W. R. 518; *Curriers' Co.* v. *Corbett*, 13 W. R. 1056; see *Lawrence* v. *Austin*, 13 W. R. 981;

Rights to Light.

Gort v. *Clark*, 16 W. R. 569; *Dunball* v. *Walters*, 35 Beav. 565). A mandatory injunction was refused in *Calcraft* v. *Thompson* (15 W. R. 387); and *Stanley* v. *Shrewsbury* (19 Eq. 616). In form a mandatory injunction should in direct words order the building to be pulled down (*Jackson* v. *Normanby Co.*, 1899, 1 Ch. 438).

Damages awarded under 21 & 22 Vict. c. 27.

Under 21 & 22 Vict. c. 27, s. 2 (*ante*, p. 82), wherever the Chancery Division can grant an injunction, it may award damages either in addition to, or in substitution for, the injunction. This act (the repeal of which by 46 & 47 Vict. c. 49 has not affected the jurisdiction of the court; *Sayers* v. *Collier*, 28 Ch. Div. 103; see *Elmore* v. *Pirrie*, 57 L. T. 333), has not altered the settled principles on which the court grants injunctions (*Shelfer* v. *City of London Co.*, 1895, 1 Ch. 287). When a legal right has been established the plaintiff is *primâ facie* entitled to an injunction (*Martin* v. *Price*, 1894, 1 Ch. 285; *Shelfer* v. *City of London Co.*, *sup.*; *Jordeson* v. *Sutton Co.*, 1899, 2 Ch. 217). And in cases of continuing actionable nuisance the jurisdiction to award damages ought only to be exercised under very exceptional circumstances (*Shelfer* v. *The City of London Co.*, 1895, 1 Ch. 316). Damages may be given in substitution for an injunction where the following requirements exist, viz., where the injury to the plaintiff's legal right is (1) small, (2) capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction (*Shelfer* v. *The City of London Co.*, 1895, 1 Ch. 322). And the conduct of the parties may make damages the more appropriate remedy (*Ib.*; *Senior* v. *Pawson*, 3 Eq. 330). Where the defendant's building is completed before action, damages may be awarded (*Martin* v. *Price*, 1894, 1 Ch. 276), even where a mandatory injunction will not be granted (*Stanley* v. *Shrewsbury*, 19 Eq. 616; *City of London Brewery* v. *Tennant*, 9 Ch. 212; differing from the practice adopted in *Durell* v. *Pritchard*, 1 Ch. 244; *Curriers' Co.* v. *Corbett*, 4 D. J. & S. 764). In the case of threatened injury it is doubtful whether the court has jurisdiction to give damages instead of an injunction (*Martin* v. *Price*, *sup.*; *Dreyfus* v. *Peruvian Co.*, 43 Ch. D. 316). For earlier cases as to the effect of 21 & 22 Vict. c. 27, see *Pennington* v. *Prinsop Co.*, 5 Ch. D. 773; *National Co.* v. *Prudential Co.*, 6 Ch. D. 761; *Krehl* v. *Burrell*, 7 Ch. D. 555; 11 Ch. D. 148; *Holland* v. *Worley*, 26 Ch. D. 578).

Covenant.

As to the interference of a court of equity to restrain the erection of additional buildings when a covenant to that effect had ceased to be applicable according to the spirit and intent of the contract, see *Bedford* v. *British Museum*, 2 M. & K. 552.

Acquiescence and delay.

In *Dann* v. *Spurrier* (7 Ves. 235), the court proceeded upon the doctrine that it will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement. This doctrine was applied in the case of an obstruction to light in *Cotching* v. *Bassett* (32 Beav. 101), a case depending on the old law as to alteration. A plea of acquiescence was held a good defence on equitable grounds to an action for damages for obstruction of light, and a replication that the acquiescence took place on the faith of the defendant's false representations was a good equitable answer to the plea (*Davies* v. *Marshall*, 10 C. B. N. S. 697). An injunction to restrain the obstruction of ancient lights was refused on the ground of delay (*Cooper* v. *Hubbuck*, 30 Beav. 160; *Cocks* v. *Romaine*, 14 L. T. 390). As to the difference between the acquiescence which will justify the refusal of an interlocutory and of a perpetual injunction, see *Johnson* v. *Wyatt*, 2 D. J. & S. 18; *Turner* v. *Mirfield*, 34 Beav. 390). Where the plaintiff had submitted for six years to interference with an ancient light, an injunction was refused (*Gaunt* v. *Fynney*, 8 Ch. 8).

(6) Privacy.

The opening of a window, whereby the plaintiff's privacy is disturbed, is not actionable; the only remedy is to build upon the adjoining land, opposite the offensive window (*Chandler* v. *Thompson*, 3 Campb. 80; see

9 Rep. 58 b; *Cottrell* v. *Griffiths*, 4 Esp. N. P. C. 69). The intrusion upon a neighbour's privacy, even by opening a new window overlooking the adjoining property, is not a ground for interference either at law or in equity (*Turner* v. *Spooner*, 1 Dr. & Sm. 467; see also *Re Penny and South Eastern R. Co.*, 7 Ell. & Bl. 660; and the remarks of Lord *Westbury* in *Tapling* v. *Jones*, 11 H. L. C. 290; and compare *Roberts* v. *Macord*, 1 M. & Rob. 230; *Potts* v. *Smith*, 6 Eq. 311; *ante*, p. 11). But a covenant for the protection of privacy was enforced (*Manners* v. *Johnson*, 1 Ch. D. 673). An injunction was refused where the application proceeded on a particular right to a long enjoyment of a prospect (*A.-G.* v. *Doughty*, 2 Ves. sen. 453; see *Squire* v. *Campbell*, 1 M. & C. 459; *Dalton* v. *Angus*, 6 A. C. 824). So the building of a wall which merely intercepts the prospect of another, without obstructing his lights, is not actionable (*Knowles* v. *Richardson*, 1 Mod. 55; 2 Keb. 611, 642). A covenant, however, not to obstruct a prospect will be enforced in equity (*Piggott* v. *Stratton*, 1 D. F. & J. 33; *Western* v. *Macdermott*, 2 Ch. 72). The erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business (*Smith* v. *Owen*, 35 L. J. Ch. 317; *Butt* v. *Imperial Gas Co.*, 2 Ch. 158).

Of the Rights to Light and Air.

Prospect.

View of shop window.

IX.—Of Rights in Regard to Air, and of Nuisances.

No right to the passage of air can be acquired under the Prescription Act (*Webb* v. *Bird*, 13 C. B. N. S. 841; *Chastey* v. *Ackland*, 1895, 2 Ch. 402). And it has been laid down generally that the access of air to the chimney of a building over the general unlimited surface of a neighbour cannot be claimed as a natural right, or as an easement by prescription at common law, or by lost grant (*Bryant* v. *Lefever*, 4 C. P. D. 172; see *Harris* v. *De Pinna*, 33 Ch. Div. 238). A right, however, to unobstructed passage of air through a window may be acquired by prescription at common law (*Aldred's case*, 9 Coke, 58; see *Gale* v. *Abbott*, 10 W. R. 748; *Dent* v. *Auction Mart Co.*, 2 Eq. 252; *Chastey* v. *Ackland*, 1895, 2 Ch. 389; 1897, A. C. 155. The right to the passage of air through a defined channel was acquired by lost grant (*Bass* v. *Gregory*, 25 Q. B. D. 481). And a covenant not to intercept the access of air sufficient for the purposes of a slaughter-house was implied from thirty years' user (*Hall* v. *Lichfield Co.*, 43 L. T. 380). When land is granted for a particular purpose the grantor cannot interrupt air so as to interfere with that purpose (*Aldin* v. *Latimer*, 1894, 2 Ch. 437; *Tebb* v. *Cave*, 1900, 1 Ch. 642). But the court will only interfere in special cases (*City of London Brewery* v. *Tennant*, 9 Ch. 221; *Baxter* v. *Bower*, 33 L. T. 41).

Rights with regard to air.

The owner of a house has a right at common law to wholesome and untainted air, unless the business which creates a nuisance has been carried on for such a length of time as will raise a presumption of a grant from the neighbouring owners (*Elliottson* v. *Feetham*, 2 Bing. N. C. 134). Nothing less than a user of twenty years will afford such presumption (*Bliss* v. *Hall*, 5 Scott, 500; *Crump* v. *Lambert*, 3 Eq. 413; see the pleading in *Flight* v. *Thomas*, 10 Ad. & El. 590). There can be no prescription, however, to justify a public nuisance (*A.-G.* v. *Barnsley*, 1874, W. N. 37). An action will lie for pollution of air (*St. Helen's Co.* v. *Tipping*, 11 H. L. C. 642). And the pollution will be restrained (*Tipping* v. *St. Helen's Co.*, 1 Ch. 66; *Crump* v. *Lambert*, 3 Eq. 409; see *Swaine* v. *G. N. R. Co.*, 12 W. R. 391).

Remedies for pollution of air, at law and in equity.

What constitutes a nuisance was thus defined by *Knight-Bruce*, V.-C.: "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the

Nuisance.

Of the Right in regard to Air.

English people?" (*Walter* v. *Selfe*, 4 De G. & Sm. 322, adopted in *Soltau* v. *De Held*, 2 Sim. N. S. 133, and *Crump* v. *Lambert*, 3 Eq. 413; *Bellamy* v. *Wells*, 63 L. T. 635; see *Jenkins* v. *Jackson*, 60 L. T. 105). What would be a nuisance in one locality might not be so in another (*Sturges* v. *Bridgman*, 11 Ch. Div. 852).

Where a man, by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement, as to amount *primâ facie* to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land (*Bamford* v. *Turnley*, 3 B. & S. 66, overruling *Hole* v. *Barlow*, 4 C. B. N. S. 334). See *Shotts Iron Co.* v. *Inglis*, 7 App. Cas. 528; *Cavey* v. *Ledbitter*, 13 C. B. N. S. 470; *Luscombe* v. *Steer*, 15 W. R. 1191; and *St. Helen's Co.* v. *Tipping*, 11 H. L. C. 642, where Lord *Westbury* distinguishes the cases where material injury is done to property, and those where personal discomfort is produced. As to the defence of reasonable user, see the views expressed on the one hand in *Broder* v. *Saillard*, 2 Ch. D. 692; *Reinhardt* v. *Mentasti*, 42 Ch. D. 68; and *A.-G.* v. *Cole*, 1901, 1 Ch. 205; and on the other hand in *Gaunt* v. *Fynney*, 8 Ch. 8; *Ball* v. *Ray*, *Ib.* 467; and *Sanders Clark* v. *Grosvenor Mansions*, 1900, 2 Ch. 373. An injunction was granted to restrain brick burning (*Beardmore* v. *Tredwell*, 3 Giff. 683; *Walter* v. *Selfe*, 4 De G. & Sm. 315; *Boreham* v. *Hall*, 1870, W. N. 57; *Roberts* v. *Clarke*, 18 L. T. 49); and the emission of noxious vapours (*Imperial Gas Co.* v. *Broadbent*, 7 H. L. C. 600). The fact of the plaintiff having come to the nuisance, does not disentitle him to relief (*Tipping* v. *St. Helen's Co.*, 1 Ch. 66). As to how far the delicate nature of the plaintiff's trade can be taken into consideration, see *Cooke* v. *Forbes*, 5 Eq. 166; *Robinson* v. *Kilvert*, 41 Ch. D. 88. The plaintiff must prove damage, visible, substantial, and actual (*Salvin* v. *North Brancepeth Co.*, 9 Ch. 709). As to restraining alleged future nuisances, see *Rapley* v. *Smart*, 1894, W. N. 2; *A.-G. v. Manchester*, 1893, 2 Ch. 87.

Actions to restrain.

A weekly tenant can obtain an injunction (*Jones* v. *Chappell*, 20 Eq. 539), and tenants were added as co-plaintiffs by amendment at the trial (*House Property Co.* v. *H. P. Horsenail Co.*, 29 Ch. D. 190). As to joining as co-plaintiffs the occupiers of several houses affected by the nuisance, see *Truman* v. *L. B. & S. C. R. Co.*, 29 Ch. Div. 89; *Umfreville* v. *Johnson*, 10 Ch. 580; *Hudson* v. *Maddison*, 12 Sim. 416. A reversioner can sue (*Shelfer* v. *City of London Electric Co.*, 1895, 1 Ch. 287). As to liability of occupiers, see *White* v. *Jameson*, 18 Eq. 303; *Broder* v. *Saillard*, 2 Ch. D. 692; *Jenkins* v. *Jackson*, 60 L. T. 105.

The acts of two or more persons may taken together constitute such a nuisance that the court in separate actions will restrain each of them from doing the acts constituting the nuisance, although the act of one taken alone would not amount to nuisance (*Lambton* v. *Mellish*, 1894, 3 Ch. 163, where there were several actions; *Blair* v. *Deakin*, 57 L. T. 522, where there was one action against one such person).

Under the old practice such an injunction was granted in one action against several independent persons (*Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650). Whether under the present practice one action for an injunction can be maintained against several acting independently is doubtful (*Sadler* v. *G. W. R. Co.*, 1896, A. C. 450). But damages cannot be recovered in one action against separate tortfeasors (*Ib.*).

Acquiescence.

Acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage (*Bankart* v. *Houghton*, 27 Beav. 425). See also, as to the effect of acquiescence in such a case, *Williams* v. *Jersey*, Cr. & Phil. 91; *Savile* v. *Kilner*, 26 L. T. 276; *Sanders* v. *Manley*, 1878, W. N. 181.

Where a nuisance ceases after writ, but before trial, an injunction may still be granted (*Chester Chapter* v. *Smelting Corporation*, 1901, W. N. 179; correcting *Dunning* v. *Grosvenor Dairies*, 1900, W. N. 265).

LIMITATION OF ACTIONS AND SUITS.

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I.—Limitation of Time for the Recovery of Land or Rent.

The Real Property Limitation Act, 1833.

3 & 4 Will. IV. c. 27, ss. 1—39, 43, 44.

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [24th July, 1833.]

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1.—*Interpretation Clause.*

3 & 4 Will. 4, c. 27, s. 1.

Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,)

Meaning of the words in the act.

"Land."

the word "land" (*a*) shall extend to manors, messuages, and all other corporeal hereditaments whatsoever (*b*), and also to tithes (*c*) (other than tithes belonging to a spiritual or eleemosynary corporation sole) (*d*), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest (*e*), and whether freehold or copyhold, or held according to any other tenure; and the word

"Rent."

"rent" (*f*) shall extend to all heriots (*g*), and to all services and suits for which a distress may be made (*h*), and to all annuities and periodical sums of money charged upon or payable out of any land (*i*) (except moduses or compositions (*k*) belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through or under or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail (*l*), tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee (*m*),

Person through whom another claims.

devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat (*n*); and the word "person" shall extend to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as an individual (*o*); and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

3 & 4 Will. 4, c. 27, s. 1.

"Person."

Number and gender.

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(6) *Claims by and against the Crown, and of Presumption of Grants by the Crown, of Enrolments, and of Statutes*...119.

(1) Construction of statutes of limitation generally.

The object of all statutes of limitation is to prevent claims at great distances of time when evidences are lost, and in all well-regulated countries the question of possession is held to be an important point of policy (*Dundee Harbour* v. *Dougall*, 1 Macq. H. L. C. 321, *per* Lord *St. Leonards*). The several statutes of limitations being all *in pari materiâ* ought to receive an uniform construction notwithstanding a slight variation in phrase, the object and intention being the same (*Murray* v. *East India Co.*, 5 B. & Ald. 206, 215, *per Abbott*, C. J.) All these acts being, as they were emphatically termed by Lord *Kenyon*, statutes of repose, are to be liberally and beneficially expounded (*per Dallas*, C. J., in *Tolson* v. *Kaye*, 6 Moore, 558; 3 Bro. & B. 217). See the maxims "*Interest reipublicæ ut sit finis litium*" (Broom's Legal Maxims, 328, 6th ed.) and "*Vigilantibus non dormientibus jura subveniunt*" (Broom, 672, 7th ed.).

(2) "Land," meaning of word.

(*a*) The right to dower is within the word "land" (*Marshall* v. *Smith*, 5 Giff. 40). But not turnpike tolls; and consequently more than six years' arrears of interest may be recovered on a mortgage of turnpike tolls notwithstanding the 42nd section of the act (*Mellish* v. *Brooks*, 3 Beav. 22).

Hereditaments.

(*b*) Hereditament is a very comprehensive term, including whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed (Co. Litt. 6 a; 3 Rep. 2; Shep. Touch. 91). *Hereditaments* are of two sorts: *corporeal*, consisting wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land (Co. Litt. 4; 2 Bl. Com. 17); and *incorporeal*, which are rights issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same (*Ib.* 20). Many of the latter are not within this act, but the periods of limitation for several incorporeal rights are prescribed by the Prescription Act, 1832 (*ante*, pp. 1—20).

Tithes.

(*c*) The word "tithes" has an ambiguous meaning, signifying either the estate in the tithes or the chattel itself, the fruits of the estate. Tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole) are included in the word "land," which in its proper sense applies only to cases in which there are two parties, each claiming an estate in the land adverse to each other. It has been held, that the statute does not prevent the tithe-owner from recovering tithes as *chattels* from the occupier, although none had been set out for twenty years, but that the

3 & 4 Will. 4, c. 27, s. 1.

"LAND."

operation of the statute is confined to cases where there are two parties, each claiming an adverse *estate* in the tithes. Therefore a person who has received no tithes for the statutory period cannot recover the possession of them from another, who has for the same period received those tithes from the terre-tenant (*Ely* v. *Cash*, 15 M. & W. 617; *Ely* v. *Bliss*, 2 D. M. & G. 459; see *Shannon* v. *Hodder*, 2 Ir. L. R. 223). The effect of time as between tithe-owner and occupier is determined by the Tithe Act, 1832 (see *Salkeld* v. *Johnston*, 1 Mac. & G. 242, where Lord *Cottenham* expressed his opinion that under that act the proof of the enjoyment of the discharge claimed for the prescribed time is a sufficient answer to a demand for tithes: see *S. C.*, 2 Ex. 256; 2 C. B. 749). The cases on the construction of that act are collected, Shelford on Tithes, 391—398, 3rd ed., and Supplement, 47—86; and see Leach's Tithe Acts, 6th ed.

As regards payments for tithe imposed in London by 37 Hen. 8, c. 12, an action for their recovery was brought by a lay impropriator, and the defendant pleaded the Tithe Act, 1832. Held by House of Lords, affirming the Court of Appeal (52 L. T. 532), who had reversed *Kay*, J. (*Ib.* 530), that these payments were not within that act, which only applies to tithes in kind (*Payne* v. *Esdaile*, 13 App. Cas. 613). The defence of non-payment apart from statute was also held bad in House of Lords (*Ib.*), affirming *Kay*, J. (53 L. T. 21). Lastly, the defendant relied on the Real Property Limitation Act, 1833, which the Court of Appeal held did not apply (54 L. T. 705). This was reversed by House of Lords, who held that these payments fell within the words "periodical sums of money charged upon land" (*Payne* v. *Esdaile*, 13 App. Cas. 613).

Tithes, moduses or compositions, belonging to a spiritual or eleemosynary corporation sole, are excepted from the operation of the present act. The time for recovering lands belonging to such a corporation is prescribed by sect. 29, *post*, p. 175.

Tithe rent-charge.

Tithe rent-charge not belonging to a spiritual or eleemosynary corporation sole is within the meaning of the word "rent" in sect. 2, and the right thereto will be extinguished by non-payment for the statutory period (*Irish Land Commission* v. *Grant*, 10 App. Cas. 14). In the case of a tithe rent-charge belonging to a spiritual corporation sole, and which arose under the Tithe Rent-charge (Ireland) Act, 1838, the House of Lords held on the construction of the last-mentioned act that it was not a "composition" within the meaning of sect. 1 of the Real Property Limitation Act, 1833, and accordingly fell within the general operation of the act (*Ib.*; see *Conolly* v. *Gorman*, 1898, 1 I. R. 20).

Arrears of tithes.

As to the recovery of arrears of tithes and tithe rent-charge, see note to sect. 42, *post*, p. 201.

Corporations.

(*d*) Spiritual corporations are those of which not only the members composing it are spiritual persons, but of which the object of the institution is also spiritual, such as bishops, some deans, and prebendaries, all archdeacons, parsons, and vicars, which are *sole* corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate (Co. Litt. 150 a; 1 Bl. Com. 471; 1 Kyd on Corporations, 22).

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms or bounty of the founder of them to such persons as he has directed (1 Bl. Com. 471). These are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons, and colleges for the promotion of learning, and the support of persons engaged in literary pursuits, of which the greater number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them. Between hospitals having a common seal, and colleges in the universities or out of them, there is no difference in legal consideration, the difference is only in degree; for where in an hospital the master and poor are incorporated, it is a college having a

common seal by which it acts, although it have not the *name* of a college (*per Holt*, Skinn. 484). There are many hospitals not incorporated in which the succession is kept up by trustees (10 Rep. 31, 35). There are other corporations which may be classed under the head of *eleemosynary*, as their object is, by means of trustees or governors incorporated, to carry into execution some public charity; such is the corporation created in the reign of Queen Anne, under the name of "The Governors of the Bounty of Queen Anne, for the Augmentation of the Maintenance of the Poor Clergy" (2 Anne, c. 11; 5 Anne, c. 24; 6 Anne, c. 27; 1 Geo. 1, stat. 2, c. 10; 3 Geo. 1, c. 20). And such are many corporations of trustees or governors of free schools (see 1 Kyd on Corporations, 25—27). All these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons (1 Ld. Raym. 6), and although they, in some things, partake of the nature, privileges and restrictions of ecclesiastical bodies (1 Bl. Com. 471). Each university of Oxford and Cambridge is a *lay* corporation and not eleemosynary, as particular colleges are, although some salaries are attached to some of their officers (*R.* v. *Cambridge*, 3 Burr. 1652; see Shelford on the Law of Mortmain and Charities, 8—34; Tudor's Charitable Trusts, 3rd ed.).

3 & 4 Will. 4, c. 27, s. 1. "Land."

Corporations *aggregate* consist of many persons, of which kind are the mayor and commonalty of a city, the head and fellows of a college, the master and brethren of a hospital, the dean and chapter of a cathedral church (10 Rep. 29 b; 11 Rep. 69 b).

Corporations *sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a corporation sole (Co. Litt. 43). So are archbishops, bishops, deans and prebendaries, distinct from their several chapters; and so is every parson and vicar (10 Rep. 29 b; Wood's Inst. 109; 1 Bl. Com. 470; 1 Kyd on Corporations, 20). Corporations are as liable to the operation of prescription as private persons (*Dundee* v. *Dougall*, 1 Macq. H. L. C. 317).

(*e*) The term *freehold*, as denoting an estate of a given *quantity*, or rather of a peculiar *quality*, is opposed to the term chattel (Co. Litt. 43 b; 1 Burr. 108). An estate of freehold may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or some uncertain interest, created by will, or some other mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee, or of some other person" (Watk. on Conv. by Morley and Coote, 63; Prest. on Estates, 200—203; see observations on an Estate of Freehold, by Manning, 2 Jur. 459). All interests in land for a shorter period than a life, or, more properly speaking, all interests for a *definite* space of time, measured by years, months, or days, are deemed *chattel* interests (1 Prest. on Estates, 203), which may subsist in both corporeal and incorporeal hereditaments (Noy's Maxims, by Bythewood, 142, 357; Bac. Abr. Executors (H. 3)). Chattels real are such as concern the realty, as terms for years in land, the next presentation to a church (Dyer, 135 a), estates by statute-merchant, statute-staple, elegit, or the like (Co. Litt. 118 b). By the common law no estate of inheritance or freehold is comprehended under the word chattels.

Meaning of the term "freehold."

(3) "Rent."

(*f*) The following have been held to fall within the definition of rent in sect. 1, viz.: Quit rents payable in respect of freeholds (*De Beauvoir* v. *Owen*, 5 Ex. 166), or in respect of copyholds (*Howitt* v. *Harrington*, 1893, 2 Ch. 497); rent-charges granted by deed (*Jones* v. *Withers*, 74 L. T. 572); the yearly sum payable under the Land Tax Act, 1802, s. 123, by way of interest on money paid for redeeming land tax (*Skene* v. *Cook*, 1901, 2 K. B. 7; 1902, 1 K. B. 682); annuities charged on land by will (*James* v. *Salter*, 3 Bing. N. C. 544), or by deed (*Hughes* v. *Coles*, 27 Ch. D. 231); payments for tithe imposed in

Payments within the definition of rent.

3 & 4 Will. 4, c. 27, s. 1.

"Rent."

London by 37 Hen. 8, c. 12 (*Payne* v. *Esdaile*, 13 App. Cas. 613); tithe rent-charge (*Irish Land Commission* v. *Grant*, 10 App. Cas. 31); certain services not involving pecuniary render (*Doe* v. *Benham*, 7 Q. B. 981). In a case which arose between landlord and tenant it was said that rent in sect. 2 was confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rent service, fee farm rents, or the like (*Grant* v. *Ellis*, 9 M. & W. 113, 122). And Lord *St. Leonards* said, *rent*, in the second section, meant rent of inheritance (*Ely* v. *Bliss*, 2 D. M. & G. 472). In a recent case, however, where interest on money paid to redeem land tax had not been paid for twenty years, it was said that if by statute a periodical payment charged upon land is created, and is a property distinct from the land, though not real property, it is rent within the statute (*Skene* v. *Cook*, 1901, 2 K. B. 14; 1902, 1 K. B. 682). The word does not include a conventional rent reserved by a lease (*Irish Land Commission* v. *Grant*, 10 App. Cas. 26). See generally as to the use of the word "rent" in the statute, *Doe* v. *Angell*, 9 Q. B. 328. And as to annuities see further, p. 118, *post*.

Heriots:

heriot service;

(*g*) Heriot is defined to be the best beast, or other thing, due to the lord on the death or alienation of his tenant. Heriots are usually divided into two sorts, heriot *service* and heriot *custom*. The former are such as are due upon a special reservation in a grant or lease of lands (*Lanyon* v. *Carne*, 2 Saund. 166); the latter depend merely upon immemorial usage and custom (Co. Cop. s. 24). Heriot *service* may be recovered either by seizure (Plowd. 96; Cro. Eliz. 589; 1 And. 298; Gouldsb. 191; 1 Salk. 356; 1 Show. 81; Willes, 192), or by distress within the manor (Plowd. 96 a; Cro. Car. 260; Bro. Har. 2; Kich. 133 b; 3 Bl. Comm. 15; Gilbert's Distresses, 10, 11). *Quære* whether it can exist in the case of copyholds (*Western* v. *Bailey*, 1896, 2 Q. B. 234; 1897, 1 Q. B. 86). Any goods belonging to another, found upon the lands charged with heriot service, may be distrained (Bro. Har. 6; Cro. Car. 260; *Austin* v. *Bennet*, 1 Salk. 356).

heriot custom;

A heriot due by the *custom* of a manor may be payable on the death of every tenant of an estate of inheritance, or for life or years (21 Hen. 7, 13 & 15; Keilw. 80; Bro. Har. 5), or at will (*Hix* v. *Gardiner*, 2 Bulstr. 196), and may be seized outside the manor although the beast was never within it (*Western* v. *Bailey*, 1897, 1 Q. B. 86). As the property of it vests immediately in the lord on the death or alienation of the tenant, the lord may seize the identical thing, though he cannot distrain any other chattel for it (Cro. Eliz. 590; Keilw. 82 a, 84 b, 167 a; Br. Har. 2, 6, 7; *Parker* v. *Gage*, 1 Show. 81). The property in any particular beast will not vest in the lord before selection of it (*Abington* v. *Lipscomb*, 1 Q. B. 776); see Copyhold Acts, 1841, 1843, 1852, 1858, providing for the commutation of manorial rights in respect of copyholds. See further, as to heriots, Shelford on Copyholds and the Supplement thereto, pp. 119—133; 2 Watk. on Cop. c. 6; 2 Saund. Rep. 168, n.; Cruise, Dig. tit. X., c. 4, ss. 49—63; Com. Dig. Copyhold (K. 18), (K. 27); Scriven on Cop. 244—258, 7th ed.; *Croome* v. *Guise*, 4 Bing. N. C. 148). A heriot may be due by custom on the death of a tenant in respect of a tenement of free lands held in fee simple of a manor (*Damarell* v. *Protheroe*, 10 Q. B. 20).

In a case of heriot service, where a manor had been settled, it was held that the right of the remainderman to seize a heriot in 1847 (he being then entitled in possession) was not barred by sects. 2 and 3, owing to the non-payment of a heriot to the tenant for life in 1824 (*Chichester* v. *Hall*, 17 L. T. (O. S.) 121). In *Lord Zouch* v. *Dalbiac* (L. R. 10 Ex. 172), a case of heriot custom, where it was admitted that more than twenty years before the heriot the subject-matter of the action became due, a previous heriot had become due which the lord had not seized, the lord's right of seizure was not barred under this statute. Opinions were expressed that neither heriot custom nor heriot service were within sects. 2 and 3 (*Ib.* 182); and that if rent did anywhere in the statute include heriots,

it might be in sect. 42 (*Ib.* 179). *Bramwell*, B., doubted whether it was the general intention of the statute to bar not merely the right to a particular heriot, but the title generally (see the relation of the statute to heriots discussed in *Owen* v. *De Beauvoir*, 16 M. & W. 566; *De Beauvoir* v. *Owen*, 5 Exch. 166; Darb. & Bos. Stat. Lim. 2nd ed. 280).

3 & 4 Will. 4, c. 27, s. 1.

"Rent."

In the absence of evidence adverse to the rights of the lord of a manor, the court will not presume the enfranchisement of land shown to have been copyhold more than a century ago, from mere negligence by the lords in exacting the small acknowledgments for fines, &c., which were then commuted. *Wood*, V.-C., said it was not a case to which any statute of limitations applied (*Turner* v. *West Bromwich Union*, 9 W. R. 155; see also, as to these presumptions, *Chichester* v. *Hall*, 17 L. T. (O. S.) 121).

negligence in exacting acknowledgments for fines.

(*h*) A rent (*reditus*) is properly a sum of money, or other thing to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion of which is in the grantor or person demising (2 Bl. Comm. 31; Gilb. on Rents, 9, &c.). There are at common law three sorts of rents: rent-service, rent-charge, and rent-seck (Litt. s. 213). *Rent-service* is so called because it hath some corporeal service incident to it, as at least fealty or the tenant's feodal oath of fidelity (Co. Litt. 142). And for these, in case they be in arrear, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands, after the lease or particular estate of the lessee or grantee is expired (Litt. s. 215). A *rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress if the rent be in arrear. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a rent-*charge*, because in this manner the land is charged with a distress for the payment of it (Co. Litt. 143; see *Re Gerard and Beecham*, 1894, 3 Ch. 308). A rent for equality of partition is not a rent-service, but a rent-charge of common right, and may be distrained for (Litt. s. 253). Rent-*seck* (*reditus siccus*), or barren rent, is, in effect, nothing more than a rent reserved by deed, but without any clause of distress (2 Bl. Comm. 42; see *Dodds* v. *Thompson*, L. R. 1 C. P. 133). Either a rent-service disconnected from the reversion (*Ards* v. *Watkin*, Cro. Eliz. 637, 651) or a rent-charge may be divided by will or by deed, operating under the Statute of Uses, so as to make the tenant liable without attornment to several distresses by the devisee or *cestuis que use*. It seems that since the stat. 4 Anne, c. 16, s. 9, a rent-charge may be so divided by a conveyance of any kind (*Rivis* v. *Watson*, 5 M. & W. 255; see *Colborne* v. *Wright*, 2 Lev. 239).

"Services and suits for which distress may be made."

Different kinds of rents: rent-service; rent-charge; rent-seck;

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor (2 Inst. 19), which cannot be departed from or varied. Those of the freeholders are frequently called *chief* rents (*reditus capitales*); and both sorts are indifferently denominated *quit-rents* (*quieti reditus*), because thereby the tenant goes quit and free of all other services. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation (Co. Litt. 143; see *Bradbury* v. *Wright*, Dougl. 627, n. 1).

other rents.

The above are the general divisions of rent; but the difference between them (in respect of the remedy for recovering) is now abolished. By the Landlord and Tenant Act, 1730, the same remedy was given by distress, and by impounding and selling the same, in cases of rents-seck, rents of assize, and chief-rents, which had been duly answered or paid for the space of three years within the space of twenty years before the first day of that

Remedy by distress for recovering rents-seck given by 4 Geo. 2, c. 28, s. 5.

3 & 4 Will. 4, c. 27, s. 1.

session of parliament, or which should be thereafter created, as in case of rent reserved upon lease. As to this section, it was held that, unless the case was brought within it, a rent-seck could not be recovered by distress (*Bradbury* v. *Wright*, Dougl. 627). It was not, however, necessary that the three years mentioned in the statute should be *continuous;* it was sufficient if, for the space of three *whole* years within twenty years before the passing of the act, the rent was paid, though those years might not be consecutive (*Musgrave* v. *Emerson*, 10 Q. B. 326). A rent-charge granted by deed containing no power of distress is within the section (*Dodds* v. *Thompson*, L. R. 1 C. P. 133). Whenever land is sold reserving a rent, that rent may properly be called a rent-charge, for under the above section the right of distress is incident to it (*Re Gerard and Beecham*, 1894, 3 Ch. 311).

"Rent."

Distress for rents.

Now by Conv. Act, 1881, s. 44, *post*, where an annual sum is, by an instrument coming into operation after December 31, 1881, charged on land or the income thereof, whether by way of rent-charge or otherwise, and which annual sum is not a rent incident to a reversion, such annual sum can be recovered by means of (1) a distress, (2) an entry, (3) a demise of the land charged.

As a general rule, a person who has parted with the reversion cannot distrain (*Parmenter* v. *Webber*, 8 Taunt. 593; *Langford* v. *Selmes*, 3 K. & J. 226; see as to a mortgage, *Trent* v. *Hunt*, 9 Exch. 14). So a lessee who has parted with his whole term (which amounts to an assignment, *Beardman* v. *Wilson*, L. R. 4 C. P. 57; *Hyde* v. *Warden*, 3 Ex. D. 83), reserving a rent, cannot distrain (——— v. *Cooper*, 2 Wils. 375). Under certain circumstances, however, the rent reserved may amount to a rent-charge (see *Williams* v. *Hayward*, 1 E. & E. 1040), to which, apparently, the Landlord and Tenant Act, 1730, s. 5, would apply.

It is laid down in Co. Litt. 142 a, that "rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, comine, wheat, or other profit that lieth in render, office, attendance, and such like, as in payment of money;" and that for these things there may be a distress. So in Co. Litt. 96 a, it is said, "A man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number and sometime a lesser number there; and yet this uncertainty being referred to the manor, which is certain, the lord may distrain for this uncertainty." So in Litt. s. 137, it is laid down, that if land be holden by the service of singing a mass every Friday, the lord may distrain for not doing it (*Doe* v. *Benham*, 7 Q. B. 982). The keeping up of a grindstone upon land for the convenience of the parish, was held not rent, or "profits of land" within the third section of the act (*Doe* v. *Hinde*, 2 M. & Rob. 441; *Doe* v. *Benham*, 7 Q. B. 978).

Right of executors to distrain.

By the Civil Procedure Act, 1833, ss. 37, 38, the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrearages due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime (sect. 37). And such arrearages may be distrained for after the determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined: provided such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and all powers and provisions in the several statutes, made relating to distresses for rent, are made applicable to the distresses so made as aforesaid (sect. 38). See before that act, *Prescott* v. *Boucher*, 3 B. & Ad. 849.

Distress after end of term.

Since the Landlord and Tenant Act, 1709, s. 6, rent accruing before the expiration of a tenancy can be distrained for within six months after the tenancy expires, and while the tenant continues in occupation. See before that act, *Williams* v. *Stiven* (9 Q. B. 14).

Action of debt for rent-charge.

Since the abolition of real actions, a rent-charge in fee may be recovered in an action of debt from the terre-tenant entitled to a freehold interest,

3 & 4 Will. 4, c. 27, s. 1.

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either under a covenant binding him (*Varley* v. *Leigh*, 2 Exch. 446), or independently of one (*Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Ex p. Graham*, 42 Ch. D. 343; *Searle* v. *Cooke*, 43 Ch. D. 519); and that, whether he has or has not received rents and profits equal to the amount of rent-charge claimed (*Pertwee* v. *Townsend*, 1896, 2 Q. B. 129). But a tenant for years is not liable in such an action (*Re Herbage Rents, Charity Commrs.* v. *Green*, 1896, 2 Ch. 811). The rule as to suing the freeholder does not apply when the land is situate out of England (*Whitaker* v. *Forbes*, 1 C. P. Div. 51). See as to the old law, *Webb* v. *Jiggs* (4 M. & S. 112).

Rents not in general issuable out of incorporeal hereditaments;

Rent cannot as a general rule issue out of an incorporeal hereditament, so as to warrant a distress, which can only be made in respect of a fixed ascertained rent reserved out of land (2 B. & Ad. 339). A rent cannot, strictly speaking, be reserved out of an advowson in gross, tithes, or any other *incorporeal* hereditament (Co. Litt. 47 a, 142 a; Gilb. on Rents, 20, 22; *Re Alms Corn Charity*, 1901, 2 Ch. 759). Nor can a rent be reserved out of a rent (2 Roll. Abr. 446; Keilw. 161); but part of a rent may be granted (2 Ves. sen. 178). Nor, at common law, can a rent be reserved by a subject out of a mere privilege or easement in land (*Buzzard* v. *Capel*, 8 B. & C. 141; *Re Gerard and Beecham*, 1894, 3 Ch. 315); but payment of money in respect of an easement may be secured by covenant (*Hastings* v. *N. E. Ry.*, 1898, 2 Ch. 674), and such a payment may sometimes be called rent (*A.-G.* v. *Emerson*, 1891, A. C. 659).

exceptions to the rule;

The king, however, may reserve a rent out of an incorporeal hereditament, as well as out of lands, because by his prerogative he may distrain for such rent on all the lands of his tenant (Co. Litt. 47 a; 2 Inst. 132; 5 Rep. 4; Gilb. on Rents, 22). And the grantee of fee-farm rents from the Crown might exercise the same power (*A.-G.* v. *Coventry*, 1 P. Wms. 306). And a subject may, by statute, reserve a rent out of an easement (*Re Gerard and Beecham*, 1894, 3 Ch. 315). A rent may be reserved upon a grant of an estate in remainder or reversion, for the remedy by distress will arise when the lessee comes into possession (Co. Litt. 47 a) for all the arrears (2 Roll. Abr. 446).

lease of tithes.

A lease by a bishop of *tithes only*, rendering the ancient rent, was held void against the successor, because there was no remedy for the rent by distress or assize (*Tanlintine* v. *Denton*, Cro. Jac. 111; *Windsor* v. *Gover*, 2 Wms. Saund. 230). But by stat. 5 Geo. 3, c. 17, all leases for one, two, or three lives, or for any term not exceeding twenty-one years, of any tithes, tolls, or other incorporeal hereditaments, without any lands by any bishop, college or hall, dean and chapter, precentor, prebendary, hospital, or any other person who is enabled by statute to make such leases of any *corporeal* hereditaments, are as effectual against the lessors and their successors as any leases of corporeal hereditaments are by virtue of 32 Hen. 8, c. 28, and an action of debt against the lessee is given for the recovery of such rent. It is perfectly clear that, in point of law, tithes, being an incorporeal hereditament, cannot pass by parol, but by deed only (*Gardiner* v. *Williamson*, 2 B. & Ad. 336).

Old limitation act as to rents.

By stat. 32 Hen. 8, c. 2, s. 4 (10 Car. 1, sess. 2, c. 6, Irish), no person should make any avowry or cognizance for any rent, suit, or service, and allege any seisin of any rent, suit, or service in the same avowry or cognizance, in the possession of his or their ancestors or predecessors, or in his own possession, or in the possession of any other whose estates he shall pretend or claim to have above fifty years next before the making of the said avowry or cognizance. This provision was held to apply only where it was necessary to allege seisin, and not where rent was expressly created by deed, the commencement whereof could be shown (Co. Litt. 115 a; 8 Rep. 64), or by act of parliament (*Faulkner* v. *Bellingham*, Cro. Car. 80), or by will (*Collins* v. *Goodall*, 2 Vern. 235); as to which there was no prescribed period of limitation, either at law or in equity (*Cupit* v. *Jackson*, M'Clel. 495; 13 Price, 721; see *White* v. *James*, 4 Jur. N. S. 1214; and *Stackhouse* v. *Barneton*, 10 Ves. 467; *Foster's case*, 8 Rep. 128; *De Beauvoir* v. *Owen*, 19 L. J. Exch. 182). So that arrears for any number of years might have been recovered unless there was evidence to raise a presump-

3 & 4 Will. 4, c. 27, s. 1.

"Rent."

tion of payment (10 Ves. 467). But mere length of time, short of fifty years, the period fixed by the stat. 32 Hen. 8, c. 2, and unaccompanied with other circumstances, was not of itself sufficient ground to presume a release or extinguishment of a quit rent (*Eldridge* v. *Knott*, Cowp. 214, cited 10 Ves. 467, 468).

Annuities:

(*i*) An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor (2 Bl. Comm. 40). The material distinction between an annuity and a rent is, that the former is a charge on the *personal* estate only, and the latter on the real (Co. Litt. 2 a; 114 b, 20 a).

charged on land.

An annuity charged upon land is by this clause included in the word "rent" as used in the act (*James* v. *Salter*, 3 Bing. N. C. 544). So is an annuity charged on both real and personal estate (*Dower* v. *Dower*, 15 L. R. Ir. 275; *Re Nugent*, 19 L. R. Ir. 140). Six years' arrears only of such an annuity can be recovered under sect. 42, in proceedings other than an action on a specialty (*Francis* v. *Grover*, 5 Hare, 39; *Re Nugent*, 19 L. R. Ir. 140). Where such an annuity was secured by specialty, twenty years' arrears could formerly be recovered under the Civil Procedure Act, 1833, s. 3, in an action on the specialty (*Strachan* v. *Thomas*, 12 Ad. & El. 536). See now R. P. Lim. Act, 1874, s. 8, p. 211, *post*. A gross sum of money charged upon land, to be paid by yearly instalments, and secured by power of distress, is within R. P. Lim. Act, 1833, ss. 40 and 42 (*Uppington* v. *Tarrant*, 12 Ir. C. L. R. 262).

Raising annuity by distress or sale.

It has been decided, that a distress may be taken for arrears of a rent-charge created by *will*, although the testator does not in terms give a power to distrain, such power being a consequence drawn by law from the rent-charge (*Rodham* v. *Berry*, Watk. Conv. by Cov. 243, n. (*a*)). So in the case of annuities charged on land by wills containing no power of distress, the annuitant can distrain under 4 Geo. 2, c. 28, s. 5 (*Buttery* v. *Robinson*, 3 Bing. 392; *Roper* v. *Roper*, 3 Ch. D. 720); and a receiver will not be appointed (*Sollory* v. *Leaver*, 9 Eq. 22); except, perhaps, where the rents are not sufficient, or the annuity has been long in arrear (*Kelsey* v. *Kelsey*, 17 Eq. 500). In the case of an annuity created since 1881, see Conv. Act, 1881, s. 44, *post*. As to raising arrears by sale, see *Re Tucker*, *T.* v. *T.*, 1893, 2 Ch. 323; *Hambro* v. *Hambro*, 1894, 2 Ch. 564; *Blackburne* v. *Hope Edwards*, 1901, 1 Ch. 419.

Annuities not charged on land.

An annuity given by will and not charged upon land is within the provision as to legacies in sect. 40 (*Ashwell's Will*, Johns. 112). Lord *St. Leonards* seems to have been of opinion that such an annuity would be extinguished if no payment were made for twenty years (R. P. Stat. 138, 2nd ed.). But it has been held that the annuity would not be extinguished by non-payment for the statutory period (*Dower* v. *Dower*, 15 L. R. Ir. 275; Darb. & Bos. Stat. Lim. 171, 182, 2nd ed.). Such an annuity has been decided not to be within sect. 42 (*Roch* v. *Callen*, 6 Hare, 531). If such an annuity be secured by bond or covenant, the non-payment of each instalment is a distinct breach, and time runs, under Civil Procedure Act, 1833, s. 3, against each as it becomes due (*Amott* v. *Holden*, 18 Q. B. 593).

Compositions.

(*k*) The "compositions" excepted from the definition of rent were compositions real (*per* Lord Selborne, *Irish Land Commission* v. *Grant*, 10 App. Cas. 31).

(4)

Person through whom another claims.

(*l*) As to the meaning and operation of the words "issue in tail" in this clause, see *Abergavenny* v. *Brace*, L. R. 7 Ex. 152, *post*, p. 124.

Appointee.

(*m*) Whether the word "appointee" (in the definition of person through whom another claims) includes the case where the power of appointment is not in substance created by the appointor himself, *quære* (*Re Devon Settled Estates*, 1896, 2 Ch. 572; where Chitty, J., draws a further distinction between a general power and a special power).

(*n*) An *escheat* was in its nature feodal. A feud was the right which the tenant had to enjoy lands, rendering to the lord the duties and services reserved to him by contract. After a grant made, a right remained in the lords, called a seigniory, consisting of services to be performed by the tenant, and a right to have the land returned on the expiration of the grant as a reversion, called an escheat (*Burgess* v. *Wheate*, 1 Eden, 191). **3 & 4 Will. 4, c. 27, s. 1.**

Escheat.

Escheat is founded on the principle that the blood of the person last seised *in fee* is by some means utterly extinct and gone; and since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence that the inheritance must fail (2 Inst. 64; Wright's Ten. 115). Escheat may happen from default of heirs, as where the tenant dies without any relations on the part of any of his ancestors, or where he dies without any relations on the part of those ancestors from whom the estate descended, or where, until the Inheritance Act, 1833, s. 9 (see *post*), he died without any relations of the whole blood. An escheat also arose from the corruption of the tenant's blood, consequent upon an attainder for treason or felony, by which he became incapable of inheriting, and of transmitting anything by heirship (see the Inheritance Act, 1833, s. 10, and note, *post*). On the subject of escheat, see 2 Bl. Comm. 241—257; Cruise's Dig. tit. XXX.; Harg. Co. Litt. 18 b, n. (2); *Henchman* v. *A.-G.* (2 Sim. & Stu. 498; 3 M. & K. 492); Intestates' Estates Act, 1884, s. 4; *Re Hartly*, 1899, P. 40; and the note to *A.-G.* v. *Sands*, Tudor, L. C. Conv., 4th ed. 211.

(*o*) The poor of a parish are a class of persons within the meaning of the word "person" in this section, in a case where the rents of property are applicable for the benefit of such poor (*Magdalen College* v. *A.-G.*, 6 H. L. C. 189). The Att.-Gen., whether suing *ex officio*, or at the relation of others, is not a "person" having a right to bring an action or suit in equity to recover land within the meaning of this act; he is only part of the machinery by which the rights of others are sought to be enforced (*Ib.*; see *A.-G.* v. *Magdalen College*, 18 Beav. 223; sect. 24, *post*). A statutory corporation was held to fall within the definition of "person" (*Jones* v. *Withers*, 74 L. T. 572). Where tenants holding leases under a parish vestry had occupied and enjoyed the soil of a lane for more than a century, it was held that the above statute vested the title in the churchwardens and overseers under 59 Geo. 3, c. 12, s. 17 (*Haigh* v. *West*, 1893, 2 Q. B. 19). (5)

Persons.

The king having the prerogative of not being included within the words "person or persons, bodies politic or corporate," used in an act of parliament, whether affirmatively or negatively (11 Rep. 68), is not bound in his public capacity by the general words of an act of parliament, unless named (7 Rep. 32; 11 Rep. 68; Plowd. 240; 1 Str. 516; 1 Show. 464; Show. P. C. 185; *Hall* v. *Maule*, 4 Ad. & Ell. 284; *R.* v. *Wright*, 1 Ad. & Ell. 434; *Re Cuckfield Board*, 19 Beav. 153, and the cases cited in the note thereto; *Re Bevan*, 14 W. R. 147; *Re Henley*, 9 Ch. Div. 481; see *Perry* v. *Eames*, 1891, 1 Ch. 668; *Re Pratt*, 55 L. T. 313; *Dacre* v. *Patrickson*, 1 Dr. & Sm. 191), except where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, when the king is bound, though not particularly named (Plowd. 136, 137; 11 Rep. 68 b; 5 Rep. 14; 7 Rep. 32; see Bac. Abr. Prerogative (E.)). But where a statute is general, and its effect would be to deprive the king of any prerogative, right, title, or interest, he is not bound unless specially named (11 Rep. 68), and was held not to be bound by the Statute of Limitations (Br. St. Lim. 67), or the statute of 13 Edward 1, st. 1, c. 5, which makes plenarty for six months a good plea in *quare impedit* (11 Rep. 68; Plowd. 244). It was said by Lord *Romilly* that the R. P. Lim. Act, 1833, does not affect suits by the Att.-Gen. to recover property belonging to the Crown (*A.-G.* v. (6)

Crown, when bound by acts of parliament.

3 & 4 Will. 4, c. 27, s. 1.

Magdalen Coll., 18 Beav. 246); and in *Rustomjee* v. *The Queen* (1 Q. B. D. 491, 492) it was said that the Crown cannot be bound by the Statute of Limitations, which has relation only to actions between subject and subject. In the same case the statute was held not to apply to a petition of right. The Crown comes expressly within 2 & 3 Will. 4, c. 100, for shortening the time required in claims of modus or discharge from tithes. The Crown is also expressly within sects. 1 and 2 of Prescription Act, 1832, *ante*, pp. 1, 4; but is not within sect. 3 (*Perry* v. *Eames*, 1891, 1 Ch. 658; *Wheaton* v. *Maple*, 1893, 3 Ch. 64); or sect. 1 of the Land Transfer Act, 1897 (*Re Hartley*, 1899, P. 40).

Statutes of limitation as to rights of Crown to realty.

21 Jac. 1, c. 2.

9 Geo. 3, c. 16.

Nullum Tempus Act.

By stat. 21 Jac. 1, c. 2, the king was disabled from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued sixty years before the then session of parliament, unless within that time there had been a possession under such title; but this provision becoming daily more ineffectual by lapse of time, a permanent limitation was introduced (see Co. Litt. 119 a, n. (1); 3 Inst. 188). And by the Crown Suits Act, 1769, it is provided that the king shall not sue, &c., any persons, &c., for any lands, &c. (except liberties and franchises) on any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *insuper* of record; and the subject shall quietly enjoy against the king, and all claiming under him, by patent, &c. This statute was extended to Ireland by 48 Geo. 3, c. 47, as to which, see *Tuthill* v. *Rogers*, 6 Ir. Eq. R. 429; 1 J. & Lat. 36. It applies to N. S. Wales (*A.-G. for N. S. Wales* v. *Love*, 1898, A. C. 679), where the provision as to rents being in charge is explained; and see 3 Inst. 189). In the case of tithes where none had been received, it was held, that the accounts of the auditors of the revenue, in which the tithes had been entered and returned *nil*, were sufficient proof that they had been "duly in charge" (*A.-G.* v. *Eardley*, 8 Price, 73).

24 & 25 Vict. c. 62.

By the Crown Suits Act, 1861, s. 1, the Crown shall not sue for real property (other than liberties or franchises) of which the profits have been taken by the space of sixty years, by reason only that the rents have been in charge to the Crown, or stood *insuper* upon record within the said space of sixty years. The Crown shall not be deemed to have been answered the rents of real property by reason only of the same real property having been parcel of any manor of which the rents shall have been answered to the Crown, or of any manor which shall have been duly in charge to the Crown or stood *insuper* of record (s. 3). See as to Ireland, Nullum Tempus (Ireland) Act, 1876; see *A.-G. British Honduras* v. *Bristowe*, 6 App. Cas. 143. These acts do not apply in case of a quit rent (*Re Maxwell*, 28 L. R. Ir. 356).

Adverse possession against the Crown.

Where an entire manor has been in charge to the Crown within sixty years, acts done in different parts of it by different persons, such as the erection and occupation of lime-kilns and cottages, and the sale of lime produced, do not displace the title of the Crown to the district, although continued for sixty years (*Doe* v. *Roberts*, 13 M. & W. 520).

The Crown Suits Act, 1769, does not give a title, it only takes away the right of suit of the Crown, or those claiming from the Crown, against such as have held an adverse possession against it for sixty years (*Goodtitle* v. *Baldwin*, 11 East, 495). Adverse possession of Crown lands for less than sixty years was not sufficient to support the plaintiff's title in an action of ejectment against a stranger (*Ib.*).

21 Jac. 1, c. 14.

Practice in Crown suits.

By stat. 21 Jac. 1, c. 14, s. 1, it was in effect provided that a person who had been in adverse possession of Crown lands for twenty years might, on information of intrusion, plead the general issue, and might retain possession until trial. Although the king can never be put out of possession in point of law by the wrongful entry of a subject, yet there may be an adverse possession *in fact* against the Crown. After such an adverse possession for twenty years, the Crown could only recover by information of intrusion, and ejectment would not lie at the suit of the grantee of the Crown (*Doe* v. *Morris*, 2 Bing. N. R. 189). See further as to

intrusion, 28 & 29 Vict. c. 104, s. 31 *et seq.*; 2 Chitty's Statutes, 4th ed. 619 *et seq.* **3 & 4 Will. 4, c. 27, s. 1.**

The title of the Crown may be tried in the information of intrusion itself, and need not be first found by inquest of office, the only effect of the statute 21 Jac. 1, c. 14, being to throw the *onus* of proving title in the first instance, in such a case, on the Crown (*A.-G.* v. *Parsons*, 2 M. & W. 23). As to inquests of office, see now 28 & 29 Vict. c. 104, s. 52. See, as to evidence in Crown suits, *Doe* v. *Roberts*, 13 M. & W. 520.

Chose in action vested in the Crown.

Although the Statute of Limitations does not bind the Crown, yet where the claim of the Crown is only a derivative right, it must stand in the same situation as its principal. Therefore, the statute may be pleaded to a *scire facias* issued by the Crown against the drawer of a bill of exchange, which was barred in the hands of the Crown debtor (*R.* v. *Morrall*, 6 Price, 24). But where a right has vested in the Crown before the statute has run against the former owner, the rights of the Crown are not barred or affected by the statute, as the Crown is not within its operation (*Lambert* v. *Tayler*, 4 B. & C. 138). See *Tayler* v. *A.-G.*, 10 Sim. 413, as to course of proceeding by a subject to enforce a claim of property against the Crown; see also *Re Robson*, 2 Phil. 64; *Re De Bode*, *Ib.* 85. And as to petitions of right and the orders thereon, see Petition of Right Act, 1860; Seton, 6th ed. 397.

With respect to the personal estate of a deceased, proceedings on the part of the Crown cannot now be instituted, nor can a petition of right be presented, except within the same time, and subject to the same rules of law and equity, as in the case of an action by or against a subject (Intestates' Estates Act, 1884, s. 3).

Claim of Crown to duties.

Under the Customs Act, 1889, ss. 12 and 14, the claim of the Crown to legacy and succession duty in specified cases cannot be enforced after specified periods. These sections have been made applicable to estate duty by the Finance Act, 1894, s. 8 (2).

Statutes of Limitation as to rights of Duke of Cornwall.

The Statutes of Limitation which affect the rights of the Duke of Cornwall are 7 & 8 Vict. c. 105, ss. 71—88; 23 & 24 Vict. c. 53; and Crown Suits Act, 1861; as to which, see Darb. & Bos. Stat. Lim. 523, 2nd ed.; Brown's Law of Limitation, 251, 415.

Presumption of grants from the Crown.

But though the Crown was not bound by the Statute of Limitations, yet a grant from it may be presumed from great length of possession, not because the court really thinks a grant has been made, but it presumes the fact for the purpose and from a principle of quieting the possession (*Hull* v. *Horner*, Cowp. 102, 215). Thus grants from the Crown of markets and the like, after an uninterrupted enjoyment of twenty years have been presumed (*Goodtitle* v. *Baldwin*, 11 East, 490; *Holcroft* v. *Heel*, 1 Bos. & Pull. 400; *Campbell* v. *Wilson*, 3 East, 294). So a grant by the Crown of a several fishery in tidal waters was presumed (*Goodman* v. *Saltash*, 7 App. Cas. 633), and of a manor (*Merttens* v. *Hill*, 1901, 1 Ch. 851); and see *A.-G.* v. *Wright*, 1897, 2 Q. B. 318. So an enfranchisement of a copyhold may be presumed against the Crown (*Roe* v. *Ireland*, 11 East, 280). So where the title of a family to an advowson was evidenced by deeds for nearly 140 years, and there had been three presentations by them and none by the Crown, a grant from the Crown might be presumed (*Gibson* v. *Clark*, 1 Jac. & W. 159; see 3 T. R. 158). Letters patent from the Crown have been presumed (*Picking* v. *Stamford*, 2 Ves. jun. 282). A grant from the Crown of undefined shares in land will not be held void for uncertainty after long modern possession, for a supplementary grant may be presumed (*Des Barres* v. *Shey*, 29 L. T. 592). Enjoyment of property for 110 years by a parish, although no conveyance appeared in evidence, was held conclusive proof of ownership against the Crown (*A.-G.* v. *Hotham*, 1 T. & R. 210; see *Haigh* v. *West*, 1893, 2 Q. B. 19). An objection to a title that two fee-farm rents, created by letters patent by James I., were not shown to have been extinguished, was overruled, it being proved that no claim had been made by the Crown of the rent from the year 1706, and no proof of any previous claim (*Simpson* v. *Gutteridge*, 1 Madd. 609; see *Flower* v.

3 & 4 Will. 4, c. 27, s. 1.

Hartopp, 12 L. J. Ch. 507). A lost surrender to the Crown of one of two differing charters was presumed in *A.-G.* v. *Simpson*, 1901, 2 Ch. 716. In a case where Charles I. had granted the soil between high and low-water marks, but the Crown remained in possession for 150 years after the grant, this created a presumption against the grant (*Parmeter* v. *A.-G.*, 1 Dow, 316). A grant from the Crown will not be presumed where it would have been against a statutory provision of a public nature (*Goodtitle* v. *Baldwin*, 11 East, 495). Nor where the enjoyment has been, not against the Crown itself, but against a lessee from the Crown (*Wheaton* v. *Maple*, 1893, 3 Ch. 62; see *Ib.* 56 as to modern enjoyment against the Crown).

Presumption of inrolments and registration.

Where port duties are claimed under a grant from the Crown, which appears from the evidence to be inrolled, but which is not produced, the jury ought not to be directed to presume such grant upon mere evidence of usage (*Brune* v. *Thompson*, 4 Q. B. 543; as to the presumption that a claim for port duties had a legal origin, see *Foreman* v. *Whitstable*, L. R. 4 H. L. 266, and cases there cited). There seems to be no instance of presuming inrolment of a deed which was made essential by statute (*Doe* v. *Waterton*, 3 B. & Ald. 149, 151; *Wright* v. *Smythies*, 10 East, 409). It might be otherwise if some foundation were laid for raising a presumption by showing that there was a chasm in the records corresponding with the date of the supposed conveyance (*Allen* v. *Walker*, 1 Jac. & W. 619). The registry of a deed of lands in a register county will not be presumed (*Doe* v. *Hirst*, 11 Price, 475). But where the usage of paying tithe was shown, an inrolment of a decree directing such payment was presumed (*Macdougall* v. *Purrier*, 4 Bligh, N. S. 433; see *A.-G.* v. *Moor*, 20 Beav. 119; *Haigh* v. *West*, 1893, 2 Q. B. 31).

Presumption of an act of parliament.

After long possession the court will even presume an act of parliament in order to protect a right (*A.-G.* v. *Ewelme Hospital*, 17 Beav. 366), but not the passing of an act of parliament within the last 250 years, on an important subject of the most general interest, of which no vestige can be found (*R.* v. *Exeter*, 12 Ad. & Ell. 532, 533). *Jessel*, M. R., refused to presume an act of parliament as an origin for an alleged right (*Chilton* v. *London*, 7 Ch. D. 735). See *Neaverson* v. *Peterborough Council*, 1902, 1 Ch. 574.

2. *Period of Limitation fixed, and when Right first accrues.*

No land or rent to be recovered, but within twenty years after the right of action accrued to the claimant, or some person whose estate he claims.

2. After the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

(1) *Effect of sect.* 2...123.

(2) *Old law and adverse possession*...124.

(3) *Nature of possession necessary to give title under sect.* 2...127.

37 & 38 Vict. c. 57.

From the 1st January, 1879, sect. 1 of R. P. Lim. Act, 1874 (*post*, p. 184), has, by sect. 9 of the same act, been substituted for sect. 2 of R. P. Lim. Act, 1833. Sect. 1 of R. P. Lim. Act, 1874, fixes the period of limitation for the recovery of land or rent at twelve years, and also expressly includes "suits," but is in other respects similar to sect. 2 of

R. P. Lim. Act, 1833. The following note has reference to the last-mentioned section. **3 & 4 Will. 4, c. 27, s. 2.**

(1) Effect of sect 2.

Where the claim is to the possession of land, the real right is the right of entry, and the right of action is only given to enforce the right of entry (*Magdalen Hospital* v. *Knotts*, 8 Ch. Div. 727). By this section the right of entry is taken away unless an entry be made within the statutory period computed from the right first accruing (*Holmes* v. *Newlands*, 11 Ad. & El. 44; 8 Q. B. 679).

This section governs cases which fall within its general words, even though not included among the instances given in sect. 3 (*James* v. *Salter*, 3 Bing. N. C. 553; *Pugh* v. *Heath*, 7 App. Cas. 235). A testator charged an annuity on land, with a power of distress. The testator died in 1804, and in 1835 the defendants distrained for twenty nine years' arrears, the right to make a distress having first accrued in April, 1805. The claim was held barred. *Tindal*, C. J., said "that the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon a more close examination of the third section, the object and intent of it seems to us to be no more than this: to explain and give a construction to the enactment contained in the second clause, as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second" (*James* v. *Salter*, 3 Bing. N. C. 553; approved, *Irish Land Commission* v. *Grant*, 10 App. Cas. 27; see *Magdalen Hospital* v. *Knotts*, 8 Ch. Div. 727). This section governs cases not included among instances in sect. 3. *James* v. *Salter*.

Where a lessee entered under a lease granted by a charitable corporation in 1783, which was held to have been void, and an action was brought in 1876 claiming possession of the demised land, it was held that the lessees must be taken to have been in possession from 1783 without any title whatever, and that the rights of the corporation were barred by this section (*Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; see *Webster* v. *Southey*, 36 Ch. D. 9). In the courts below, the same lease was treated as voidable only; and it was held by the Court of Appeal that the period of limitation ran from the granting of the lease (8 Ch. Div. 709). Landlord and tenant; void lease;

A person must have an effective right to make entry and recover possession in order that the statute may commence to run against him (*Warren* v. *Murray*, 1894, 2 Q. B. 658). An intended lessor had not such a right where the intended lessee entered under an agreement for a lease and occupied under such circumstances that specific performance would have been decreed (*Ib.*). valid lease.

Where a lessor permitted his lessee during the continuance of the lease to pay no rent for the statutory period, time ran against the lessor's right to recover the land from the determination of the lease, his right of action accruing under the fourth branch of the third section (*Doe* v. *Oxenham*, 7 M. & W. 131). Where a lease was renewed, the landlord's estate became an estate in possession, and his right of action to recover the land accrued (*Eccl. Commrs.* v. *Rowe*, 5 App. Cas. 741). *Secus*, where a valid underlease was subsisting at the time of the renewal (*Eccl. Commrs.* v. *Treemer*, 1893, 1 Ch. 166). See as to encroachments by a tenant, *post*, p. 128.

Further, as regards the landlord's right to recover rent, it has been laid down that the right to recover proper arrears is not barred by non-payment for however long a time, so long as the relation of landlord and tenant under a lease in writing subsists as a legal relation (*Archbold* v. *Scully*, 9 H. L. C. 360; *Grant* v. *Ellis*, 9 M. & W. 113; *Re Turner*, 11 Ir. Ch. R. N. S. 304; *Irish Land Commission* v. *Grant*, 10 App. Cas. 26). But where a tenant from year to year holds for twelve years without paying rent the landlord loses not only the land, but also any right to recover past rent (*Re Jolly*; *Gathercole* v. *Norfolk*, 1900, 2 Ch. 616).

3 & 4 Will. 4, c. 27, s. 2.

Rent within this section.

The word "rent" in the second section of the act does not include rents reserved on leases for years, but is confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rents service, fee-farm rents, or the like (*Grant* v. *Ellis*, 9 M. & W. 113; *Irish Land Commission* v. *Grant*, 10 App. Cas. 26; *Jones* v. *Withers*, 74 L. T. 572; but see *Skene* v. *Cook*, 1901, 2 K. B. 14; 1902, 1 K. B. 682; where the word was held to include a periodical payment charged by statute on land and being distinct from the land though not itself real property). The word is used to express rents which are a charge on land (*Paget* v. *Foley*, 2 Bing. N. C. 688; see 1 Real Prop. Report, 50). An additional rent payable by a tenant in the nature of a penal rent was not within the section (*Daly* v. *Bloomfield*, 5 Ir. L. R. 65).

The various cases in which the provisions of this section as to rent (as interpreted by sect. 1) have been held to apply are given *ante*, p. 113. As to the use of the word "rent" in the statute generally, see *ante*, p. 113, and *post*, p. 145.

Tenant in tail.

The first section interpreting the person through whom another person is said to claim as meaning any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed "as issue in tail," an ordinary tenant in tail would by virtue of the first and second sections lose his right after want of possession for the statutory period in the time of his ancestor (*Abergavenny* v. *Brace*, L. R. 7 Ex. 152, 172). But a statutory entail (as that of the Abergavenny estates) is not within these words (*Ib.* 155, 172).

Copyholds.

An action by a lord of a manor to enforce his right to seize *quousque* is within this section (*Eccl. Commrs.* v. *Parr*, 1894, 2 Q. B. 420; *Re Lidiard*, 42 Ch. D. 254; *Beighton* v. *Beighton*, 64 L. J. Ch. 796). So also a suit by a copyhold tenant to compel admittance by the lord (*Walters* v. *Webb*, 5 Ch. 531). The lord's right to enter for forfeiture is within sects. 3 and 4 (see note to sect. 4, *post*, p. 134). As to copyholds generally, adverse possession for forty years of waste, which had been enclosed under a licence from the lord, was held to confer a freehold, not a copyhold title (*A.-G.* v. *Tomline*, 15 Ch. Div. 150). Copyhold fines are dealt with by the Civil Procedure Act, 1833, sect. 3 (see *Monckton* v. *Payne*, 1899, 2 Q. B. 603).

Other actions within this section.

An action for assignment of dower is within sect. 2 (*Marshall* v. *Smith*, 5 Giff. 37). A foreclosure action is an action to recover land within this section (*Harlock* v. *Ashberry*, 19 Ch. Div. 539; *Hugill* v. *Wilkinson*, 38 Ch. D. 480). A mortgagee's petition to recover arrears of interest out of a fund in court, representing the mortgaged property, was held analogous to a suit to recover land (*Re Stead*, 2 Ch. D. 713, 718).

(2)

Old law.

32 Hen. 8, c. 2.

By the common law there was no stated or fixed period within which it was necessary to commence actions, but afterwards certain remarkable events were from time to time selected for that purpose, as the return of King John from Ireland, and the coronation of Henry the Third. A certain period was limited by stat. 32 Hen. 8, c. 2, which enacted that no person should maintain any writ of right, or make any prescription, title or claim of, to or for any *manors*, *lands*, *tenements*, *rents*, *annuities*, *commons*, *pensions*, *portions*, *corodies*, or *other hereditaments* of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but within sixty years next before the teste of the said writ, or next before the said prescription, title or claim so made. Actions upon the *possession* of the ancestor of the party claiming were limited to fifty years; and those upon the seisin or possession of the party himself to thirty years; and formedons in remainder or reverter were required to be sued within fifty years. The writ of intrusion came within the stat. 32 Hen. 8, c. 2, and not within the Limitation Act, 1623, and the limitation of time for suing out such writ was fifty years (see *Peircey* v. *Gardner*, 3 Bing. N. C. 748). Dignities were held not to be within the Statute of Limitations (in the barony of Willoughby of Paiham, Lords' Journ. vol. 31, p. 350; see 3 Cru. Dig. 202).

But offices with fees and profits are within them (Lords' Journ. vol. 36, p. 295). An annuity was not within the stat. 32 Hen. 8, c. 2, for the plaintiff did not declare upon a seisin, but upon his grant (Bro. St. Lim. 26; see *ante*, p. 117). So that statute did not extend to a corporation aggregate, as mayor and commonalty, nor to a dean and chapter. But it was otherwise as to a corporation sole; for if a bishop or other sole corporation sued upon a seisin of his predecessor, he was barred if the seisin was not within sixty years (Bro. St. Lim. 33; Bac. Abr. Limitation of Actions (B)). **3 & 4 Will. 4, c. 27, s. 2.**

The Limitation Act, 1623, sects. 1 and 2 (repealed by 26 & 27 Vict. c. 125), limited the period for all writs of formedon to twenty years, and enacted that no persons should make any entry into any lands, tenements, or hereditaments, but within twenty years next after his title should *first descend* or accrue to the same. [The provisions of the statutes 32 Hen. 8, c. 2, and the Lim. Act, 1623, were extended to Ireland by the Irish stat. 10 Car. 1, sess. 2, c. 6.] In the case of the rights of persons entitled in possession the period of twenty years was computed from the time when the *wrongdoer* acquired possession *adversely* to the owner; and in many cases it was very difficult to ascertain what would constitute such possession. **Limitation of right of entry. 21 Jac. 1, c. 16.**

As to the rights of issues in tail under the Lim. Act, 1623, see *Tolson* v. *Kaye*, 3 Brod. & B. 217; 3 B. & A. 738; 6 M. & G. 536; *Doe* v. *Woodroffe*, 16 M. & W. 769.

By stat. 4 Hen. 7, c. 24, a fine with proclamations was made a bar to all persons if they did not claim within five years after the proclamations made, or after their rights of entry accrued, or after the removal of their disabilities (see *Davies* v. *Lowndes*, 5 Bing. N. C. 177, 178; *Runcorn* v. *Doe*, 5 B. & C. 701; *Doe* v. *Perkins*, 3 M. & S. 271; *Doe* v. *Gregory*, 2 Ad. & Ell. 14). For the case of married women, see *Doe* v. *Pett*, 11 Ad. & Ell. 853; *Doe* v. *Plumtre*, 3 B. & Ald. 474. It seems that the adverse possession necessary to make a fine with proclamations operate by way of bar, was the same as the adverse possession necessary for the purpose of barring a right of entry (note to *Nepean* v. *Doe*, 2 Smith's L. C., 10th ed. 636). **Non-claim on fines. 4 Hen. 7, c. 24.**

To constitute adverse possession, it was formerly considered necessary that there should be an ouster of the seisin in one of five modes, called disseisin, abatement, intrusion, discontinuance, and deforcement. Disseisin is where the person in possession of the freehold is evicted. Abatement is where a wrongdoer enters on the vacant possession, after the death of the owner, instead of the heir or devisee. Intrusion is where a wrongdoer enters on the vacant possession, after the death of the tenant for life, instead of the remainderman or reversioner. Discontinuance was where a tenant in tail in *possession* aliened by a tortious conveyance, as feoffment or fine, which did not bar the entail. Deforcement was considered to include the other four terms, and any holding over after the determination of an estate, or other wrongful withholding of the freehold from the right owner (see 1 Real Prop. Rep. 494; 3 Bl. Comm. 167—173). **Adverse possession necessary under above statutes.**

When a party entered by colour of a *void* grant, he was a *disseisor* (*Buckler's case*, 2 Rep. 55 b; Cro. Eliz. 451; Cro. Car. 306, 388; Litt. Rep. 298, 373; Cro. Jac. 660; 1 Jones, 316). But where a grant was according to the rules of law, but required to be perfected by a subsequent ceremony, as if a feoffee entered before livery of seisin, he was not a disseisor (2 Rep. 55). Wherever there was a disseisin, the possession of the disseisor was considered *adverse*, and the party was bound to pursue his remedy within twenty years from the act constituting the disseisin (Butl. Co. Litt. 330 b, n.). There might be an unlawful possession which did not amount to a disseisin (*Doe* v. *Gregory*, 2 Ad. & Ell. 14; 4 Nev. & M. 308; see 2 M. & W. 904). As to disseisin, see *Taylor* v. *Horde*, 1 Burr. 108; *Doe* v. *Lynes*, 3 B. & C. 388; *Williams* v. *Thomas*, 12 East, 141; Roscoe on Real Actions, 61—63; 2 Prest. on Abst. 284 *et seq.* **Disseisin.**

At the time of the enactment of R. P. Lim. Act, 1833, it seems that the question whether possession was or was not adverse, was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant (note to *Nepean* **Question of adverse possession**

3 & 4 Will. 4, c. 27, s. 2.

v. *Doe*, 2 Smith's L. C., 10th ed. 635; and see the judgment of the Privy Council in *Des Barres* v. *Shey*, 22 W. R. 273, an appeal from Nova Scotia).

before 3 & 4 Will. 4, c. 27.

The possession of a lessee could not be adverse (1 Wils. 176; 3 Wils. 521; 2 Bos. & P. 542; 2 D. & R. 38), until the end of the tenancy (Cowp. 218). So in the case of a husband of a tenant for life holding on after her death (*Doe* v. *Gregory*, 4 Nev. & M. 308; see *Doe* v. *Blakeway*, 5 C. & P. 563). Joint possession with the real owner was held not adverse (*Reading* v. *Rawsterne*, 2 Ld. Raym. 829; 1 Salk. 242).

Possession was not adverse in some cases if there was a possible explanation consistent with the plaintiff's title; as when possession might have been, under a custom, for a husband to hold for life his deceased wife's copyhold (*Doe* v. *Brightwen*, 10 East, 583); or might have been in respect of dower (*Doe* v. *Haslewood*, 6 Ad. & Ell. 167; see *Doe* v. *Pettet*, 5 B. & Ald. 223; *Doe* v. *Harbrow*, 1 Ad. & Ell. 67, n.; *Doe* v. *Langfield*, 16 M. & W. 497); or might have been under an agreement for partition by deed, which was never executed (*Doe* v. *Millett*, 11 Q. B. 1036). Where a person held land which was intended to be, but was not in fact, conveyed to him on certain trusts, his possession was not adverse while it was in accordance with the trusts (*Doe* v. *Hulse*, 3 B. & C. 757). But where copyhold lands had been granted to A. for the lives of herself and B., and in reversion to C. for other lives, and A. died, having devised to B., who entered and kept possession for more than twenty years, it was held that C. was barred by the statute after B.'s death from maintaining ejectment, as C.'s right of possession accrued on the death of A., when his interest terminated, inasmuch as there could be no general occupant of copyhold land (*Doe* v. *Scott*, 4 B. & C. 706). Possession by a woman was held adverse to her brother, who was entitled as heir (*Doe* v. *Lawley*, 13 Q. B. 954). So possession by the mother of the heir was adverse unless it was by his permission (*Doe* v. *Jauncey*, 8 C. & P. 99). Where a party was let into possession with the consent of the owner, and did acts importing that he continued in possession only with the owner's permission, such acts prevented the possession being adverse (see Litt. s. 70). So where a person was let into possession under a contract for purchase, and paid interest on a portion of the purchase-money for some years, but never completed the purchase, it was held that his possession was not adverse (*Doe* v. *Edgar*, 2 Bing. N. C. 498). A woman, living apart from her husband, obtained a demise of property for a term: it was held that possession, if adverse to the wife, was adverse to the husband, and not otherwise (*Roe* v. *Wilkins*, 4 Ad. & Ell. 86). The solitary act of entry and attornment, followed by no assertion of right for upwards of thirty years, was no evidence of a possession not being adverse (*Doe* v. *Edwards*, 5 Ad. & Ell. 95).

Adverse possession before 3 & 4 Will. 4, c. 27, in the case of encroachments from waste.

The Limitation Act, 1623, ran against the lord of a manor as well as against any other person. Hence it was said if a house, &c. be built upon the waste, the lord shall take care to have some entry made of it in his books, and reserve some rent or service, otherwise he will lose his right. If a cottage was built upon waste in defiance of a lord of a manor, and quiet possession had been had of it for twenty years, it was within the Lim. Act, 1623; but if it were built at first by the lord's permission, or any acknowledgment had been since made (though it were 100 years since), that statute would not run against the lord (*Doe* v. *Wilkinson*, 3 B. & C. 414; *Doe* v. *Clarke*, 8 B. & C. 717; *R.* v. *Cuddington*, 2 New Sess. C. 10; 14 L. J., M. C. 182; *R.* v. *Woburn*, 10 B. & C. 846). A mere licensee is in this respect on the same footing as a tenant (*Doe* v. *Baytup*, 3 Ad. & Ell. 188). As to licence for an encroachment on a common given by a commoner, see *Harvey* v. *Reynolds*, 1 C. & P. 141; or by the lord, see *Doe* v. *Williams*, 7 C. & P. 332; *Doe* v. *Wilson*, 11 East, 56; *Doe* v. *Heakin*, 6 Ad. & Ell. 495).

Possessory title before 3 & 4 Will. 4, c. 27.

Before R. P. Lim. Act, 1833, if no other title appeared, possession for twenty years was strong presumptive evidence of a fee (*Doe* v. *Barnard*, Cowp. 595): and though gained by manifest wrong, and though liable to be defeated by the entry of the rightful owner, was a title as against strangers (*Doe* v. *Webber*, 1 Ad. & Ell. 119; *Doe* v. *Parke*, 4 Ad. & Ell. 816); and conferred on the possessor, on ouster or trespass by a stranger, the

ordinary remedies for such injuries (see 3 Man. & Ry. 112, n.). Where a plaintiff in ejectment proved twenty years' possession immediately preceding possession for ten years by defendant, the former was entitled to recover, his earlier possession prevailing (*Doe* v. *Cooke*, 7 Bing. 346; see *Stokes* v. *Berry*, 2 Salk. 421). Possession of land for any term less than twenty years by a feoffee was not presumptive evidence of livery of seisin (*Doe* v. *Cleveland*, 9 B. & C. 864; *Doe* v. *Davies*, 2 M. & W. 503).

3 & 4 Will. 4, c. 27, s. 2.

(3) Nature of possession requisite under 3 & 4 Will. 4, c. 27, s. 2.

Shortly after the passing of the R. P. Lim. Act, 1833, the change in the law was thus described by Lord *St. Leonards*: "It is perfectly settled that adverse possession is no longer necessary in the sense in which it was formerly used, but that mere possession may be and is sufficient under many circumstances to give a title adversely; and although perhaps now no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before this act was passed" (*Ely* v. *Bliss*, 2 D. M. & G. 476, 477; see *Culley* v. *Doe*, 11 Ad. & Ell. 1008; *Nepean* v. *Doe*, 2 M. & W. 911; *Doe* v. *Barton*, 3 P. & Dav. 198; *Jack* v. *Walsh*, 4 Ir. L. R. 254). It has been said that under the present statute all possession is adverse. Thus at the end of the statutory period the possession of a tenant from year to year who pays no rent becomes adverse during the whole time. The landlord retains no right to recover any rent (*Re Jolly*, *Gathercole* v. *Norfolk*, 1900, 2 Ch. 619).

Some of the principles, however, laid down in the old cases on adverse possession have been acted on in recent cases (see *Scott* v. *Scott*, 4 H. L. C. 1085). Thus, in *Thomas* v. *Thomas* (2 K. & J. 83), where a father, entering on the estate of his infant children, was held to have been in possession as a bailiff for them, *Wood*, V.-C., applied and acted on the principle (*Doe* v. *Brightwen*, 10 East, 583) that possession is never considered adverse if it can be referred to a lawful title (see *Wall* v. *Stanwick*, 34 Ch. D. 763; *Hobbs* v. *Wade*, 36 Ch. D. 553; *Bolling* v. *Hobday*, 31 W. R. 9). Where a purchaser entered into possession of land, an undivided share in which was vested in a trustee for an infant, who did not join in the conveyance, the purchaser, having notice of the infant's rights, was treated as a bailiff for the infant, and was not allowed to plead the statute (*Young* v. *Harris*, 65 L. T. 45; see *Quinton* v. *Frith*, 2 Ir. Eq. 396; *Allen* v. *Sayer*, 2 Vernon, 368). In *Pelly* v. *Bascombe* (4 Giff. 394), *Stuart*, V.-C., said: "One effect of the statute 3 & 4 Will. 4, c. 27, is materially to alter the law as to what is called adverse possession. The present state of the law is as follows:—The fact of a person receiving the rents of a property raises a presumption that he receives them in the character of owner; but this presumption may be rebutted by express evidence to the contrary; by evidence affecting the person who has entered into possession, or by evidence of the mode in which he has dealt with the rents." Accordingly, where a father seised of land made a will invalid as to real estate whereby he appointed his brother, to whom he was indebted, executor, and died leaving two infant daughters, and the uncle entered upon the real estate and kept down the interest on a mortgage, and laid out sums on improvements, his possession was not adverse to his nieces (*Ib.*; affirmed on appeal, 13 W. R. 306). As to a person entering on an infant's estate being a bailiff for him, see *Crowther* v. *Crowther*, 23 Beav. 305; *Howard* v. *Shrewsbury*, 17 Eq. 398; even after the infant has attained his majority, *Tinker* v. *Rodwell*, 69 L. T. 591. See, further, the note on account of rents in equity, *post*, p. 205.

Possession obtained by a person as trustee cannot be set up as adverse to the *cestui que trust* (*Stone* v. *Godfrey*, 5 D. M. & G. 76). Before the R. P. Lim. Act, 1833, the possession of a *cestui que trust* was not at law adverse to the title of the trustee (*Smith* v. *King*, 16 East, 283); and the same has been held since the act (*Drummond* v. *Sant*, L. R. 6 Q. B. 763; see *Warren* v. *Murray*, 1894, 2 Q. B. 648). It was said that in the case of a mortgagee the doctrine of adverse possession had been revived by the R. P. Lim. Act, 1837 (*Doe* v. *Eyre*, 17 Q. B. 366). The occupation of a school by a schoolmaster for more than the statutory period did not give him an adverse right against the owner; for his occupation was the occupation of the owner, he being in the situation of a servant (*Moore* v.

3 & 4 Will. 4, c. 27, s. 2.

Doherty, 5 Ir. L. R. 449; see *Ellis* v. *Crawford*, 5 Ir. L. R. 404; *Montmorency* v. *Walsh*, 4 Ir. L. R. 254; *Gibson* v. *Wise*, 35 W. R. 409). Charitable trustees, however, acquired title by possession under a void grant, although one of their number was the person entitled to dispute the grant (*Churcher* v. *Martin*, 42 Ch. D. 312; see *Re Lacy*, 1899, 2 Ch. 149). As to the result where possession of leaseholds was taken by the next-of-kin of a deceased leaseholder, see *M'Cormack* v. *Courtney*, 1895, 2 Ir. 97; *Rankin* v. *McMurtry*, 24 L. R. Ir. 297; *Coyle* v. *McFadden*, 1901, 1 Ir. R. 298; by his representative, *Reed* v. *Fenn*, 35 L. J. Ch. 464; *Re Lacy, Royal Association* v. *Kydd*, 1899, 2 Ch. 149; and by a stranger, *Tichborne* v. *Weir*, 67 L. T. 735. See further the note as to possession, p. 131, *post*.

Where a husband was in possession of land which really belonged to his wife but was erroneously supposed to belong to the heir of a deceased person, and he accounted for the rents to such heir, the possession was held to be the possession of the heir (*Hounsell* v. *Dunning*, 1902, 1 Ch. 512).

Receipt of rents by agent.

A principal may acquire a possessory title to real estate by receiving the rents through an agent, although that agent is the person really entitled to the estate (*Williams* v. *Pott*, 12 Eq. 149). And see as to receipt of rents by an agent, *Smith* v. *Bennett*, 30 L. T. 100. An owner in fee who had received rents through an agent died intestate. The agent, who continued to receive the rents, was held to act on behalf of the heir (*Lyell* v. *Kennedy*, 14 App. Cas. 437). Where a solicitor received the rents of a mortgaged property, his possession was that of the client, and time did not run against the client (*Ward* v. *Carttar*, 1 Eq. 29).

Encroachments by tenant on landlord's adjoining estate.

According to the law both before and since the R. P. Lim. Act, 1833, it is settled that if a tenant makes an encroachment adjoining to the land he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly, from some act done at the time, that the tenant intended to make the encroachment for his own benefit (*Doe* v. *Rees*, 6 C. & P. 610); the same rule prevails where the encroachment is at a distance. Even though at the time of making the encroachment there is nothing to rebut this presumption, circumstances may afterwards occur by which it may be severed from the farm; for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord (*per Parke*, B., *Kingsmill* v. *Millard*, 11 Exch. 318, 319; see, further, *Lisburne* v. *Davies*, L. R. 1 C. P. 259; and *Whitmore* v. *Humphries*, L. R. 7 C. P. 1). Such presumption may be rebutted by the special circumstances of the case (*Berney* v. *Bickmore*, 8 L. T. 353). The presumption was held to prevail where the landlord was not lord of the waste (*Doe* v. *Jones*, 15 M. & W. 580), and was not rebutted by the fact that the encroachment was separated from the tenant's holding by a road (*Andrews* v. *Hailes*, 2 Ell. & Bl. 349). See, further, *Doe* v. *Davies*, 1 Esp. 461; *Brian* v. *Winwood*, 1 Taunt. 208; *Doe* v. *Morris*, 2 Bing. N. C. 189; *Doe* v. *Williams*, 7 C. & P. 332; *Doe* v. *Murrell*, 8 C. & P. 134; and the cases quoted *ante*, pp. 45, 126. Where a tenant occupied adjoining land belonging to his landlord for twelve years, he was entitled to retain it as part of the holding during the remainder of the term (*Tabor* v. *Godfrey*, 64 L. J. Q. B. 245).

The landlord of A. and B., adjacent closes, demised A. The tenant of A. built upon B. without leave of the landlord, who, on permission being asked, refused it. The tenant having occupied both A. and B. for twenty years, paying rent to the landlord under the demise of A., but not expressly in respect of B., was held entitled to insist, as against the landlord, on a twenty years' occupation of B. within the R. P. Lim. Act, 1833, ss. 2 and 3 (*Doe* v. *Massey*, 17 Q. B. 373). One who occupies as his own land belonging to another, and afterwards becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire as against his landlord a possessory title to the land first occupied (*Dixon* v. *Baty*, L. R. 1 Ex. 259).

Tenant for life when estopped from disputing his grant or devise.

Where A., who has no title, purports by deed to grant land to B. for life with remainder over, and B. enters under the deed, and afterwards acquires title by possession against the true owner, B. and his privies are estopped as against the remainderman from disputing the validity of the deed (*Dalton* v. *Fitzgerald*, 1897, 2 Ch. 86). The same principle applies

3 & 4 Will. 4, c. 27, s. 2.

where B. enters under a devise by a testator who had a defective title (*Board* v. *Board*, L. R. 9 Q. B. 48; *Hawksbee* v. *Hawksbee*, 11 Hare 230; compare *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Yem* v. *Edwards*, 1 De G. & J. 598; *Molony* v. *Molony*, 1894, 2 I. R. 1).

The Courts have refused to apply estoppel to the cases where B. entered under a devise which was invalid (*Re Stringer*, 6 Ch. D. 10); or which did not comprise the particular land (*Paine* v. *Jones*, 18 Eq. 320; *contra*, *Anstee* v. *Nelms*, 1 H. & N. 225; 26 L. J. Ex. 5; *Kernaghan* v. *M'Nally*, 12 Ir. Ch. Rep. 89). The last case was considered inconsistent with *Scott* v. *Nixon* (3 Dr. & W. 388) by the C. A. in *Dalton* v. *Fitzgerald*, *sup.*; where see also remarks on *Paine* v. *Jones*, *sup.*

Rights of claimant to take possession.

Every claimant who has such a right of possession as would entitle him to maintain ejectment against a wrongdoer is still competent to take possession, of his own authority, if he can do so without committing a breach of the peace (*Taylor* v. *Cole*, 3 T. R. 292; *Taunton* v. *Costar*, 7 T. R. 431; *R.* v. *Wilson*, 8 T. R. 357; *Rogers* v. *Pitcher*, 6 Taunt. 202; *Turner* v. *Meymott*, 1 Bing. 158; Co. Litt. 245 b; 1 M. & R. 221, n. (*c*); 5 Nev. & M. 164; *R.* v. *Newlands*, 4 Jurist, 322; *Perry* v. *Fitzhowe*, 8 Q. B. 757); but he cannot turn out the wrongdoer with violence (*Edwick* v. *Hawkes*, 18 Ch. D. 199). As to damages in case of a forcible entry by the rightful owner, see *Beddall* v. *Maitland*, 17 Ch. D. 174.

A landlord cannot lawfully acquire possession by a forcible entry after the expiration of the term (*Newton* v. *Harland*, 1 M. & G. 644; *Jones* v. *Foley*, 1891, 1 Q. B. 732); even under a licence from the tenant to that effect (*Edwick* v. *Hawkes*, 18 Ch. D. 199).

Cross references.

As to what acts amount to possession, see the note to sect. 3, *post*; as to the effect of certain acts in creating or determining a tenancy at will, see the note to sect. 7, *post*, p. 138; and as to possessory titles under the R. P. Lim. Act, 1833, see the note to sect. 34, *post*, p. 179.

When the right shall be deemed to have first accrued:

in case of an estate in possession,

on dispossession,

on abatement or death,

on alienation:

3. In the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received (*p*); and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death (*q*); and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been

3 & 4 Will. 4, c. 27, s. 3.

in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person, claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument (*r*); and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession (*s*); and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken (*t*).

in case of future estates:

in case of forfeiture or breach of condition.

(1) *Dispossession and Discontinuance of Possession*...130.
(2) *Wrongful Possession Commencing on Death*...133.
(3) *Wrongful Possession Commencing on Alienation by Rightful Owner*...133.
(4) *Future Interests*...133.
(5) *Forfeitures and Breaches of Condition*...134.

(1) Dispossession and discontinuance of possession of land.

(*p*) The first branch of sect. 3 deals with cases of dispossession and discontinuance of possession of land and discontinuance of receipt of rent. Dispossession is where a person comes in and drives out the others from possession: discontinuance of possession is where the person in possession goes out and is followed into possession by other persons (*Per Fry*, J., *Raine* v. *Buxton*, 14 Ch. D. 539). To dispossess a former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it (*Leigh* v. *Jack*, 5 Ex. Div. 264, 273). As regards equivocal acts the intention is all-important (*Littledale* v. *Liverpool College*, 1900, 1 Ch. 19). In cases of discontinuance and also of dispossession regard must be had to the nature of the property (*Leigh* v. *Jack*, 5 Ex. Div. 274; *Marshall* v. *Taylor*, 1895, 1 Ch. 645). Small acts are sufficient to show there is no discontinuance (*Leigh* v. *Jack*, 5 Ex. Div. 272; see *Solling* v. *Broughton*, 1893, A. C. 556; *Re Vernon*, 1901, 1 Ir. R. 1). There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute (*Smith* v. *Lloyd*, 9 Exch. 562; *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514; see *Rimington* v. *Cannon*, 12 C. B. 1, *post*). And if, before the statutory period has expired, the intruder abandons possession and the possession is vacant, the rightful owner is in the same position in all respects as before the intrusion (*Trustees' Co.* v. *Short*, 13 App. Cas. 793; *Willis* v. *Howe*, 1893, 2 Ch. 554). It has been said that, to bring a case within the statute, possession must be by the person wishing to assert the statute, and not by third persons, or by the custody of the law (*Howlin* v. *Sheppard*, 19 W. R. 253). As to possession by a series of independent trespassers, see the note to sect. 34, *post*, p. 180. And as to the party upon whom the onus lies of proving the commencement of the wrongful possession, see *Poole* v. *Griffith*, 15 Ir. C. L. R. 239, 277.

What possession is sufficient.

A road, the soil of which was vested in A., ran from a highway to a well, the land upon each side belonging to B. B. built a wall across the mouth of the road, leaving a stile for foot passengers, and levelled the

fences on each side of the road. B.'s acts were sufficient to bar A. (*Tottenham* v. *Byrne*, 12 Ir. C. L. R. 376). 3 & 4 Will. 4, c. 27, s. 3.

The erection and locking of gates was not alone sufficient to show dispossession (*Littledale* v. *Liverpool College*, 1900, 1 Ch. 19). As to possession by the erection of a fence, see *Worssam* v. *Vandenbrande*, 17 W. R. 53. As to acts constituting possession of a ditch, see *Searby* v. *Tottenham R. Co.*, L. R. 5 Eq. 409; *Norton* v. *L. & N. W. R. Co.*, 13 Ch. Div. 268; *Marshall* v. *Taylor*, 1895, 1 Ch. 645. Of a boundary wall, *Phillipson* v. *Gibbon*, 6 Ch. 428; *Waddington* v. *Naylor*, 60 L. T. 480. Of a gravel-pit and road, *Smith* v. *Stocks*, 17 W. R. 1135. Of the soil under a highway by means of a tunnel, *Bevan* v. *London Cement Co.*, 67 L. T. 615. Of land over a railway-tunnel, *Midland R. Co.* v. *Wright*, 1901, 1 Ch. 738. Of a dry river-bed, *Hindson* v. *Ashby*, 1896, 1 Ch. 87; 1896, 2 Ch. 1. As to possession by overhanging trees, see *Lemon* v. *Webb*, 1895, A. C. 6. Title to the soil of a lane was acquired by letting the grazing (*Haigh* v. *West*, 1893, 2 Q. B. 31). Acts of the other party which are relied on as negativing possession may be attributed to an easement (*Norton* v. *L. & N. W. R. Co.*, *sup.*; *Marshall* v. *Taylor*, *sup.*). Acts done on part of the land may be evidence of possession of the whole, where there is a common character of locality (*Jones* v. *Williams*, 2 M. & W. 326; *Bristow* v. *Cormican*, 3 App. Cas. 641; *Lord Advoc.* v. *Blantyre*, 4 App. Cas. 791; *Clark* v. *Elphinstone*, 6 App. Cas. 164; *Lord Advoc.* v. *Wemyss*, 1900, A. C. 68). See further as to acts of ownership, *A.-G.* v. *Chambers*, 4 De G. & J. 65, and the cases quoted *ante*, p. 91; also sect. 10, *post*, p. 147.

A title to an underground cellar may be acquired by possession, of which the owner of the surface is ignorant (*Rains* v. *Buxton*, 14 Ch. D. 537). Where a rector built on a piece of land a school, which was placed under a committee of which he was a member, the possession was not such as to give the rector a statutory title to the land as glebe (*Gibson* v. *Wise*, 35 W. R. 409; see *Churcher* v. *Martin*, 42 Ch. D. 312; and compare the title acquired by churchwardens and overseers as trustees for a parish, *Haigh* v. *West*, 1893, 2 Q. B. 31). A stranger may acquire by possession a title to land of a railway company, whether superfluous (*Norton* v. *L. & N. W. R. Co.*, 13 Ch. Div. 268) or not superfluous (*Bobbett* v. *S. E. R.*, 9 Q. B. D. 424; *Midland R. Co.* v. *Wright*, 1901, 1 Ch. 738; see *Rosenberg* v. *Cook*, 8 Q. B. Div. 166), and to the surface of land situate vertically over a tunnel used by the company (*Midland R. Co.* v. *Wright*, *sup.*). In the last case the title was acquired not to the surface only, but also *usque ad cœlum*. And a possessory title may be acquired, even though the true owner is under a statutory prohibition against letting or selling (*Brighton* v. *Brighton Guardians*, 5 C. P. D. 368). See further the cases quoted *ante*, pp. 127, 128.

Possession of mines and minerals:

In order to prove possession in an ejectment for mines, it is not sufficient to show that the plaintiff was lord of the manor: an actual possession of them within twenty years must be proved (*Rich* v. *Johnson*, Str. 1142). A verdict for the plaintiff in trover for lead dug out of a mine will not prove possession of the mine; for trover may be brought on property without possession (Bull. N. P. 102; Adams on Ejectment, 263, 4th ed.)

A man who had entered and worked two seams of coal was held under the circumstances to have taken possession of seven seams lying under the same lands (*Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186); in which case, however, it was said, that where a man has entered upon and taken possession of one seam, and by lapse of time has acquired some title to it, the law will not assume that his possession extends to all other seams lying under that one. As to when working one part of a mine is evidence of possession of the whole, see *Taylor* v. *Parry*, 1 M. & Gr. 604; *Wild* v. *Holt*, 9 M. & W. 672; *Lord Ad.* v. *Wemyss*, 1900, A. C. 68. Where a mine owner in working his own coal went on working into the vein, and for more than twenty years worked coal lying under his neighbour's land, it was held under the circumstances that he had not acquired any title to

3 & 4 Will. 4, c. 27, s. 3.

the adjoining mine by possession (*Ashton* v. *Stock*, 6 Ch. D. 719). Acts of trespass by working coal, of which the then owner of the coal mine was ignorant, were held not to constitute adverse possession of the mine within this statute (*Dartmouth* v. *Spittle*, 19 W. R. 444; see as to ignorance, *Rains* v. *Buxton*, 14 Ch. D. 537).

effect of possession of surface;

When the defendant, being entitled to a mere right of way over land belonging to a stranger which adjoined his farm, used for more than twenty years such adjoining land as part of his farm, he was held to have acquired by possession of the surface a good title to the minerals underlying such adjoining land (*Seddon* v. *Smith*, 36 L. T. 168). A lessee, under a lease in which mines were not reserved, who was in possession of the surface, was held to be in possession of the mines (*Keyse* v. *Powell*, 2 Ell. & Bl. 132). But where the owner in fee of land with minerals under it conveyed the surface to A., excepting the minerals to himself, his heirs and assigns, and reserving liberty to enter and work, and such right of entering had not been exercised for more than forty years, but no other person had worked the mines, it was held that the owner was not barred (*Smith* v. *Lloyd*, 9 Exch. 562; see *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514; *Seaman* v. *Vawdrey*, 16 Ves. 390).

where title to surface and minerals is not severed; is severed.

"Receipt of profits of land."

Lord *St. Leonards* was of opinion that the expression "in receipt of the profits of any land," is used in the act, in conjunction with the words "in possession of the land," to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land (R. P. Stat. 47). By sect. 35 (p. 181, *post*), the receipt of the rent payable by any tenant from year to year, or other lessee, is, against such lessee or any person claiming under him (but subject to the lease), the receipt of the profits of the land for the purposes of this act. As to receipt of rents by agent, see note, *ante*, p. 128.

Discontinuance of receipt of rent:

The provisions of this section as to discontinuance of the receipt of rent only apply when the party entitled to the rent does not apply for payment, or omits to enforce his remedies with knowledge that the payment has not been made (*Adnam* v. *Sandwich*, 2 Q. B. D. 485).

point from which time runs.

Where a party has been in receipt of rent and afterwards discontinues such receipt, the statute fixes the point from which time is to run at the day on which the last payment of rent was made, and the party claiming has not the option of calculating from the time when he discontinued the receipt of rent (*Owen* v. *De Beauvoir*, 16 M. & W. 547; 5 Exch. 166; see *Irish Land Commission* v. *Grant*, 10 App. Cas. 27; and the note to sect. 34, *post*). Under R. P. Lim. Act, 1833, a person dispossessed of land is allowed twenty years from the time of his being dispossessed to bring ejectment. But a person disseised of rent has only twenty years from the last payment; and so, if an annual rent has been paid on the day on which it became due, and afterwards unjustly withheld, the party aggrieved has only nineteen years during which he can bring his action or distrain; for during the first year he has no right of distress or action at all (16 M. & W. 565). The R. P. Lim. Act, 1874 (*post*, p. 184), has fixed the period of limitation at twelve, instead of twenty, years.

Where an old rent-charge had always been received from the occupier of one part of the premises charged, and another part for more than the statutory period had been in a separate ownership, and the owner had never paid the rent, the right to distrain on the latter portion was not barred (*Woodcock* v. *Titterton*, 12 W. R. 865; cf. *Dublin* v. *Trimleston*, 12 Ir. Eq. R. 251). Where the rents of mines are reserved by means of payment of produce in specie, time will run under the statute from the receipt and not from the sale of such produce by the lessor (*Denys* v. *Shuckburgh*, 4 Y. & Coll. 42; see *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514).

Seizure *quousque*.

Where a copyhold tenant had not paid his fine, and the lord seized *quousque*, time ran against the tenant from the seizure (*Walters* v. *Webb*, 5 Ch. 531). The statute does not run against the lord's right to seize *quousque* until the time at which, after proclamation and notice, the heir has failed to come in and be admitted (*Eccl. Commrs.* v. *Parr*, 1894, 2 Q. B. 420; *Beighton* v. *Beighton*, 64 L. J. Ch. 796).

(*q*) The second branch of sect. 3 deals with cases where wrongful possession commenced on the death of a rightful owner. "Thus where A., seised in fee in possession dies either intestate, leaving B. his heir, or having devised to B. in fee or for a less estate (*sed qu.*, *James* v. *Salter*, 3 Bing. N. C. 544), and C., a stranger, first obtains possession after the death of A., the time runs against B. from A.'s death, and not from C.'s entry" (1 Hayes, Conv. 248).

3 & 4 Will. 4, c. 27, s. 3.

(2) Wrongful possession commencing on death.

Lord *St. Leonards* seems to be of opinion that a rent newly created by will (as in *James* v. *Salter*, 3 Bing. N. C. 544) would fall within this second branch of sect. 3 (R. P. Stat. 22). But this opinion is questioned (Darb. & Bos. Stat. Lim. 2nd ed. 308).

A. let land to B. by parol from year to year, reserving rent payable in March and November. The last payment of rent was in March, 1846: A. died in December, 1846; time ran, under sect. 8, from the last payment of rent, and not from A.'s death, under sect. 3 (*Baines* v. *Lumley*, 16 W. R. 674).

(*r*) The third branch of sect. 3 deals with cases where wrongful possession commenced on alienation by a rightful owner. On the construction of the words "other than a will" in this branch, see *James* v. *Salter*, 3 Bing. N. C. 544.

(3) Wrongful possession commencing on alienation by rightful owner.

It was held by the Court of Common Pleas (differing from the Queen's Bench, *Doe* v. *Phillips*, 10 Q. B. 130) that the case of a *cestui que trust* holding land under a trustee does not fall within this clause (*Garrard* v. *Tuck*, 8 C. B. 231).

Cestui que trust in possession.

(*s*) The fourth branch of sect. 3, together with sect. 20, and sect. 2 of R. P. Lim. Act, 1874 (*post*, p. 184), which has been substituted for sect. 5 of R. P. Lim. Act, 1833, deal with future interests.

(4) Future interests.

The words in this branch of sect. 3, "or other future estate or interest," were said to be large enough to comprehend, and would comprehend, all executory devises (*James* v. *Salter*, 3 Bing. N. C. 554, *ante*, p. 123; see *Doe* v. *Liversedge*, 11 M. & W. 517, *post*, p. 157, for a case of a future estate within these words).

Where a tenant for life aliens in fee, time does not run against the remainderman until the death of the tenant for life (*Doe* v. *Rolfe*, 8 Ad. & Ell. 650; see *Scott* v. *Scott*, 4 H. L. C. 1084).

In 1788 estates were settled to the use of the wife for life, with remainder to her issue in tail, with remainder to the settlor (whose heiress-at-law she was) in fee. In 1818, by deeds to which the husband and wife and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G., the son, for life, remainder to his issue in tail, remainder to J. F., his sister, for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828: it was held, that, inasmuch as the estate of J. F. was carved out of the estate by R. G., she had the same period for bringing an ejectment in respect of any estates comprised in the above deeds as he would have had if he had continued alive, viz., twenty years from the year 1822, when his remainder came into possession. The effect of the deed of 1818 and of recovery was to bar all remainders over, and to create new estates out of his estate tail (*Doe* v. *Edmonds*, 6 M. & W. 295).

When a landlord merely omits to compel his lessee, during the continuance of a lease, to pay rent, and there has been no payment to any other person, time runs from the determination of the lease (*Doe* v. *Oxenham*, 7 M. & W. 131, 133, 134; see *Grant* v. *Ellis*, 9 M. & W. 113; *Doe* v. *Godsill*, 4 Q. B. 603, n.). Upon the renewal of a lease the landlord's estate became an estate in possession, and his right of action accrued (*Eccl. Commrs.* v. *Rowe*, 5 App. Cas. 741); but not where a sub-lease was subsisting (*Eccl. Commrs.* v. *Treemer*, 1893, 1 Ch. 166).

Landlord and tenant.

For the case of leases containing a clause of re-entry for non-payment of rent, see note to sect. 4, *post*.

3 & 4 Will. 4, c. 27, s. 3.

Husband and wife.

If husband and wife, being seised in fee in right of the wife, convey to a purchaser by a conveyance not operative to bind her, the wife, if she survives, and if not, her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for forty years. It was held that the right of the wife came within the fourth branch of sect. 3, as being a future estate or interest (*Jumpsen* v. *Pitchers*, 13 Sim. 327; see *Hounsell* v. *Dunning*, 1902, 1 Ch. 512). The case would be different if the husband and wife simply discontinued possession (Sugden, R. P. Stat. 83; see also *Cannon* v. *Rimington*, 12 C. B. 1).

See further as to future interests, the notes to sect. 20 (*post*, p. 156), and R. P. Lim. Act, 1874, s. 2 (*post*, p. 185).

(5) Forfeiture or breach of condition.

(*t*) The fifth branch of sect. 3 and sect. 4 deal with rights arising on forfeitures and breaches of conditions, as to which see note to sect. 4.

When advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

4. Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest, in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

(1) *Cases on the Section*...134.
(2) *Conditions of Re-entry, whether void or voidable*...135.

(1) Meaning of section.

The above section must be read in connection with, and forms a proviso upon, the last branch of sect. 3. The words "forfeiture" and "breach of condition" are to be read in their largest sense, including forfeitures which give a right to an estate under a conditional limitation, as well as forfeitures which can only be taken advantage of by the heir (*Astley* v. *Essex*, 18 Eq. 290). See also as to this section the remarks of *Thesiger*, L. J., *Magdalen Hospital* v. *Knotts*, 8 Ch. Div. 727. The proviso contained in sect. 4 in fact preserves the previous law (see 1 Ves. sen. 278; *Doe* v. *Blakeway*, 5 C. & P. 563; *Doe* v. *Danvers*, 7 East, 299).

Entry for forfeiture of copyholds.

The lord of a manor is barred by the statute from entering for a forfeiture of copyholds after the expiration of the statutory period (*Witton* v. *Peacock*, 3 M. & K. 325). Where the lord died before entry or seizure for forfeiture, the reversioner or remainderman could never take advantage of the forfeiture done or committed before their time (*Montagu's case*, Cro. Jac. 301; Co. Cop. s. 60; *Doe* v. *Hellier*, 3 T. R. 162; see *Doe* v. *Trueman*, 1 B. & Ad. 744; *Doe* v. *Bousfield*, 6 Q. B. 492); unless the act of forfeiture destroys the estate (3 T. R. 173). As to seizure *quousque*, see *ante*, p. 132; and generally as to the forfeiture of copyholds, see Shelford on Copyholds, pp. 148—172; Scriven, 208 *et seq.*, 7th ed.; *Chamberlain* v. *Drake*, 2 Sid. 8; and for waste, *Eastcourt* v. *Weeks*, Salk. 186; Lutw. 799; *Bird* v. *Kirkby*, 1 Mod. 199; Carter, 237; Gilb. Ten. 249.

Clause of re-entry for non-payment of rent.

With regard to express clauses of re-entry for non-payment of rent, it is settled that in Ireland a landlord is not barred from recovering rent by non-payment for the statutory period (*Cosbie* v. *Sugrue*, 9 Ir. L. R. 17; *Purke* v. *McLoughlin*, 1 Ir. C. L. R. 186; *Spratt* v. *Sherlock*, 3 Ir. C. L. R. 69; overruling *Doe* v. *Bingham*, 3 Ir. L. R. 456). In the case of an English lease containing such a clause, it has been suggested that a fresh

right to re-enter accrues every time a fresh default in payment of rent is made (Darb. & Bos. Stat. Lim. 2nd ed. 338; see *Doe* v. *Bliss*, 4 Taunt. 725; *Macher* v. *Foundling Hospital*, 1 Ves. & B. 191). In the case of certain covenants and conditions, sect. 14 of the Conv. Act, 1881 (see *post*), now requires notice to be given before a lessor's right of re-entry or forfeiture can be enforced by action. **3 & 4 Will. 4, c. 27, s. 4.**

Where a party is really ignorant of the existence of an instrument in which the condition is contained, and where he would have a good title if there were no such instrument, a neglect of the terms of the condition will not subject him to a loss of the estate; and the party entitled to avail himself of the condition must take care to make it known to the person who was to comply with it (*France's case*, 8 Rep. 89 b; Shep. T. 148; *Mallon* v. *Fitzgerald*, 3 Mod. 28; Skinn. 125; *Doe* v. *Beauclerk*, 11 East, 657). But a person who takes by gift under a will cannot plead want of knowledge of the contents of the will as an excuse for not complying with its provisions (*Astley* v. *Essex*, 18 Eq. 297); unless he is the testator's heir and could, but for the will, have taken as such (*Ib.*; see *Doe* v. *Crisp*, 8 Ad. & Ell. 779; *Porter* v. *Fry*, 1 Vent. 199). **Notice of condition.**

(2)

In cases of conditions of re-entry there was a difference between leases for lives and leases for years. As to leases for lives, if the tenant was guilty of any breach of the condition of re-entry the lease was only voidable, and not determined until the lessor re-entered, though the clause of the condition should be that the lease should be void. For it was a rule that where an estate commences by livery it could not be determined before entry (*Browning* v. *Beston*, Plowd. 135, 136). But a lease for years, with a condition that, for non-payment of the rent or the like, the lease should be null and void if the lessee was guilty of any breach of the condition, was absolutely determined (*Goodright* v. *Davids*, Cowp. 804). But if in such a lease the clause was that for non-payment of the rent it should be lawful for the lessor to re-enter, the lease was only voidable, and might be affirmed by acceptance of rent accrued due after, or other act (*Browning and Beston's case*, Plowd. 133; *Pennant's case*, 3 Rep. 64 a, b; 65 a, b; Co. Litt. 215, a; *Goodright* v. *Davids*, Cowp. 804; see 1 Wms. Saund. 441, ed. 1871). **Conditions in leases, whether void or voidable. Old law.**

Since the statutes 7 & 8 Vict. c. 76, and the Real Property Act, 1845, s. 2, estates for life may commence without livery; and the distinction taken above between leases for lives and leases for years (in those cases where the clause is, that the lease shall be void on breach of the condition) seems therefore to be now inapplicable (1 Smith's L. C. 41, 10th ed.). But even in the case of a lease for years which contains a proviso that it shall be void for non-payment of rent or other breach of covenant, the modern authorities seem to establish that such a lease in case of a breach shall be regarded as voidable only, so that the landlord, by the acceptance of rent or the like, with notice of the breach, will waive the forfeiture (*Roberts* v. *Davey*, 4 B. & Ad. 664; *Doe* v. *Bancks*, 4 B. & A. 401; *Arnsby* v. *Woodward*, 6 B. & C. 519; *Read* v. *Farr*, 6 M. & S. 121; *Malins* v. *Freeman*, 4 Bing. N. C. 395; *Doe* v. *Birch*, 1 M. & W. 402; *Hyde* v. *Watts*, 12 M. & W. 254; *Hughes* v. *Palmer*, 19 C. B. N. S. 393; *Davenport* v. *The Queen*, 3 App. Cas. 128; compare *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324). A distress made by a landlord on the assignee of his lessee is a waiver of a forfeiture incurred by a prior breach of covenant; but if there be a continuing breach the landlord is not precluded from taking advantage of it for a time subsequent to the distress (*Doe* v. *Peck*, 1 B. & Ad. 428). A condition of re-entry on breach of covenants in a lease can only operate during the continuance of the lease (*Johns* v. *Whitley*, 3 Wils. 127). See now sect. 14 of Conv. Act, 1881, *post*. **Present state of the law.**

[*Sect. 2 of R. P. Lim. Act*, 1874 (*which see* post, p. 184) *has been substituted for sect. 5 of R. P. Lim. Act*, 1833.]

3 & 4 Will. 4, c. 27, s. 6.

6. For the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

An administrator to claim as if he had obtained the estate without interval after death of deceased.

(1) *Old Rule*...136.
(2) *Cases on the Section*...136.
(3) *Distinction between Executor and Administrator and Administrator's Rights*...136.

(1) Old rule that time ran from grant of administration.

In the case of intestacy, it had been decided that, as to all rights occurring after the death of the intestate, the Statutes of Limitation only began to run from the grant of administration. Hence a right to a chattel interest in lands might have been kept alive, notwithstanding adverse possession, to the expiration of the term, however long, and instances had occurred of serious practical inconvenience from that state of the law (see *Stanford's case*, Cro. Jac. 61; cited in *Cary* v. *Stephenson*, 2 Salk. 421; *S. C.*, Carth. 335; Skinn. 555; 4 Mod. 376; *Fairclaim* v. *Little*, cited in 5 B. & Ald. 214). The object of this clause of the Act was to make the period of limitation with respect to chattel interests in land begin to run from the time when the right of entry arose and might have been acquired by taking out letters of administration (see 1st Real Prop. Rep. p. 48).

(2) Cases on the section.

It has been held under this section as regards leaseholds that time runs against the administrator from the death of the intestate, not from the grant of administration (*Davies* v. *Williams*, 34 Ch. D. 558). As regards freeholds vested in an administrator by the Land Transfer Act, 1897, it seems that the same rule will apply (L. T. Act, 1897, s. 1, sub-s. 1; s. 2, sub-s. 2). The above section of the R. P. Lim. Act, 1833, applies to cases arising in respect of charges on land, as well as to cases arising under the earlier part of the Act (*Re Bonsor and Smith*, 34 Ch. D. 560, n.).

(3) Distinction between administrator and executor.

The distinction between an administrator and an executor is, that an administrator derives his title wholly from the probate court, and has none until administration is granted, and the property and rights of the deceased vest in him only upon the grant (*Woolley* v. *Clark*, 5 B. & Ald. 744; *Pratt* v. *Swain*, 8 B. & C. 287). The title of an administrator, however, though it does not exist until the grant, may relate back to the time of the death of the intestate, so as to entitle him to recover against a wrong-doer who has seized or converted the goods of the intestate after his death in an action of trespass or trover (*Tharpe* v. *Stallwood*, 5 M. & G. 760; *Foster* v. *Bates*, 12 M. & W. 233; *Welshman* v. *Sturgess*, 13 Q. B. 522; see *Hill* v. *Curtis*, 1 Eq. 100). The grant has the effect of vesting leaseholds in the administrator by relation, so as to enable him to sue for all matters affecting such leaseholds subsequent to the death, and to render him liable to account for rent and profits from the death (*R.* v. *Horsley*, 8 East, 410). But this doctrine of relation exists only in cases where the administrator's act is for the benefit of the estate (*Morgan* v. *Thomas*, 8 Exch. 302; see *Re Watson*, 19 Q. B. Div. 234). Nor does relation back divest any right legally vested in another between the death and the grant, so as to enable an administrator, who had obtained administration after an execution issued against the intestate's tenant, to call on the sheriff to pay one year's rent, pursuant to 8 Anne, c. 17 (*Waring* v. *Dewberry*, Gilb. Eq. Rep. 223, cited in 1 Str. 97; Fortesc. 360; *S. C.*, Vin. Abr. Executors (Q)). Before taking out administration, an administrator cannot assign his intestate's leaseholds (Wms. Exors. 405, 7th ed.), or surrender them (*Rex* v. *Great Glenn*, 5 B. & Ad. 195), or enter into a binding agreement in regard thereto

(*Doe* v. *Glenn*, 1 Ad. & El. 49; see as to estoppel, *Meffers* v. *Brown*, 32 L. J. Ex. 138). 3 & 4 Will. 4, c. 27, s. 6.

On the other hand an executor derives his title from the will itself, the property vesting in him from the testator's death (*Hickman* v. *Walker*, Willes, 27). An executor before probate can do almost anything incident to his office. Probate is only evidence, not the source of his title. He can even sell the property (*Sykes* v. *Sykes*, L. R. 5 C. P. 118). He can assign leaseholds (*Re Pawley and London Bank*, 1900, 1 Ch. 64), and can enter on the land demised (*R.* v. *Stone*, 6 T. R. 298; see *Fenton* v. *Clegg*, 9 Ex. 680). He can give a good receipt for money (*Re Masonic Co.*, 32 Ch. D. 374; *Re Stevens, Cook* v. *Stevens*, 1897, 1 Ch. 429). But if the legal validity of acts done before probate is challenged, probate must be produced (*A.-G.* v. *New York Co.*, 1898, 1 Q. B. 216; *Re Stevens, sup.*). An executor.

An executor or administrator is not deemed to be in possession of things immoveable, as leases for years or houses, before entry (Went. Off. Ex. 228, 14th ed.); although a reversion of a term, which the testator granted *for part* of the term, is in the executor immediately on the testator's death (*Trattle* v. *King*, T. Jones, 170).

As to the running of time under Lim. Act, 1623, in the case of executors and administrators, see *post*, p. 231. Cross references.

7. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee. In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

(1) *Operation of Sect.* 7...137.
(2) *Creation and Determination of Tenancies at Will*...138.
(3) *Proviso as to Mortgagors and* cestui que trusts...140.

(1) Tenancies within the section;

This section did not apply to cases where the tenancy at will had been determined before the passing of the act (*Doe* v. *Page*, 5 Q. B. 767, see p. 772; *Doe* v. *Thompson*, 6 Ad. & Ell. 721; *Doe* v. *Bold*, 11 Q. B. 127). But where the tenancy was subsisting at the passing of the act, time ran from the expiration of one year after the expiration of the tenancy (*Doe* v. *Moore*, 9 Q. B. 555).

Where a bargainee took possession of land included in an indenture of bargain and sale which was not enrolled, this operated to make the bargainee a tenant at will, and time began to run in his favour from the end of the first year (*Low Moor Co.* v. *Stanley Co.*, 34 L. T. 186). The occupation for twenty-six years by guardians of public offices belonging to a corporation without payment of rent was held to be a tenancy at will, the guardians acquiring a title under this section (*Brighton* v. *Brighton Guardians*, 5 C. P. D. 368). Persons were held to occupy as guests of the true owner, not tenants at will within this section (*Peakin* v. *Peakin*, 1895, 2 I. R. 359).

A tenancy at will of the waste of a manor was held to be created by a licence from the lord (*A.-G.* v. *Tomline*, 15 Ch. Div. 150, 157), even where a yearly rent was reserved (*Hodgson* v. *Hooper*, 29 L. J. Q. B. 222); in which last case it was said that each successive payment of rent was a tenancies of waste.

3 & 4 Will. 4, c. 27, s. 7.

fresh acknowledgment that the land was held by permission of the lord. But where a lessee, with the verbal consent of the lessor, enclosed land adjoining his holding (which land was in fact copyhold waste belonging to the lessor as lord of a manor), this did not create such a tenancy as is referred to in sect. 7 (*Whitmore* v. *Humphries*, L. R. 7 C. P. 1).

Tenancy determined after expiration of one year;

Where, after the expiration of one year from the commencement of a tenancy at will, the tenancy has been determined, time runs not from the determination, but from the expiration of the year (*Doe* v. *Carter*, 9 Q. B. 863; *Doe* v. *Turner*, 7 M. & W. 226).

new tenancy created;

Where time has begun to run after the expiration of one year from the commencement of a tenancy at will, the question of a subsequent determination of the original tenancy is only relevant so far as it may be preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation (*Day* v. *Day*, L. R. 3 P. C. 751). In the event of such new tenancy being created, time runs from the determination of such new tenancy, or from the expiration of one year after the commencement thereof, without regard to the original tenancy (*Locke* v. *Matthews*, 13 C. B. N. S. 753; 11 W. R. 343; *Turner* v. *Doe*, 9 M. & W. 643; see *Doe* v. *Rock*, 4 M. & Gr. 30; *Thorp* v. *Facey*, 35 L. J. C. P. 349). New tenancies were held to have been created in *Locke* v. *Matthews* and *Turner* v. *Doe*, *sup.*; and see *Jarman* v. *Hale*, 1899, 1 Q. B. 994.

no new tenancy created.

Where parish overseers determined a pauper's tenancy at will by turning him out, and he subsequently resumed possession, no new tenancy at will being created, time ran against the overseers from the pauper's subsequent resumption of possession without any regard to the original tenancy (*Randal* v. *Stevens*, 2 E. & B. 641). And where B.'s occupation of land began by the permission of the owner A., and A. from time to time came on the land and gave directions as to cutting trees and repairs, it was said that every time A. came on the land, time commenced afresh to run against him (*Allen* v. *England*, 3 F. & F. 49; but see *Lynes* v. *Snaith*, 1899, 1 Q. B. 486).

(2) Creation of tenancy at will.

An estate at will, being the lowest estate which can arise by the agreement of the parties, is not bounded by definite limits with respect to time; but as it originated in mutual agreement, so it depends upon the concurrence of both parties (see Litt. ss. 68, 82). As it depends upon the will of *both*, although it is expressed to be at the will of *one* only (Co. Litt. 55 a), the dissent of either may determine it. An estate at will may arise by implication, as well as by express words. The definition of an estate at will is, "where lands and tenements are let by one man to another, to have and hold at the will of the lessor, and the tenant by force of this lease obtains possession" (Litt. s. 68; 2 Bl. Com. 145). Thus, where a person makes a feoffment, and delivers the deed to the feoffee, without giving him livery of seisin, and the feoffee enters, he becomes tenant at will (Litt. s. 70). And a person who entered and enjoyed lands under a void lease, and paid rent, was held to be tenant at will (*Denn* v. *Fearnside*, 1 Wils. 176); though by payment of rent he may become tenant from year to year (see *Smith* v. *Widlake*, 3 C. P. D. 10; *Magdalen Hospital* v. *Knotts*, 11 App. Cas. 335). A simple permission to occupy may create a tenancy at will unless an intention appears to create a yearly tenancy by an agreement to pay rent quarterly, or some other aliquot part of a year. Under an agreement to let premises so long as both parties like, and receiving a compensation accruing *de die in diem*, and not referable to a year or any aliquot part of a year, a tenancy at will, strictly so called, is created (*Richardson* v. *Langridge*, 4 Taunt. 128; *Doe* v. *Wood*, 14 M. & W. 687; see *Braythwayte* v. *Hitchcock*, 10 M. & W. 497; *Cox* v. *Bent*, 5 Bing. 185). A tenancy from year to year will not be presumed against the clearly expressed intention of the parties. By a proviso in a deed, A. agreed to become tenant to C. at his will and pleasure at a rate of 25*l.* 4*s.* per annum, payable quarterly; it was held that A. was tenant at will

(*Doe* v. *Cox*, 11 Q. B. 122; see *Re Threlfall*, 16 Ch. Div. 274). A party in possession as apparent owner was, under the circumstances of the case, held to be tenant at will, his conduct amounting to an admission to this effect (*Doe* v. *Groves*, 10 Q. B. 486). In *Ley* v. *Peter* (3 H. & N. 101; 6 W. R. 437), a letter was held to be no evidence of such a tenancy. 3 & 4 Will. 4, c. 27, s. 7.

An entry by a person under a contract for the purchase of an estate, or under an agreement for a lease, with the consent of the vendor or of the person agreeing to grant the lease, will create a tenancy at will between the parties (*Hegan* v. *Johnson*, 2 Taunt. 147; *Dunk* v. *Hunter*, 5 B. & Ald. 322; *Doe* v. *Lawder*, 1 Stark. 308; *Right* v. *Beard*, 13 East, 210; *Doe* v. *Jackson*, 1 B. & C. 448; *Doe* v. *Sayer*, 3 Camp. 8; *Doe* v. *Stanion*, 1 M. & W. 700; *Ball* v. *Cullimore*, 2 C. M. & R. 120; see *Doe* v. *Rock*, 4 M. & G. 30; *Warren* v. *Murray*, 1894, 2 Q. B. 657); even where he pays interest after the rate of 5*l.* per cent. per annum on the purchase-money (*Doe* v. *Chamberlaine*, 5 M. & W. 14; see *Saunders* v. *Musgrove*, 8 B. & C. 524). But where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time (*Doe* v. *Stanion*, 1 M. & W. 695; see *Souter* v. *Drake*, 5 B. & Ad. 992).

Determination of tenancy at will.

The most obvious mode of determining an estate at will is an express declaration that the lessee shall hold no longer, either made on the land, or by notice given to the lessee (Co. Litt. 55 b). Any act of ownership exercised by the landlord, which is inconsistent with the nature of the estate, will operate as a determination of it (*Ib.*; Co. Litt. 245 b). Thus, a conveyance by the lessor operates as a determination of the will (*Dinsdale* v. *Iles*, 2 Lev. 88). So a legal mortgage of which the tenant had notice (*Jarman* v. *Hale*, 1899, 1 Q. B. 994). The tenancy may be determined by demand or by entry (*Doe* v. *Chamberlaine*, 5 M. & W. 16). It is clearly laid down, "that if the lessor, without the consent of the lessee, enter into the land and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue" (Co. Litt. 55 b). So a tenancy at will is determined by the landlord's entry on the land without the consent of the tenant, and cutting and carrying away stone therefrom (*Doe* v. *Turner*, 7 M. & W. 226); but not by entry (not objected to) for repairs (*Lynes* v. *Snaith*, 1899, 1 Q. B. 486; see *Allen* v. *England*, 3 F. & F. 49). So in *Ball* v. *Cullimore* (2 C. M. & R. 120), it was held, that a feoffment by the lessor, with livery of seisin on the land, operates as a determination of the will, although the tenant at will be off the land at the time when the livery is made, and have no notice of the determination of the will; *secus*, in the case of an ordinary conveyance without notice (*Doe* v. *Thomas*, 6 Exch. 857). A tenancy at will is determined by an agreement to purchase (*Daniels* v. *Davison*, 16 Ves. 252). A letter from the owner to the tenant at will, stating that unless the latter paid what was due to the former, immediate measures would be taken to recover possession of the property, was held sufficient to determine the estate at will (*Doe* v. *Price*, 9 Bing. 356). Neither party can determine an estate at will at a time which would be prejudicial to the other (Co. Litt. 55 b, n. 16; *Leighton* v. *Theed*, 1 Ld. Raym. 707; *Peacock* v. *Peacock*, 16 Ves. 57). A tenant at will cannot put an end to his tenancy, even by an assignment, without giving notice to his landlord (*Pinhorn* v. *Souster*, 8 Exch. 763; see *Melling* v. *Leak*, 16 C. B. 669). For the case where the lessor became an insolvent debtor, see *Doe* v. *Thomas*, 6 Exch. 854. The granting of a lease to a third person by the lessor of a tenant at will, though it determines the tenancy at will as against the lessor, does not give him such a right of entry as is contemplated by R. P. Lim. Act, 1833, s. 2 (*Hogan* v. *Hand*, 14 Moore, P. C. C. 310; 9 W. R. 673). The death of the lessor or tenant also determines the tenancy (*James* v. *Dean*, 11 Ves. 391).

See further, as to the creation and determination of tenancies at will,

3 & 4 Will. 4, c. 27, s. 7.

the notes to *Richardson* v. *Langridge* (Tudor, L. C. Conv. 11, 4th ed.); and *Clayton* v. *Blakey* (2 Smith, L. C. 124, 10th ed.); Woodfall, 16th ed., 238.

(3)

Proviso as to mortgagors and *cestui que trusts*.

The proviso as to mortgagors and *cestui que trusts* was introduced to prevent the title of the mortgagee or trustee from being barred in twenty-one years in those cases in which a mortgagor or *cestui que trust* in possession was held to be tenant at will to the mortgagee or trustee.

By the R. P. Lim. Act, 1837 (*post*, p. 172), read in connection with the R. P. Lim. Act, 1874, s. 9 (*post*, p. 189), mortgagees may bring actions to recover the land mortgaged within twelve years after the last payment of principal or interest.

Operation of section as to mortgagors.

Where a mortgage was paid off, but no reconveyance executed, the proviso did not apply; and the legal estate of the mortgagee was extinguished by thirteen years' possession of the mortgagor, who was held to be a tenant at will (*Sands* to *Thompson*, 22 Ch. D. 614).

Relation between mortgagee and mortgagor in possession.

The relation between mortgagor and mortgagee is perfectly anomalous and *sui generis* (2 Jac. & W. 183). The mortgagor is only like a tenant at will to the mortgagee, his *legal* interest being inferior to that of a strict tenant at will (Doug. 22, 282, 283). A mortgagor in possession may be described in pleading as the tenant of the mortgagee in an action by a third party (*Partridge* v. *Bere*, 5 B. & Ald. 604). The legal interest of the mortgagor after default is not more than that of a tenant by sufferance, and he may be treated as such or as a trespasser, at the election of a mortgagee (*Doe* v. *Maisey*, 8 B. & C. 767; see *Wheeler* v. *Montefiore*, 1 Gale & D. 493); and the mortgagor, or his tenant coming in after the mortgage, may be ejected without any demand of possession having been made (*Ib.*), either by the original mortgagee or by his assignee (*Thunder* v. *Belcher*, 3 East, 449); whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will (4 T. R. 680); and the mortgagor is not entitled to the growing crops after the will is determined, as in the case of a tenant at will (1 T. R. 383; see Coote on Mortgages, 325—330; *Walmsley* v. *Milne*, 7 C. B. N. S. 133; 5 B. & Ald. 605, n.). "It is now established, that a mortgagor only holds the possession of the land, and receives the rent of it, by the will or permission of the mortgagee, who may by ejectment, *without giving notice*, recover against him or his tenant. In this respect, the estate of a mortgagor is inferior to that of a tenant at will" (*Bird* v. *Wright*, 1 T. R. 378; see 4 Bligh, 97; *Partridge* v. *Bere*, 5 B. & Ald. 604; *Hitchman* v. *Walton*, 4 M. & W. 415; *Doe* v. *Olley*, 12 Ad. & Ell. 481). And this is so, even where by the mortgage deed the mortgagor attorned to the mortgagee as tenant at a quarterly rent, which was stated to be done for the purpose of securing the principal and interest, and in contemplation and part discharge thereof (*Doe* v. *Tom*, 4 Q. B. 615). In *Doe* v. *Barton* (11 Ad. & Ell. 314), *Denman*, C. J., said, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the cases of *Partridge* v. *Bere* (5 B. & Ald. 604), and *Hitchman* v. *Walton* (4 M. & W. 409), that the mortgagee may treat the mortgagor as being rightfully in possession, and himself as reversioner; so that, as long as he be not treated as a trespasser, his possession is not hostile to, nor inconsistent with, the mortgagee's right. (We purposely avoid the expression 'is not adverse,' by reason of the statutes 3 & 4 Will. 4, c. 27, and 7 Will. 4 & 1 Vict. c. 28.)" A mortgagor may be tenant at will to the mortgagee notwithstanding the reservation of a yearly rent by the mortgage deed (*Doe* v. *Davies*, 7 Exch. 89; *Doe* v. *Cox*, 11 Q. B. 122; *Walker* v. *Giles*, 6 C. B. 662; see the *Metropolitan Co.* v. *Brown*, 4 H. & N. 428). Where a mortgagee recognizes a tenant as being in lawful possession of the premises at a given time by the receipt of rent, it is not competent to him to say afterwards that at that time he was a trespasser (*Doe* v. *Hales*, 7 Bing. 322). Mere payment of interest does not create a tenancy at will (*Scobie* v. *Collins*, 1895, 1 Q. B. 375; see *Doe* v. *Cadwallader*, 2 B. & Ad.

473). Upon payment off of the mortgage money the mortgagor becomes tenant at will (*Sands* to *Thompson*, 22 Ch. D. 614). 3 & 4 Will. 4, c. 27, s. 7.

A mortgagor in possession may, as against a mortgagee, grant certain leases (Conv. Act, 1881, s. 18); and where the mortgagee has not given notice of his intention to take possession or enter into receipt of rents, the mortgagor may sue for rent or possession (Jud. Act, 1873, s. 25 (5)).

See further, as to the relation subsisting between a mortgagee and a mortgagor in possession, the note to *Keech* v. *Hall* (1 Smith, L. C. 494); Watkins on Conveyancing, 13, 9th ed.; and Tudor, L. C. Conv. 13, 4th ed.

Meaning of the proviso as to *cestui que trusts*.

The proviso as to *cestui que trusts* is equivalent to saying, that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time (*Garrard* v. *Tuck*, 8 C. B. 231).

It was the opinion of *Kay*, L. J., that the proviso includes implied trusts (*Warren* v. *Murray*, 1894, 2 Q. B. 657). The proviso was extended to the case of an intended lessee who entered and remained in possession under an agreement for a lease, no lease being granted (*Ib.*; *Drummond* v. *Sant*, L. R. 6 Q. B. 763). On the other hand, the courts have refused to extend the proviso to the case of a person holding under an agreement to purchase (*Doe* v. *Rock*, 4 M. & G. 30); or to the case of a mortgagor who paid the mortgage debt (*Sands* to *Thompson*, 22 Ch. D. 614).

Relation between trustee and *cestui que trust* in possession.

The general rule is, that a *cestui que trust* being in possession of the estate, with the consent, or even the mere acquiescence, of the trustee, is considered as his tenant at will (4 Bac. Abr. 198; *Smith* v. *Pierce*, 3 Mod. 195; *Focus* v. *Salisbury*, Hardr. 400; *Freeman* v. *Barnes*, 1 Ventr. 55, 80; 1 Lev. 270; *Pomfret* v. *Windsor*, 2 Ves. sen. 472, 481; 1 Ventr. 329; *Gree* v. *Rolle*, 1 Ld. Raym. 716). Before the Judicature Acts it was a rule, that however plain the trust might be, yet in a court of law the *legal interest* must prevail (*Doe* v. *Wharton*, 8 T. R. 2); therefore trustees of a meeting-house or of lands, of which they were seised in trust for the support of the minister, might maintain an action of ejectment against him upon a simple demand of possession without any notice to quit (*Doe* v. *Jones*, 10 B. & C. 718; *Doe* v. *M'Kaig*, 10 B. & C. 724). But the trustee and visitors of a free grammar school could not recover the schoolhouse in ejectment without having previously determined the schoolmaster's interest by summons (*Doe* v. *Gartham*, 1 Bing. 357; see *R.* v. *Gaskin*, 8 T. R. 209; *R.* v. *Darlington School*, 6 Q. B. 682). The relation between trustee and *cestui que trust* is not analogous to that between mortgagor and mortgagee, as equity never takes away the possession of the *cestui que trust* by delivering it to the trustees, unless there be gross mismanagement; or some other reason for it (9 Mod. by Leach, p. 227; see Watkins on Conveyancing, 16, 9th ed.). As to letting an equitable tenant for life into possession, see note to sect. 3 of S. L. Act, 1882, *post*.

The doctrine that a *cestui que trust* who is in the possession of an estate by the consent or acquiescence of the trustee must be regarded as tenant at will, only applies where the *cestui que trust* is the actual occupant. If he is only allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees, and if the actual occupier holds for more than the statutory period without paying rent, the trustees lose their title (*Melling* v. *Leak*, 16 C. B. 652; see *Jones* v. *Phipps*, L. R. 3 Q. B. 567).

No person after a tenancy from year to year to have any right but from the end of the

8. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to

3 & 4 Will. 4, c. 27, s. 8.

first year or last payment of rent.

bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

(1) *Cases under Sect.* 8...142.
(2) *Creation of Tenancy from Year to Year*...142.
(3) *Determination of Tenancy from Year to Year*...144.

(1) Cases under this section;

The 8th section applied to tenancies from year to year, created before and existing at the passing of the act (*Doe* v. *Sumner*, 14 M. & W. 39).

lease in writing;

The lease in writing referred to in this section by which a case would be taken out of its operation, must be not merely an instrument which was evidence of the conditions of holding but one passing an interest (*Doe* v. *Gower*, 17 Q. B. 599).

payment of rent;

The reservation and receipt of any rent, however small, will create the legal relation of tenancy from year to year for the purposes of the act (*Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324). The rent may be any service for which distress may be made (sect. 1, *ante*), and accordingly includes cleaning the parish church and ringing the bell (*Doe* v. *Benham*, 7 Q. B. 976). Where the tenancy is disputed, the circumstances connected with the annual payments are very important, for if the person paying makes the payment expressly or impliedly on account of something else than rent of land of which he is tenant, that would not be a payment of rent within this section (*A.-G.* v. *Stephens*, 6 D. M. & G. 146). Payment of rent within this section may be proved by parol admission (*Doe* v. *Beckett*, 4 Q. B. 601).

date from which time runs.

Where after the expiration of twenty years during which no rent had been paid, the tenant within five years before action paid some arrears, time ran under this section from the last payment of rent; and sect. 34 did not extinguish the title of the reversioner (*Bunting* v. *Sargent*, 13 Ch. D. 330; see, however, as to this last point, *Sanders* v. *Sanders*, 19 Ch. Div. 373, and cases quoted *post*, p. 179). Where A. let land to B. by parol from year to year, reserving rent payable in March and November, the last payment of rent was in March, 1846. A. died in December of the same year, and B. retained possession. Time ran from the last payment of rent, and not from the death of A. (*Baines* v. *Lumley*, 16 W. R. 674).

Where a tenant from year to year remains in possession without paying rent, on the expiration of the statutory period the right of the landlord is barred not only to the land but also to any arrears of rent (*Re Jolly, Gathercole* v. *Norfolk*, 1900, 2 Ch. 618).

(2) Creation of tenancy from year to year.

An estate from year to year may be created either by the parol or written agreement of the parties. The qualities that distinguish it from proper terms of years, and from estates at will, are, that it is now raised by construction of law alone instead of an estate at will, in every instance where a possession is taken with the consent of the legal owner, and where an annual rent has been paid, but without there having been any conveyance or agreement conferring a legal interest; and that whether it arises from express agreement, or by implication of law, it may, unless surrendered or determined by a regular notice to quit, subsist for an indefinite period, if the estate of the lessor will allow of it, or for the whole term of his estate, where it is of a limited duration, unaffected by the death either of the lessor or lessee, or by a conveyance of their estate by either of them (*Birch* v. *Wright*, 1 T. R. 380). It is not to be considered as recommencing every year (*Doe* v. *Wood*, 14 M. & W. 682). It will not arise by implication where it would work a forfeiture (*Fenny* v. *Child*, 2 M. & S. 255). Although *primâ facie* all leases for uncertain terms

create a tenancy at will, the courts of law have for some time past inclined to construe such leases to constitute a tenancy from year to year, especially where an annual rent is reserved (3 Burr. R. 1609; *Roe* v. *Lees*, 2 Bl. R. 1171; *Doe* v. *Weller*, 7 T. R. 478; see *Pope* v. *Garland*, 4 Y. & Coll. 399; *Doe* v. *Watts*, 7 T. R. 83; *Doe* v. *Morse*, 1 B. & Ad. 365); which is certain, or which, from the terms of the agreement, is capable of being ascertained with certainty (*Daniel* v. *Gracie*, 6 Q. B. 145). 3 & 4 Will. 4, c. 27, s. 8.

Payment of rent is *primâ facie* evidence of a tenancy from year to year (*Doe* v. *Dodd*, 5 B. & Ad. 689); if made with a reference to a year or some aliquot part of a year (*Braythwayte* v. *Hitchcock*, 10 M. & W. 497; *Doe* v. *Wood*, 14 M. & W. 687). Although a tenancy from year to year is ordinarily implied from the mere receipt of rent (*Bishop* v. *Howard*, 2 B. & C. 100; *Weller* v. *Stone*, 54 L. J. Ch. 497; 53 L. T. 361), it is competent to either the payer or receiver to prove the circumstances under which the payments as for rent were so made, and by such circumstances to repel the legal implication which would result from the payment of rent unexplained (*Doe* v. *Crago*, 6 C. B. 90).

A lease for one year and so on from year to year, until the tenancy hereby created shall be determined as hereafter mentioned, with a provision that it should be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain (*Doe* v. *Green*, 9 Ad. & Ell. 658; see *Birch* v. *Wright*, 1 T. R. 378; *Denn* v. *Cartwright*, 2 Camp. 572; *Thompson* v. *Maberley*, 4 East, 29; *Buckworth* v. *Simpson*, 1 C. M. & R. 834). The defendant being tenant from year to year at a given rent, the rent was raised. It was held, that a contract for a tenancy for two years certain from the time of raising the rent could not be inferred (*Doe* v. *Geekie*, 5 Q. B. 841). A tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as of any subsequent year, unless, in creating such tenancy, the parties use words showing that they contemplate a tenancy for two years at least (*Doe* v. *Smaridge*, 7 Q. B. 957).

Though a *parol* agreement for a longer term than three years is void by the Statute of Frauds (29 Car. 2, c. 3, s. 1), as to the duration of the term, yet it creates a tenancy from year to year, regulated in every other respect by the agreement (*Doe* v. *Bell*, 5 T. R. 471; *Clayton* v. *Blakey*, 8 T. R. 3; see *Goodtitle* v. *Herbert*, 4 T. R. 680). By the Real Prop. Act, 1845, s. 3 (*post*), a lease required by law to be in writing of any tenements or hereditaments "shall be void at law unless made by deed," where see note as to the effect of a lease void under that act. Where a party entered into possession of a farm, and paid rent under an agreement for a lease containing divers covenants applicable to a tenancy from year to year: it was held that where the agreement stipulated for the lease to contain a condition of re-entry if the tenant should grow two successive crops of white corn without fallowing, that he might be ejected without notice if he committed a breach of the covenant (*Doe* v. *Amey*, 4 P. & Dav. 177; see *Bolton* v. *Tomlin*, 5 Ad. & Ell. 856). See further, as to the effect of holding under an agreement for a lease, note to sect. 3 of Real Property Act, 1845, *post*.

A tenant who holds on after a term has elapsed goes on as tenant from year to year (*Doe* v. *Pullen*, 2 Bing. N. C. 753; *Bell* v. *Nangle*, 2 Jebb & Symes, 259; see *Doe* v. *Watts*, 7 T. R. 83; *Howard* v *Sherwood*, 1 Alcock & Nap. 217), on the terms of the lease so far as applicable (*Dougal* v. *McCarthy*, 1893, 1 Q. B. 736). An undertenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is a quasi tenant at sufferance, and the mere fact of occupation, coupled with payment of rent for such time of occupation, does not raise the presumption of a demise for years, unless there is some evidence to show an agreement for a demise for a term (*Simpkin* v. *Ashurst*, 1 C. M. & R. 261). So long as the occupation is merely continued with the bare acquiescence, or without the disagreement of the person entitled to the possession, a tenancy at sufferance exists (*Sykes* v. *Birkett*, cited 1 T. R. 161; Co. Litt. 270 b; Cro. Jac. 169). As to when

3 & 4 Will. 4, c. 27, s. 8.

a new tenancy is created by waiver of notice to quit, see *Tayleur* v. *Wildin*, L. R. 3 Exch. 303; *Holme* v. *Brunskill*, 3 Q. B. D. 495; *Inchiquin* v. *Lyons*, 20 L. R. Ir. 474.

(3) Determination of tenancy;

The non-payment of rent for sixteen years, and no proof of any demand being made, is of itself sufficient evidence to presume the determination of a tenancy from year to year (*Stagg* v. *Wyatt*, 2 Jur. 892).

The interest of a tenant from year to year does not determine by his death, but devolves to his personal representatives (*Doe* v. *Porter*, 3 T. R. 13; 15 Ves. 241).

by a notice to quit;

A tenancy from year to year may be determined by a notice to quit from either party, which, when there is no agreement, or where the agreement is silent on that point, must be at least half a year's (and not merely six months') notice, requiring from the tenant, or offering on his part, to give up possession at the expiration of the year, computing from the time when the tenancy commenced (*Right* v. *Darby*, 1 T. R. 159). A notice to quit "on the 11th October now next ensuing, or such other day and time as the defendant's tenancy might expire on," was not a good notice (*Mills* v. *Goff*, 14 M. & W. 72; see *Doe* v. *Smith*, 5 Ad. & Ell. 350; *Sidebotham* v. *Holland*, 1895, 1 Q. B. 378; *Wride* v. *Dyer*, 1900, 1 Q. B. 23). On a demise for one year and six months certain from August 13th, three calendar months' notice to be given before determination of the said tenancy, a three months' notice to quit, expiring on 13th August, was proper; and not a notice expiring at the end of a year from the termination of the year and six months (*Doe* v. *Dobell*, 1 Q. B. 806).

A tenant's notice given by mistake to quit in the middle of a year, even when accepted by landlord, did not determine the tenancy (*Doe* v. *Milward*, 3 M. & W. 328; see *Johnstone* v. *Hudlestone*, 4 B. & C. 922; *Weddall* v. *Capes*, 1 M. & W. 50; *Bessell* v. *Landsberg*, 7 Q. B. 638). A notice to quit must be such that the tenant may safely act on it at the time of receiving it; therefore a notice by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time for giving it. Notice to quit at the end of the current year of tenancy, "on failure whereof I shall require you to pay me double former rent or value for so long as you detain possession," is an unqualified notice, and does not give the tenant an option (*Doe* v. *Goldwin*, 2 Q. B. 143; *Bury* v. *Thompson*, 1895, 1 Q. B. 696). A notice to quit given by a person authorized by one of several joint-tenants, purporting to be given on behalf of them all, is good for all, because the tenant holds the premises only so long as he and they shall all agree (*Doe* v. *Summersett*, 1 B. & Ad. 135; *Doe* v. *Hughes*, 7 M. & W. 139; see *Doe* v. *Walters*, 10 B. & C. 626).

As to notices to quit in the case of tenancies from year to year of agricultural holdings in England, see now 46 & 47 Vict. c. 61, s. 33; and *Barlow* v. *Teal*, 15 Q. B. Div. 501.

when notice not requisite.

A notice to quit cannot be required by a person holding adversely, but only where there is a subsisting tenancy on both sides, nor is it necessary where the tenant does an act which amounts to a disavowal of the title of the landlord (*Doe* v. *Frowd*, 1 Moore & P. 486). A notice to quit is unnecessary, where on demand of possession the party refuses to give up possession, claiming the property as his own (*Doe* v. *Gower*, 17 Q. B. 589). In *Doe* v. *Pasquali* (Peake's N. P. C. 196), a refusal to pay rent to a devisee under a will, which was contested, was not such a disavowal of his title as to entitle such devisee to maintain ejectment without a previous notice to quit (see *post*, p. 146).

Where rent amounting to 20*s.* reserved by a lease in writing shall

9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent (*charge*), by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved,

and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent (*charge*) in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent (*charge*), subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

3 & 4 Will. 4, c. 27, s. 9.

have been wrongfully received, no right to accrue on the determination of the lease.

(1) *Cases under sect.* 9...145.
(2) *Old Law*...145.
(3) *Disclaimer of Landlord's Title*...146.

(1) Cases under sect. 9.

According to the judgment of Lord *Denman*, C. J., in *Doe* v. *Angell* (9 Q. B. 356), this section is to be read as if the word "charge" in italics had been interposed (see *Baines* v. *Lumley*, 16 W. R. 675).

Doe v. *Angell.*

In *Doe* v. *Angell* (9 Q. B. 328) there was an adverse receipt of rent which would have barred an action under this section. In that case Lord *Denman* discussed the meaning of the word "rent" in the act, pointing out that it meant rent-charge, in sections 2, 3, 4, 5, 7, 8 and 9 (see *Baines* v. *Lumley*, 16 W. R. 675).

When time begins to run.

The right to recover land subject to a lease is to be considered as having accrued not from the time when any person dealing with the leases, or dealing with those entitled to the leases, gets possession, and claims to be entitled to the fee, but from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant on such lease (*Chadwick* v. *Broadwood*, 3 Beav. 316; see *Archbold* v. *Scully*, 9 H. L. C. 360; *Twiss* v. *Noblett*, I. R. 4 Eq. 60; *Weeks* v. *Birch*, 69 L. T. 759). A person claiming without any real title to be entitled to land is a person "wrongfully" claiming within the meaning of this section, although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property (*Williams* v. *Pott*, 12 Eq. 149). For the bearing of this section on the case where there is a lease and a sub-lease, and the parties claiming under the sub-lease pay their rent directly to the head landlord, see *Drew* v. *Lord Norbury* (3 J. & Lat. 306). See further, as to wrongful receipt of rent within this section, *Sloane* v. *Flood* (5 Ir. C. L. 75); *Shaw* v. *Keighron* (I. R. 3 Eq. 574).

Wrongful receipt of rent within this section.

(2) Law before the statute.

The rule of law before this statute was, that where there was a subsisting lease, the right of entry was preserved until the determination of the lease although no rent had been received (*Orrell* v. *Maddox*, Runn. Eject. App. No. 1). And the adverse receipt of rent for more than twenty years did not deprive the party of such right of entry (*Doe* v. *Danvers*, 7 East, 299; see *Bushby* v. *Dixon*, 3 B. & C. 304). But in such a case a bill in equity for discovery was dismissed (*Cholmondeley* v. *Clinton*, T. & R. 107). A void lease or an attendant term did not prevent time running (*Taylor* v. *Horde*, 1 Burr. 60).

The mere receipt of rent by a stranger was not evidence of adverse

3 & 4 Will. 4, c. 27, s. 9.

possession, even although the stranger made a lease by indenture, reserving rent, unless he made an actual entry (Bull. N. P. 104; 1 Roll. Abr. 659; and see *Smith* v. *Parkhurst*, Andr. 324; *Jayne* v. *Price*, 5 Taunt. 326). So if a tenant at will made a lease for years, and the lessee entered, though the estate at will did not warrant the lease, it was only a disseisin at election (*Blunden* v. *Baugh*, Cro. Car. 302). For where a person gains a possession under a title consistent with that of the person having right, it is but a disseisin at election (see *Hovenden* v. *Annesley*, 2 Sch. & Lef. 622; 1 Taunt. 599).

The real property commissioners observed, "Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil: the person who is in the receipt of them can do nothing more to establish his right, and the person to whom they are demised is virtually dispossessed. Where *no rent* or only a *nominal rent* is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and, in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than 20*s.* a year may for this purpose be considered nominal" (1 Real Prop. Rep. 47).

(3) Disclaimer of landlord's title.

A disclaimer imports a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself (*Doe* v. *Cooper*, 1 M. & G. 139). And if a tenant disavowed his landlord's title by attorning to another, and the landlord was apprised of it and acquiesced, the possession of his tenant became adverse, and the statute would have run against the landlord (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 624). But where there is no disavowal of the tenure, the mere non-payment of rent by the tenant for a number of years did not bar the remedies of the landlord at the expiration of the term (2 Sch. & Lef. 625, 626).

Payment of rent to another party without the consent or knowledge of the landlord, after an adverse possession of twenty-three years, did not amount to an attornment; and the fraudulent act of a tenant in betraying the possession of his landlord by disclaiming tenure under him, and admitting a title in a third person, would not affect the landlord's title, so long as he had a right to consider the person as holding possession as tenant (*Meredith* v. *Gilpin*, 6 Price, 146). Payment of rent by a lessee to a lessor, after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired, and such knowledge is a fact to be decided by the jury (*Fenner* v. *Duplock*, 2 Bing. 10). A tenant, though not permitted to deny the right of demising, may rely upon his landlord's title having expired (*Downs* v. *Cooper*, 2 Q. B. 256).

The act of a tenant in setting up a title adverse to that of his landlord, in order to obtain the freehold, operates as a forfeiture of his term, and it is the same whether he does it himself, or assists another to do it (*Doe* v. *Flynn*, 1 C. M. & R. 137). But a tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own (*Doe* v. *Wells*, 10 Ad. & Ell. 427). In order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it (*Doe* v. *Pasquali*, Peake, N. P. C. 196; *Doe* v. *Stanion*, 1 M. & W. 703; see *Doe* v. *Cooper*, 1 M. & G. 135; *Rees* v. *King*, Forrest, 19). An assertion by a

yearly tenant that he has a right to hold at a customary rent amounts to a disclaimer (*Vivian* v. *Moat*, 16 Ch. D. 730). On disclaimer, see Woodfall's L. & T. 387 *et seq.*, 16th ed. 3 & 4 Will. 4, c. 27, s. 9.

10. No person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon. A mere entry not to be deemed possession.

By the Limitation Act, 1623, it was enacted, that no entry should be made by any man upon lands, unless within twenty years after his right should accrue. By the stat. 4 & 5 Ann. c. 16, s. 14, it was enacted, that no entry upon lands should be of force to satisfy the Limitation Act, 1623, or to avoid a fine levied of lands, unless an action were thereupon commenced within one year after, and prosecuted with effect (see 1 Wms. Saund. 319, n. (1); 10 B. & C. 848). Old law.

The section applies to a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night-time and pronouncing a few words, without any attempt or intention or wish to take possession (*Randall* v. *Stevens*, 2 E. & B. 652; compare *Solling* v. *Broughton*, 1893, A. C. 556, where the entries were made *animo possidendi*). Cases on section.

The defendant being in adverse possession of a hut and land, the lord of the manor entered, in the absence of the defendant but in the presence of his family, and said he took possession in his own right, and he caused a stone to be taken from the hut, and a portion of the fence to be removed. These acts were not sufficient to disturb the defendant's possession (*Doe* v. *Combes*, 9 C. B. 714). But where the only adverse possession taken by the defendant consisted in the erection of a fence, and the plaintiff entered and wholly destroyed the fence, the defendant's possession was disturbed (*Worssam* v. *Vandenbrande*, 17 W. R. 53). Acts sufficient to interrupt adverse possession.

11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action. No right to be preserved by continual claim.

Previously to the enactment in this and the preceding section an actual entry made by one who had a legal right to enter on an estate, or by his agent duly authorized by power of attorney, if made peaceably and repeated once in the space of every year and a day (which was called *continual claim*), was deemed sufficient to prevent the right of entry from being tolled by a descent cast or discontinuance, or barred by the Statute of Limitations (Litt. ss. 414, 415; Runn. Eject. 51, 52, 2nd ed.; Ad. Eject. 101, 3rd ed.; *Ford* v. *Grey*, 1 Salk. 285). Actual entry was sufficient to keep alive the right of a person disseised; but a mere demand, without process or acknowledgment, was not sufficient against the Statute of Limitations (*Hodle* v. *Healey*, 1 Ves. & B. 540).

12. When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have Possession of one coparcener, &c. not to be the possession of the others.

3 & 4 Will. 4, c. 27, s. 12.

been the possession or receipt of or by such last-mentioned person or persons, or any of them.

(1) *Old Law as to Coparceners*...148.
(2) *Cases under sect.* 12...148.
(3) *Occupation by Co-owners*...148.

(1) How coparceners, &c. were affected by old statutes of limitation.

Coparceners, joint tenants, and tenants in common, having a joint possession and occupation of the whole estate, it was a settled rule of law that the possession of any one of them was the possession of the others or other of them, so as to prevent the statutes of limitation from affecting them; nor did the bare receipt of all the rents and profits by one operate as an ouster of the other (Co. Litt. 243 b, n. (1), 373 b; *Ford* v. *Grey*, 1 Salk. 285; 6 Mod. 44; Br. Coparceners; 1 Moore, 868; Burton's Compendium, 395 *et seq.*; see *Doe* v. *Keen*, 7 T. R. 386; *Doe* v. *Pearson*, 6 East, 173; *O'Sullivan* v. *M'Swiney*, 1 Long. & T. 111; *Denys* v. *Shuckburgh*, 4 Y. & C. Ex. 42). But the possession of one heir in gavelkind was held not to be that of the other, where he entered with an adverse intent to oust the other (*Davenport* v. *Tyrrel*, 1 Bl. R. 675).

(2) Effect of sect. 12.

This section makes the possession of one coparcener, joint tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession (*Culley* v. *Doe*, 11 Ad. & Ell. 1008; *O'Sullivan* v. *M'Swiney*, 1 Long. & T. 118, 119; *Doe* v. *Horrocks*, 1 Car. & K. 566). Consequently, the entry of one coparcener cannot have the effect of vesting the possession in the other (*Woodroffe* v. *Doe*, 15 M. & W. 792).

One coparcener was held barred by the receipt of the whole rents by another coparcener and his widow for more than the statutory period, although an estoppel enabled him to succeed in another right (*Weeks* v. *Birch*, 69 L. T. 759).

Lands were conveyed in trust for five tenants in common. For more than twenty years four of them had been in the exclusive receipt of the rents of all the lands, the trustee never having interfered. The title of the fifth was barred; the case not being within the saving of the 25th section (*Burroughs* v. *M'Creight*, 1 J. & Lat. 290; *Bolling* v. *Hobday*, 31 W. R. 9). And where a father was in receipt of the whole rents of a property one undivided share of which belonged to an infant child, and another share to an adult child, the title of the adult was barred after the statutory period, although, as regards the infant's share, the father was considered as the infant's bailiff (*Re Hobbs, Hobbs* v. *Wade*, 36 Ch. D. 553). A presumption that one tenant in common had accounted to his co-tenant for a share of the rents was raised in *Sanders* v. *Sanders* (19 Ch. Div. 373). This section applies, not only to the case where one of several joint tenants has been in possession of the entirety of the whole of the lands held jointly, but also to the case where such tenant has been in possession of the entirety of any portion of such lands (*Murphy* v. *Murphy*, 11 Ir. C. L. R. 205, where *Tidball* v. *James*, 29 L. J. Ex. 91, is explained). The title of the owner of one undivided moiety of premises was barred by the sole possession of the owners of the other (*Thornton* v. *France*, 1897, 2 Q. B. 143).

(3) Occupation by co-owners.

Where two persons were in lawful possession of a copyhold, and the title under which they held came to an end, but they continued in possession for twenty-one years, it was decided that they held on as joint tenants; and inasmuch as they had done nothing to sever their tenancy, the interest of the one who died first determined on his death (*Ward* v. *Ward*, 6 Ch. 789; *Bolling* v. *Hobday*, 31 W. R. 9; see *Williams* v. *Williams*, 2 Ch. 294).

3 & 4 Will. 4, c. 27, s. 12.

Where one tenant in common as tenant at sufferance occupies the whole property after the expiration of a lease granted to him by his co-tenant, he will be liable for rent to his co-tenant in an action for use and occupation (*Leigh* v. *Dickeson*, 15 Q. B. Div. 60). In partition actions tenants in common have been charged with an occupation rent (*Pascoe* v. *Swan*, 27 Beav. 508; *Teasdale* v. *Sanderson*, 33 Beav. 534; *Hill* v. *Hickin*, 1897, 2 Ch. 579). In general, however, independently of a lease, mere occupation by one of several tenants in common, if unaccompanied by exclusion, does not make him liable for rent (*M'Mahon* v. *Burchell*, 2 Phil. 127; 1 Coop. 457). Nor can an action for money had and received be maintained, the remedy being an action of account under 4 Anne, c. 16, s. 27 (*Thomas* v. *Thomas*, 19 L. J. Exch. 175; *Henderson* v. *Eason*, 2 Phil. 308; 17 Q. B. 701; *Shirton* v. *Richardson*, 13 M. & W. 17; *Gorley* v. *Gorley*, 1 H. & N. 144; *Murray* v. *Hall*, 7 C. B. 441); nor in the absence of ouster can trespass be maintained (*Jacobs* v. *Seward*, L. R. 5 H. L. 464). Where one tenant in common of a wall excludes the other by means of an obstruction, the remedy is to remove the obstruction (*Watson* v. *Gray*, 14 Ch. D. 192).

One tenant in common of a house who spends money in ordinary repairs has no right of action against his co-tenant for contribution (*Leigh* v. *Dickeson*, 15 Q. B. Div. 60; see *Johnson* v. *Wild*, 44 Ch. D. 146). But on a sale in a partition action the expenses of permanent repairs were borne rateably by tenants in common (*Re Jones, Farrington* v. *Forrester*, 1893, 2 Ch. 461; *Re Cooke, Lawledge* v. *Tyndall*, 1896, 1 Ch. 923).

Possession of a younger brother not to be the possession of the heir.

13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

The effect of this section is illustrated in the judgment of the court in *Jones* v. *Jones*, 16 M. & W. 712.

Prior state of the law.

If a man, seised of certain lands in fee, had issue two sons, and died seised of such land, and the younger son entered by abatement into the land, the Statute of Limitations did not operate against the elder son (Litt. s. 396; *Sharington* v. *Shrotton*, Plowd. 306). So where a sister entered (*Page* v. *Selby*, Bull. N. P. 102; 2 Stark. on Ev. 220, 2nd ed.; Co. Litt. 242; Plowd. 298, 306; see *Dowdall* v. *Bryne*, Batty's Ir. R. 373).

A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time until her death in 1838. B. was the eldest son of A. and his wife. It was held, that although B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as heir on her death in 1838 (*Doe* v. *Long*, 9 C. & P. 773; see *Doe* v. *Lawley*, 13 Q. B. 954).

Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.

14. Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to

3 & 4 Will. 4, c. 27, s. 14.

the meaning of this act, to have been the possession or receipt of or by the person to whom, or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

(1) *Different sections as to acknowledgments in the Limitation Acts*...150.

(2) *Cases under sect.* 14...150.

(1) Different sections as to acknowledgments in the statutes of limitation.

The requiring an acknowledgment in writing to take a case out of the R. P. Lim. Act, 1833, was by analogy to the Statute of Frauds Amdt. Act, 1828, adopted in this section, in the 42nd section of this act, in the 5th section of the Civil Proc. Act, 1833, and in sects. 7 & 8 of the R. P. Lim. Act, 1874. A difference occurs in the language of these sections. Thus, under the 14th section, the acknowledgment is to be given to the party entitled to land or rent, or *his agent*, signed by the person in possession. By sect. 7 of R. P. Lim. Act, 1874, twelve years' possession by a mortgagee will bar the right of redemption, unless an acknowledgment in writing of such right shall have been given to the mortgagor or some person claiming his estate, or to the *agent* of such mortgagor or person, signed by the mortgagee, or the person claiming through him. By sect. 8 of the R. P. Lim. Act, 1874, money charged upon land and legacies cannot be recovered after the end of twelve years, unless in the meantime some part of the principal, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his *agent*, to the person entitled thereto, or his *agent*. By the 42nd section, no arrears of rent or interest are to be recovered, but within six years after the same shall have become due, or next after an acknowledgment of the same shall have been given to the person entitled thereto, or his *agent*, signed by the person by whom the same was payable, or his *agent*. In the four cases above mentioned, therefore, the acknowledgment is binding if given *to* the party entitled *or his agent;* but an acknowledgment of title under the 14th section, or of a right to redeem under sect. 7 of the R. P. Lim. Act, 1874, cannot be given *by an agent;* whilst, in the case of money charges, and of arrears of rent or interest, an acknowledgment by an agent will be effectual. The cases as to acknowledgments under the above-mentioned sections, and under Statute of Frauds Amdt. Act, 1828, are collected in the subsequent notes. By the 5th section of the Civil Proc. Act, 1833 (limiting the time within which actions on specialties are to be brought), any acknowledgment either by writing signed by the party liable by virtue of a specialty, or his *agent*, or part payment or part satisfaction on account of any principal or interest due thereon, will take a case out of that act.

(2) By whom acknowledgment must be made under sect. 14.

Sect. 14 of the R. P. Lim. Act, 1833, provides that the acknowledgment must be signed by the person in possession: therefore, an acknowledgment signed by an agent will be insufficient (*Ley* v. *Peter*, 3 H. & N. 101; 27 L. J. Ex. 234). An unaccepted proposal for a lease made by A., who was unable from illness to write, was evidence of an acknowledgment by A. (*Dublin* v. *Judge*, 11 Ir. L. R. 9).

To whom.

The acknowledgment must be given to the person entitled or his agent (see *Fursden* v. *Clegg*, 10 M. & W. 572; *Goode* v. *Job*, 28 L. J. Q. B. 1).

3 & 4 Will. 4, c. 27, s. 14.

What is an acknowledgment.

Whether a writing amounts to an acknowledgment of title within this section is a question for the judge, and not for the jury to decide (*Doe* v. *Edmonds*, 6 M. & W. 295; *Morrell* v. *Frith*, 3 M. & W. 402; but see *Incorporated Society* v. *Richards*, 1 D. & War. 290; Sugd. R. P. Stat. 67). A party in possession adversely of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows:—"Although if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years:" the bargain subsequently went off, and no rent was paid or lease executed. Held, that this letter was not an acknowledgment of title within this section, because there was no final bargain (*Doe* v. *Edmonds*, 6 M. & W. 295; see *Morrell* v. *Frith*, 3 M. & W. 402).

A deed which purported to bear date more than twenty years before action, but which was in fact executed by the defendant within twenty years, and which contained a recital of the plaintiff's title, was a sufficient acknowledgment (*Jayne* v. *Hughes*, 10 Exch. 430). A correspondence by a party in possession of property with the solicitor of a society, by which he merely professed to hold the estates until an account on the foot of charges, to which he was entitled, should be closed, and offered to refer to arbitration all questions touching such account, as the only matter in dispute, was a sufficient acknowledgment (*Incorporated Society* v. *Richards*, 1 D. & War. 258). A letter was held to amount to a sufficient acknowledgment in *Fursden* v. *Clegg*, 10 M. & W. 572). Where two parties are dealing with each other, the one claiming a right to the property, and the other an incumbrance on it, the incumbrancer cannot be heard to say that an acknowledgment, contained in a correspondence between them, is not binding on him, because there might be an infirmity in the title acknowledged, in case some third party were to make a claim (*Incorporated Society* v. *Richards*, 1 D. & War. 258). The acknowledgment must be in writing, and it may be doubted whether parol evidence of the acknowledgment will be excluded (*Haydon* v. *Williams*, 7 Bing. 168). An acknowledgment in an answer sworn to a bill in Chancery filed by the plaintiff in reference to the same property was sufficient (*Goode* v. *Job*, 28 L. J. Q. B. 1).

Where a statutory title has accrued by the expiration of the requisite period, it cannot be defeated by a subsequent acknowledgment (*Sanders* v. *Sanders*, 19 Ch. Div. 373).

When time runs after an acknowledgment.

The moment after an acknowledgment of title, within the meaning of the 14th section, is made, the time begins to run against the person to whom it is made (*Burroughs* v. *M'Creight*, 1 J. & L. 304; *Scott* v. *Nixon*, 3 D. & War. 404). See, however, Darb. & Bos. Stat. Lim. 381, 2nd ed.

Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or *interest* (*u*), at any time within five years next after the passing of this act (*x*).

(*u*) The word "interest," which is in the parliament roll, appears to be a mistake for "rent" (*per* Lord *Denman*, C. J., *Doe* v. *Angell*, 9 Q. B. 360).

3 & 4 Will. 4, c. 27, s. 15.

(*x*) For cases on this section, see *Holmes* v. *Newlands*, 11 Ad. & Ell. 44; *Culley* v. *Doe*, 11 Ad. & Ell. 1008; *O'Sullivan* v. *M'Sweeny*, 2 Ir. L. R. 95, 96; *Doe* v. *Williams*, 5 Ad. & Ell. 296; *Scott* v. *Nixon*, 3 D. & War. 388; *Incorporated Society* v. *Richards*, 1 D. & War. 289; *Doe* v. *Thompson*, 5 Ad. & Ell. 532; *Ex p. Hassell*, 3 Y. & Coll. 617.

3. *Savings in Case of Disabilities.*

Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the determination of their disability or death.

16. Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid (*y*), such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy (*z*), coverture, idiotcy, lunacy (*a*), unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened) (*b*).

(1) *Recent Legislation*...152.
(2) *Cases under sect.* 16...152.
(3) *Presumption of Death*...153.

(1) Recent legislation.

In all cases since 1st January, 1879, the question of disabilities depends on R. P. Lim. Act, 1874, ss. 3 and 4, which have substituted the period of six years for the ten years mentioned in sect. 16 (above), and have abolished the disability arising from absence beyond seas. See the sections given in full, p. 186, *post*. With regard to married women the disability of coverture has been abolished in the case of actions falling within M. W. P. Act, 1882, s. 1, sub-s. 2 (see *Lowe* v. *Fox*, 15 Q. B. Div. 667; *Weldon* v. *Neal*, 51 L. T. 289; cases decided under Limitation Act, 1623, s. 7). The following note has reference to R. P. Lim. Act, 1833, s. 16.

(2) Cases under sect. 16.

(*y*) See sections 2 to 14, *ante*, p. 122, *et seq*. This section was held not to apply to a mortgagor redeeming, such an action not being an action to recover land (*Kinsman* v. *Rouse*, 17 Ch. D. 104; see *Forster* v. *Patterson*, 17 Ch. D. 132).

Disability of infancy.

(*z*) Where an infant's property has been in the possession of his parent, such parent has been treated as a bailiff, and time has not run (*Thomas* v. *Thomas*, 2 K. & J. 79; *Wall* v. *Stanwick*, 34 Ch. D. 763; *Re Hobbs*, *Hobbs* v. *Wade*, 36 Ch. D. 553). Similarly where an uncle has been in possession (*Pelly* v. *Bascombe*, 4 Giff. 390; on appeal, 13 W. R. 306). Where a father remained in possession after the infant attained twenty-one, time did not run against the infant until the father's death (*Tinker* v. *Rodwell*, 69 L. T. 591).

Possession by father of son's estate.

(*a*) See *Fulton* v. *Creagh*, 3 J. & Lat. 329; 3 Y. & Coll. 620.

Successive disabilities in the same person.

(*b*) It was held under R. P. Lim. Act, 1833, s. 16, that when the person to whom the right to bring an action for the recovery of land accrued was under a disability, and before the removal of that disability the same person fell under another disability, his right to bring an action was preserved until ten years after the removal of the latter disability (*Borrows* v. *Ellison*, L. R. 6 Ex. 128; see *Supple* v. *Raymond*, 1 Hayes, Ir. Rep. 6; 2 Prest. Abstr. 340; Blansh. Lim. 21, 22).

3 & 4 Will. 4, c. 27, s. 16.

But where time had once begun to run no subsequent disability on the part of the person to whom the right first accrued, or of any one claiming under him, would stop the running of time (see *Doe* v. *Jones*, 4 T. R. 310; *Sturt* v. *Mellish*, 2 Atk. 610—614; Str. 556; 1 Wils. 134; *Cotterell* v. *Dutton*, 4 Taunt. 826; *Doe* v. *Jesson*, 6 East, 80; decided under Lim. Act, 1623, s. 2, the wording of which was very similar; and see *Goodall* v. *Skerratt*, 3 Drew. 216; *Murray* v. *Watkin*, 62 L. T. 796, *post*, p. 186). It was also decided under Lim. Act, 1623, s. 2, that where an estate descended to parceners, one of whom was under a disability, the disability of the one did not preserve the title of the other (*Doe* v. *Rowlston*, 2 Taunt. 441).

For the bearing of this section upon the construction of the first branch of sect. 3, see *Owen* v. *De Beauvoir* (16 M. & W. 567); *De Beauvoir* v. *Owen* (5 Exch. 166).

As to successive disabilities in different persons, see sect. 18, *post*, p. 155.

(3) Presumption of death where person has not been heard of for seven years;

Where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven years, a period which has been fixed from analogy to the statute of bigamy (1 Jac. 1, c. 11, s. 2; see now 24 & 25 Vict. c. 100, s. 57; *Reg.* v. *Tolson*, 23 Q. B. D. 168), and the statute concerning leases determinable on lives (19 Car. 2, c. 6). Compare the statutory rule in Scotland (44 & 45 Vict. c. 47). Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years (*Hopewell* v. *De Pinna*, 2 Campb. 113). Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death (*Doe* v. *Deakin*, 4 B. & Ald. 433; see 2 *Id.* 386). It was held, that where no account could be given of a person within the exception of the Lim. Act, 1623, s. 2, he would be presumed to be dead at the expiration of seven years from the last account of him (*Doe* v. *Jesson*, 6 East, 84). It is now settled that if a person has not been heard of for seven years, there is a presumption of law that he is dead (*Re Phene*, 5 Ch. 139; *Nepean* v. *Doe*, 2 M. & W. 894; see *Re Winstone*, 1898, P. 143; *Re Hurlston*, *Ib.* 27). The presumption of death, however, does not arise where the other circumstances of the case render it probable that he would not be heard of though alive (*Watson* v. *England*, 14 Sim. 28; *Bowden* v. *Henderson*, 2 Sm. & G. 360; *M'Mahon* v. *M'Elroy*, I. R. 5 Eq. 1). Further, in order to raise the presumption, there must have been an inquiry and search made for the man amongst those who if he were alive would be likely to hear of him (*Prudential Co.* v. *Edmonds*, 2 App. Cas. 509; *Doe* v. *Andrew*, 15 Q. B. 751; *Re Creed*, 1 Drew. 235). See, as to the presumption being made after a less period, *Re Matthews*, 1898, P. 17.

no presumption as to time of death;

But although, if a person has not been heard of for seven years, there is a presumption of law that he is dead; at what time within that period he died is not a matter of presumption but of evidence. And the onus of proving that the person survived any particular period within the seven years lies upon those who claim a right, to the establishment of which that fact is essential (*Re Phene*, 5 Ch. 139, where the cases are collected; see *Nepean* v. *Doe*, 2 M. & W. 894; *Doe* v. *Nepean*, 5 B. & Ad. 86; *R.* v. *Harbourne*, 2 Ad. & Ell. 540; *R.* v. *Twyning*, 2 B. & Ald. 386). Where, accordingly, a legatee has not been heard of for seven years, his death will be presumed, and the onus of proving that he survived the testator lies upon those who claim under him. In the absence of such proof the legacy will be paid to the residuary legatee, or the next of kin of the testator (*Re Lewes*, 6 Ch. 356; *Re Walker*, 7 Ch. 120). See form of order in *Re Benjamin*, *Neville* v. *Benjamin*, 1902, 1 Ch. 726. See also *Re Green*, 1 Eq. 288, a case of next of kin; and *Rhodes* v. *Rhodes*, 36 Ch. D. 586, where the court remained in doubt whether a fund should be paid to the next of kin ascertained at the beginning or the next of kin ascertained at the end of the period.

3 & 4 Will. 4, c. 27, s. 16.

effect of circumstances;

After seven years, having got the fact of death, you have a right to look back and inquire into all the circumstances and ascertain when the man died (*Hickman* v. *Upsall*, 4 Ch. Div. 149; *Re Beasney*, 7 Eq. 498; and see the judgment of *Lush*, J., in *R.* v. *Lumley*, L. R. 1 C. C. 196; *R.* v. *Willshire*, 6 Q. B. D. 366).

In *Sillick* v. *Booth* (1 Y. & Coll. C. C. 117), the court concluded that a party died at a particular time within the seven years after he had been last heard of, the particular time being the hurricane months, and the party having sailed from Demerara before the expiration of such hurricane months (see also *Webster* v. *Birchmore*, 13 Ves. 362). The court concluded that a young sailor, who was last seen in the summer of 1840 going to Portsmouth to embark, survived his grandmother, who died in March, 1841 (*Re Tindall*, 30 Beav. 151). A son, first tenant in tail in remainder, left this country on the 11th April, 1858, and was never afterwards heard of. His father, tenant for life, died on the 30th May, 1858. The court concluded, in 1872, that the son survived the father (*Pennefather* v. *Pennefather*, I. R. 6 Eq. 171; see *Lakin* v. *Lakin*, 34 Beav. 443). Where a testator died in 1829, leaving a will in favour of his children, one of whom went abroad in 1809, and had not been heard of since 1815; both before and after the testator's death unsuccessful attempts to procure information were made, by inquiries and advertisements. He was presumed to have died before the date of the will (*Rust* v. *Baker*, 8 Sim. 443). The certificate of a master, stating that a legatee had been abroad twenty-eight years, and not been heard of for twenty-seven years, and his opinion that he died in the lifetime of the testator, was the foundation of a decree (*Lee* v. *Willock*, 6 Ves. 606; Reg. lib. 1791, fol. 315; see also 13 Ves. 362). Where a trust was declared by deed in favour of A., A., although he had not been heard of for five years before the date of the deed, was presumed to have been then in existence (*Re Corbishley*, 14 Ch. D. 846). In some doubtful cases the court has handed over property on security to refund being given (*Dowling* v. *Winfield*, 14 Sim. 277; *Cuthbert* v. *Purrier*, 2 Phil. 199; *Re Mileham*, 15 Beav. 507).

security to refund;

practice in Probate Court;

Before granting probate or administration, the Probate Division requires evidence of the date of the death. And where no direct proof is forthcoming, the practice is to lay the available evidence before the court on motion, and take its directions. In such cases the rule as to seven years' absence is applied (*Re Howe*, 1 Sw. & Tr. 54; 27 L. J. Prob. 37); but as a rule advertisements are directed (*Re Robertson*, 1896, P. 8; see *Re Saul*, 1896, P. 151). As to the grounds on which the Probate Court will presume the death of parties who embarked in vessels lost at sea or not afterwards heard of, see *Re Norris* (1 Sw. & T. 6); *Re Main* (1 Sw. & T. 11); *Re Smyth* (28 L. J. Prob. 1).

commorientes;

The testator and his wife were shipwrecked and drowned at sea, one wave sweeping both of them together into the water, after which they were never seen again. In such cases the question of survivorship is matter of evidence, and not of positive regulation and enactment (varying according to the ages and sex of the persons dying in the same shipwreck), as it is in the French Code, and in the absence of evidence there is no conclusion of law on the subject (*Wing* v. *Angrave*, 8 H. L. C. 183; see, further, *Gen. Stanwix's case*, Fearne's Post. Works, 38; *R.* v. *D. Hay*, 1 Wm. Bl. 640; Swinburn, part 7, s. 33; *Wright* v. *Netherwood*, 2 Salk. 593, n.; *Hitchcock* v. *Beardsley*, West's Rep. t. Hardwicke, 445; *Bradshaw* v. *Toulmin*, 2 Dick. 633; *Mason* v. *Mason*, 1 Mer. 308; *Taylor* v. *Diplock*, 2 Phill. Ecc. C. 261; *Re Selwyn*, 3 Hagg. Ecc. R. 741; *Colvin* v. *The King's Proctor*, 1 Hagg. Ecc. 92; *Re Alston*, 1892, P. 142; *Re Beynon*, 1901, P. 141).

As to reduction into possession in cases of this kind, see *Scrutton* v. *Pattillo* (23 W. R. 379); *Wollaston* v. *Berkeley* (2 Ch. D. 213).

In establishing a title upon a pedigree, it is sufficient to show that the person has not been heard of for many years, to put the opposite party upon proof that he still exists (*Rowe* v. *Hasland*, 1 W. Bl. 404; see Fitz. N. B. 196, A. L.).

Where a man died long ago and there is nothing to show whether he died with issue or without issue, there is no presumption either way (*Greaves* v. *Greenwood*, 2 Exch. Div. 295). Proof by one of a family, that many years before a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *primâ facie* evidence of his death without issue to entitle the next claimant by descent to recover in ejectment (*Doe* v. *Griffin*, 15 East, 293). The court concluded that a man had died without issue (*Rawlinson* v. *Miller*, 1 Ch. D. 52; see *Re Pople*, 40 Ch. D. 589; *Re Hanby*, 25 W. R. 427); and without leaving a widow (*Re Westbrook*, 1873, W. N. 167; see *Re Benjamin*, *Neville* v. *Benjamin*, 1902, 1 Ch. 726).

3 & 4 Will. 4, c. 27, s. 16.

presumption of death without issue.

17. Provided nevertheless, and be it further enacted, that no entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years, from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

But no action, &c. shall be brought beyond forty years after the right of action accrued.

In all cases since 1st January, 1879, reference must be had to R. P. Lim. Act, 1874, s. 5 (given at length *post*, p. 187), which has prescribed thirty years as the utmost allowance for disabilities.

37 & 38 Vict. c. 57.

Before R. P. Lim. Act, 1833, the period during which a vendor of land on an open contract was bound to show title was sixty years, and sect. 17 of the act did not alter this rule (*Cooper* v. *Emery*, 1 Ph. 388; *Moulton* v. *Edmonds*, 1 D. F. & J. 250). Now by V. & P. Act, 1874, s. 1, the period is forty years. And this is the period required where the title is a possessory one (*Jacobs* v. *Revell*, 1900, 2 Ch. 858).

Vendor and purchaser.

A *feme sole* seised in fee married, and she and her husband ceased to be in the enjoyment of the land. The wife's heir-at-law brought ejectment more than forty years after the husband and wife ceased to occupy: it was held, that the heir-at-law was barred by the 17th section (*Doe* v. *Bramston*, 3 Ad. & Ell. 63). But where the husband and wife are seised in fee in right of the wife, and the husband, by a conveyance which does not bind the wife, purports to convey the fee, and thereby passes the estate which the husband might have held during the continuance of the coverture: in such case the right of the wife comes within the fourth description of interest in the 3rd section, and the wife or her heir may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for more than forty years (*Jumpsen* v. *Pitchers*, 13 Sim. 327; see *Hounsell* v. *Dunning*, 1902, 1 Ch. 512, quoted *post*, p. 187).

Where husband and wife abandon possession of wife's property.

Where husband purports to convey wife's property by a conveyance which does not bind her.

In 1787, a lease was made by a lunatic to his brother for lives renewable for ever. The lessee was permitted to hold part of the lands demised, paying the entire reserved rent, and died in 1836, being the last life in the lease. It was held, that he had not acquired either the fee-simple, subject to a perpetual rent equal to the rent reserved, or a right to a renewal (*Fulton* v. *Creagh*, 3 J. & Lat. 329).

Lease by a lunatic.

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall

No further time to be allowed for a succession of disabilities.

3 & 4 Will. 4, c. 27, s. 18.

have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

37 & 38 Vict. c. 57.

In cases since 1st January, 1879, this section is to be read substituting the periods of twelve years and six years respectively for the periods of twenty years and ten years mentioned in the section (R. P. Lim. Act, 1874, s. 9, *post*, p. 189).

Sect. 18.

As to how far sect. 18 was retrospective, see *Devine* v. *Holloway*, 14 Moore, P. C. C. 290. As to successive disabilities in the same person, see note to sect. 16, *ante*, p. 152.

Scotland, Ireland, and the adjacent islands not to be deemed beyond seas.

19. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney or Sark, nor any islands adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act.

See sect. 16, *ante*, p. 152, and Mercantile Law Amdt. Act, 1856, s. 12, *post*, p. 245; *Ex p. Hassell*, 3 Y. & Coll. 617; *Battersby* v. *Kirk*, 2 Bing. N. C. 603; *Lane* v. *Bennett*, 1 M. & W. 70; *Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. C. 4. No time is now allowed for absence beyond seas (R. P. Lim. Act, 1874, s. 4, *post*, p. 187).

4. *Concurrent Rights.*

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

20. When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

Cases on the construction of this section.

This section, so far as applicable to future estates and interests, must be read in connection with the fourth branch of sect. 3 (*ante*, p. 130) and sect. 2 of R. P. Lim. Act, 1874 (*post*, p. 184).

This section is in derogation of the old maxim, borrowed from the civil law, "*quando duo jura concurrunt in unâ personâ equum est ac si essent in*

diversis" (4 Rep. 118; 7 Rep. 2 b, 14 b; Plowd. 368). Under the Lim. Act, 1623, s. 1, a party might have pursued his right of entry twenty years after it attached, although in the meantime the party might have had a different right, of which he was barred by more than twenty years' adverse enjoyment (*Hunt* v. *Bourne*, 1 Salk. 339; 2 *Id.* 421; 4 Br. P. C. 66). 3 & 4 Will. 4, c. 27, s. 20.

Copyhold land was surrendered, in 1798, to a husband and wife, with remainder to the heirs of the husband. In 1805, the husband absconded. In 1807, a commission of bankruptcy issued against him, and the usual assignment of his estate was made to his assignee. The wife occupied the copyhold estate until her death in 1841: it was held, that an ejectment by the assignee brought within twenty years after her death was in time; for that the husband's reversion in fee was a future estate within the meaning of R. P. Lim. Act, 1833, s. 3. The court thought it clear that the husband, if he had not been bankrupt, would have been entitled to the possession during the joint lives of himself and wife, and that upon his death (which the court presumed to have taken place in 1812) the wife was entitled to possession for her life, and the heirs of the husband on the expiration of their joint lives. The court thought, supposing the twentieth section to apply, the proviso at the end of it applied also, because the wife had been in possession until her death; and this was a sufficient *recovery* for the purpose of that section (*Doe* v. *Liversedge*, 11 M. & W. 517). Where A. was entitled to a leasehold interest in land for lives as heir of B., and to the reversion fee as heir of C., adverse possession during the lease barred his original right of entry, and he had no new right of entry on the determination of the lease (*Doe* v. *Moulsdale*, 16 M. & W. 689). A testator devised lands to A., with a gift over to B. in case either of two events should happen. Both events having happened, it was held that sect. 20 deprived the plaintiff of the benefit of the new right of action which accrued on the happening of the second event (*Clarke* v. *Clarke*, I. R. 2 C. L. 395).

A general power vested in a tenant for life of appointing the fee in remainder was held not to fall within the words "other estate, interest, right, or possibility"; so that a barring of the life estate did not affect the claim of the appointee (*Re Devon Settled Estates*, 1896, 2 Ch. 562).

The above section deals with the case of the same person being entitled to successive interests in real estate. Where a person was entitled to successive life interests in personal estate, and she sued for a breach of trust as regards the *corpus* of the estate, it was held, under sect. 8 of the Trustee Act, 1888 (*post*, p. 248), that she could, in respect of her second interest, maintain the action, although an action in respect of the first would have been barred (*Mara* v. *Brown*, 1895, 2 Ch. 69, 96).

5. *Operation of the Statute in Cases of Estates Tail.*

21. When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right, which such tenant in tail might lawfully have barred. Where tenant in tail is barred, remainderman whom he might have barred shall not recover.

Land was devised to the father of the plaintiff in tail general. The plaintiff's father received the rents and profits from 1799 to 1807, at which time he was succeeded by a person through whom the defendant claimed. Held, in an action of ejectment brought in 1853, that under Cases under this section.

3 & 4 Will. 4, c. 27, s. 21.

this section, since the tenant in tail was barred, the issue in tail was also barred (*Austin* v. *Llewellyn*, 9 Exch. 276). An estate tail was limited to A., remainder in tail to B., remainder to C. A. dies, then B. dies within twenty years, and C. becomes entitled in possession, being at the time under disability. It was held, that under the 21st and 22nd sections of this act time commenced running against C. from the death of A., and that having commenced to run C. was not saved from its operation under the 16th section by being under disability (*Goodall* v. *Skerratt*, 3 Drew. 216). The 21st section does not apply to the case where the tenant in tail has conveyed away his own right to another and put it out of his power to enter (*Cannon*, dem., *Rimington*, ten., 12 C. B. 1, 18). In this last case the estate of a tenant in tail in possession is considered as coming within this section (12 C. B. 34). But it has been said by *Bramwell*, B., that the sects. 21 and 22 refer only to estates in remainder and reversion, the estate of the tenant in tail which descends to his issue being provided for by sect. 2 (*Abergavenny* v. *Brace*, L. R. 7 Ex. 149, 173). See further, pp. 124, 125, *ante*.

Possession adverse to a tenant in tail shall run on against the remainderman whom he might have barred.

22. When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred shall make an entry or distress, or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Under the Lim. Act, 1623, where an estate was limited to one in tail, with remainder to another in fee, the remainderman might, at any time within twenty years after the failure of the issue in tail, have recovered the estate (*Taylor* v. *Horde*, 1 Burr. 60).

Where there shall have been possession, under an assurance, by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

23. When a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be, and be deemed to have been, effectual

as against any person claiming any estate, interest or right to take effect after or in defeasance of such estate tail. 3 & 4 Will. 4, c. 27, s. 23.

From 1st January, 1879, sect. 6 of the R. P. Lim. Act, 1874, *post*, p. 187, has by sect. 9 of the same act been substituted for sect. 23 of the R. P. Lim. Act, 1833. Sect. 6 of the R. P. Lim. Act, 1874, fixes the period of limitation at twelve years, but is in other respects substantially similar to sect. 23 of the R. P. Lim. Act, 1833. The following note has reference to the last-mentioned section. 37 & 38 Vict. c. 57.

As to the law before the R. P. Lim. Act, 1833, see *Doe* v. *Pike* (3 B. & Ad. 742); *Woodroffe* v. *Doe* (15 M. & W. 769; 2 H. L. C. 811); *Doe* v. *Woodroffe* (10 M. & W. 608). Old law.

The proposition of the Real Property Commissioners on the subject of this section was, "That on any alienation by tenant in tail, by an assurance not operating as a complete bar to the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, possession under such assurance shall have the same effect in barring the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, as if such possession had been adverse to the said estate tail, or to the said estates, rights or interests" (1 Real Prop. Rep. 79, pl. 15; and see *Ib.* p. 46). Remarks of Real Property Commissioners.

The object of this section was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances, which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder. There are prior clauses in the statute which show what the operation is as to the issue, and those clauses [*qu.* this clause] seem to be studiously worded so as to be confined only to the case of persons entitled after the expiration of the estate tail (*Penny* v. *Allen*, 7 D. M. & G. 426; *Morgan* v. *Morgan*, 10 Eq. 99). Cases under sect. 23.

The section applies to cases where a tenant in tail executes a deed enrolled under the Fines and Recoveries Act, 1833, which, for want of the consent of the protector, operates only to create a base fee, and possession is obtained under the deed (Sugd. V. & P. 483, 14th ed.) The "possession by virtue of such assurance, however, mentioned in the section, must be a possession by virtue of an assurance which turns an estate tail into a base fee. And where a conveyance comprised a base fee and also a preceding life estate, time did not commence to run in favour of the possession taken under such conveyance until the determination of the life estate (*Mills* v. *Capel*, 20 Eq. 692).

As to whether the section extends to fines and recoveries previous to the Fines and Recoveries Act, 1833, see 1 Hayes' Conv. 264, 5th ed.; Sugd. R. P. Stat. 89; and the argument in *Anderson* v. *Anderson* (30 Beav. 207).

6. *Limitation of Time as to Suits in Equity.*

24. No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity. No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

Since 1st January, 1879, the R. P. Lim. Act, 1874, *post*, p. 184, has prescribed fresh periods of limitation, which, by the express terms of the act, were extended to "suits." How far courts of equity bound by Statutes of Limitation.

3 & 4 Will. 4, c. 27, s. 24.

Prior to the R. P. Lim. Act, 1833, courts of equity had acted in obedience to the Statutes of Limitation in the case of legal demands, and by analogy to the rules laid down by those statutes in other cases (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 629; *Smith* v. *Clay*, 3 Bro. C. C. 639, n.; *Cholmondeley* v. *Clinton*, 2 Jac. & W. 156). The R. P. Lim. Act, 1833, was intended to put an end to the discretion of courts of equity where they had acted by analogy to the time limited at law (*Berrington* v. *Evans*, 1 Y. & C. 439). But sect. 24 only barred equitable rights so far as they would have been barred if legal (*Archbold* v. *Scully*, 9 H. L. C. 360).

Independently of statute, time is a bar in equity to stale demands where there has been improper delay (*Harcourt* v. *White*, 28 Beav. 303; *Forster* v. *Thompson*, 4 Dr. & War. 318; *Coppin* v. *Gray*, 1 Y. & C. C. C. 205; *Blair* v. *Ormond*, 1 De G. & Sm. 428).

As to the proceedings under the old practice in equity sufficient to prevent the operation of the statute, see *Coppin* v. *Gray* (*sup.*); *Purcell* v. *Blennerhassett* (3 J. & Lat. 24); and as to amended bills, see *Byron* v. *Cooper* (11 Cl. and Fin. 556); *Plowden* v. *Thorpe* (7 Cl. & Fin. 164); *Blair* v. *Ormond* (1 De G. & Sm. 428); *A.-G.* v. *Hall* (11 Price, 760).

Foreclosure actions.

A foreclosure action is an action for the recovery of land within sects. 2 and 24 of this statute, and not an action for the recovery of the mortgage money within sect. 40 (*Heath* v. *Pugh*, 6 Q. B. Div. 340; *Harlock* v. *Ashberry*, 19 Ch. Div. 539; following the opinion of Lord *St. Leonards* in *Wrixon* v. *Vize*, 3 Dr. & War. 104; and R. P. Stat. 121, 2nd ed.; and overruling, on this point, *Dearman* v. *Wyche*, 9 Sim. 570; *Du Vigier* v. *Lee*, 2 Hare, 326; and *Sinclair* v. *Jackson*, 17 Beav. 405). But for purposes of practice an action for foreclosure and delivery of possession is not an action for the recovery of land within the R. S. C. (Ord. 18, r. 2).

In the case of an equitable charge on a reversionary interest in land, the statute commences to run against the right to foreclose from the time when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480; see *Re Owen*, 1894, 3 Ch. 220).

Title deeds.

A bill filed by the lord of a manor to recover his title deeds and court rolls was held barred by this section (*Wells* v. *Doddington*, 2 Coll. C. C. 73).

Partition.

So also the equitable title of a tenant in common suing for partition was barred by this section (*Thornton* v. *France*, 1897, 2 Q. B. 158).

Waste.

As to waste, see *post*, p. 254.

Charities.

Charities are within the operation of this section (*A.-G.* v. *Magdalen Coll.*, 6 H. L. C. 189; see the note to sect. 25, *post*).

See further the note as to Courts of Equity and the Statutes of Limitation, *post*, pp. 251 *et seq.*

Repeal of formal words.

S. L. R. (No. 2) Act, 1890, has repealed formal words which occurred in the following sections of this act, viz.:—24, 29, 30, 33, 39, 41, 42, and 43, and which have accordingly been omitted in the present edition.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

25. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

(1) *Old Law*...161.
(2) *Cases under Sect.* 25...161.
(3) *Running of Time between Trustee and* c. q. t....162.
(4) *Running of Time in case of Charitable Trusts*...164.

3 & 4 Will. 4, c. 27, s. 25.

In the case of proceedings against trustees commenced after 1st January, 1890, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888, *post*, p. 248.

Trustee Act, 1888.

The following note relates to the law, irrespective of that act.

(1) Old law.

Before R. P. Lim. Act, 1833, it was held that the rule that trusts are not within the Statute of Limitations would not apply where a claim was made after a great length of time against a trustee by *implication* of law arising upon a doubtful equity (*Townshend* v. *Townshend*, 1 Cox, 28; 1 Bro. C. C. 550); and where relief would originally have been given upon the ground of constructive trust, it was refused to a party who, after long acquiescence, came into a court of equity to seek that relief (*Beckford* v. *Wade*, 17 Ves. 97; *Ex p. Hassell*, 3 Y. & Coll. 622; *Bell* v. *Bell*, 1 Lloyd & G. temp. Plunket, 65; see *Bonny* v. *Ridgard*, cited 4 Br. C. C. 138).

(2) This section applies to express trusts only.

Sect. 25 is confined to express trusts—that is, trusts expressly declared by deed or will or other written instrument. It does not apply to a trust made out by circumstances (*Petre* v. *Petre*, 1 Drew. 393; see *Banner* v. *Berridge*, 18 Ch. D. 263; *Price* v. *Phillips*, 1894, W. N. 213), or to trusts resulting or trusts by operation of law (*Dickinson* v. *Teesdale*, 1 D. J. & S. 59), or to a trust which arises from acts of parties (*Sands* to *Thompson*, 22 Ch. D. 617). Distinguish the trust raised in the case of a purchase of land and treated as an express trust, *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196; and see the other cases quoted *post*, p. 255. "In order to bring a case within the 25th section there must be a trustee in whom the land is vested; there must be an express trust, by which I understand the legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience, a trust arising upon the words of the instrument itself. Therefore these three things must concur—there must be land, there must be a trustee of the land, and there must be a *cestui que trust* for whose benefit in this respect the land is to be held—and all that must be found upon the construction of the instrument" (*per* Lord *Cairns*, *Cunningham* v. *Foot*, 3 App. Cas. 984).

Who are express trustees; land;

It was held that there was an express trust within this section where a testator devised land upon trust for sale, the proceeds to be considered as part of his personal estate (*Mutlow* v. *Bigg*, 18 Eq. 246; reversed, on other grounds, 1 Ch. Div. 385), but not where a testator devised lands to his son and his heirs male in the fullest trust and confidence that he would not defeat the subsequent limitations (*Dawkins* v. *Penrhyn*, 4 App. Cas. 51). A *cestui que trust* of real estate under a will was discharged in 1825 under the Insolvent Act, but omitted the estate from his schedule. In 1831 he became bankrupt, and his assignee in bankruptcy took a conveyance of the legal estate from the trustee, in trust for the creditors under the bankruptcy: held, that the legal estate thereby became vested in the assignee upon an express trust within this section—viz., the trust declared by the will, the benefit of which belonged to the creditors under the insolvency (*Sturgis* v. *Morse*, 3 De G. & J. 1).

One of several tenants in common who entered into possession of the lands and procured a fee-farm grant to himself was not a trustee within this section for himself and his co-tenants (*Re Dane*, I. R. 5 Eq. 498), nor was a purchaser from an executor at an undervalue with notice of the trusts of the will (*Pyrah* v. *Woodcock*, 24 L. T. 407; see, as to a purchaser with notice from an express trustee, *Young* v. *Harris*, 65 L. T. 47; *A.-G.* v. *Magdalen College*, 18 Beav. 223; 6 H. L. C. 189). A paid-off mortgagee is not, within this section, an express trustee of the legal

3 & 4 Will. 4, c. 27, s. 25.

estate for the mortgagor (*Sands* to *Thompson*, 22 Ch. D. 614), even where the mortgage is in the form of a trust for sale (*Locking* v. *Parker*, 8 Ch. 30; *Johnson* v. *Mounsey*, 11 Ch. Div. 284). Where trustees of a will entered on and administered as part of a testator's estate land of which he was held to die intestate, they were not express trustees under this section (*Yardley* v. *Holland*, 20 Eq. 428; see *Churcher* v. *Martin*, 42 Ch. D. 312; *Re Lacy, Royal Association* v. *Kydd*, 1899, 2 Ch. 149); but an express trust for the benefit of an heir-at-law was held to arise as against trustees in the possession of lands devised by a will which did not declare any trust of the surplus rents (*Salter* v. *Cavanagh*, 1 Drury & Walsh, 668). So where the will did not declare trusts of part of the real estate (*Patrick* v. *Simpson*, 24 Q. B. D. 129). And where a person acted as trustee of a will containing express trusts of realty, though the estate was not vested in her, she had placed herself in the position of an express trustee (*Life Association* v. *Siddal*, 3 D. F. & J. 58).

money charged on land.

Before R. P. Lim. Act, 1874, s. 10 (*post*, p. 213), it was held that sect. 25 qualified sects. 40 and 42, where land was vested in trustees upon an express trust to secure charges, &c. (see notes to sects. 40 and 42, *post*, pp. 195, 204); and in connection with this doctrine, it was held, that where an annuity was given by will, and the real estate of the testator was charged with the payment of it, and then the estate was simply devised charged with the payment of the annuity, it was not an express trust within the 25th section (*Francis* v. *Grover*, 5 Hare, 39). A devise of realty subject and charged with legacies did not create an express trust in favour of the legatees within this section (*Proud* v. *Proud*, 32 Beav. 234). A vendor's lien was not an express trust within this section (*Toft* v. *Stephenson*, 7 Hare, 1; *Dundas* v. *Blake*, 11 Ir. Eq. R. 138; *Henderson* v. *Atkins*, 28 L. J. Ch. 913). Where a testator charged his real estates with his debts, and he devised his C. plantation in trust to pay his debts, it was held, that as to the C. plantation a trust had been created in favour of the creditors, but that as to the other real estates they had a mere charge (*Jacquet* v. *Jacquet*, 27 Beav. 332). On the construction of an entire will, it was held in one case that an express trust arose to secure a legacy (*Thomson* v. *Eastwood*, 2 App. Cas. 215; see *Williams* v. *Williams*, 1900, 1 Ch. 152), and in another that there was no express trust to secure annuities (*Cunningham* v. *Foot*, 3 App. Cas. 974; see *Re Barker, Buxton* v. *Campbell*, 1892, 2 Ch. 491; *Re Lacy, Royal Association* v. *Kydd*, 1899, 2 Ch. 156.)

(3) Time no bar between *cestui que trust* and trustee: where trustee in possession;

In the case of a direct or express trust, as where an estate is conveyed to the use of A. and his heirs in trust for B. and his heirs, no time, as between the trustee and *cestui que trust*, can operate as a bar to the equitable right of the latter (Barnard, C. R. 449; *Townshend* v. *Townshend*, 1 Br. C. C. 551). The possession of the trustee is the possession of the *cestui que trust*, and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 633). In the case of a strict trustee, it is his duty to take care of the interest of his *cestui que trust*, and he is not permitted to do anything adverse to it; a tenant also has a duty to preserve the interests of his landlord; and many acts therefore of a trustee and a tenant, which if done by a stranger would be acts of adverse possession, will not be so in them, from its being their duty to abstain from them (*per* Lord *Eldon*, 2 Jac. & W. 190; see *Latter* v. *Dashwood*, 6 Sim. 462; *Faussett* v. *Carpenter*, 5 Bligh, N. S. 75). But where any doubt arises as to the existence of a trust, and it is possible to reconcile such enjoyment with the facts of the case, the utmost regard is then to be paid to the length of time during which there has been an enjoyment of the property inconsistent with the supposed trust (*A.-G.* v. *Fishmongers' Co.*, 5 M. & C. 16). Where estates were devised to trustees upon trust to sell and to pay debts, and subject thereto for the testator's infant children, and the surviving trustee retained possession of one of the estates in satisfaction of debts which he alleged himself to have paid, the testator being insolvent: on a

bill for an account and conveyance of the estate forty-five years after the death, inquiries were directed to ascertain whether the children had any notice of the circumstances, whether they had in any manner released, and whether the trustee had advanced money to the amount of the value of the estate (*Chalmer* v. *Bradley*, 1 Jac. & W. 51, where numerous cases on this subject are cited). 3 & 4 Will. 4, c. 27, s. 25.

A deed of direction was held to constitute the receivers and the trustee of rents of realty, express trustees for the benefit of certain annuitants (*Knight* v. *Bowyer*, 2 De G. & J. 421); and where some *cestuis que trusts* received from a trustee the whole rents of real estate to the exclusion of another, the latter was not barred (*Ib.*).

Trustees in possession of land paid the rents by mistake for more than twenty years to a person not entitled; but it was held that the right of the actual *cestui que trust* was not barred (*Lister* v. *Pickford*, 34 L. J. Ch. 582; 13 W. R. 827; see *Churcher* v. *Martin*, 42 Ch. D. 312).

As to the effect of fines formerly between trustee and *cestui que trust*, see Gilb. Ch. 62; *Bell* v. *Bell*, 1 Ll. & G. temp. Plunket, 59; *Earl Pomfret* v. *Lord Windsor*, 2 Ves. sen. 472, 481; *Reynolds* v. *Jones*, 2 Sim. & Stu. 206; 1 Sand. on Uses, 291, 3rd ed.; 5 Cruise, Dig. 208—213.

In general the possession of the *cestui que trust* is not adverse against the trustee if the possession of the former is consistent with the terms of the deed and the object of the trust (*Keene* v. *Deardon*, 8 East, 248; *Smith* v. *King*, 16 East, 283). A *cestui que trust* who is let into possession of the trust estate by the trustee becomes tenant at will to the latter, and while the estate at will remains the statute does not operate (*Garrard* v. *Tuck*, 8 C. B. 231; see proviso to sect. 7, *ante*, p. 137, and note). Articles of agreement for a lease (which was never actually executed) were entered into, and the premises occupied pursuant to the articles: held, that a direct trust was constituted between the owners of the fee, and those who held under the articles; and that the *cestui que trust* being in possession, the estate of the trustees was not destroyed by lapse of time (*Drummond* v. *Sant*, L. R. 6 Q. B. 763; *Warren* v. *Murray*, 1894, 2 Q. B. 657). *Secus*, in the case of a person holding under an agreement to purchase (*Doe* v. *Rock*, 4 M. & G. 30), and of a mortgagor who had paid the mortgage debt (*Sands* to *Thompson*, 22 Ch. D. 614). where *cestui que trust* in possession;

Where a legal estate was vested in trustees on trust for five tenants in common, and the trustees not acting, the whole rents were received by some of the tenants in common; those who had received the whole rents acquired a title against the claim of another tenant in common who had been out of such receipt (*Burroughs* v. *M'Creight*, 1 J. & Lat. 290).

The rule that a trust is not barred by length of time does not apply between *cestui que trust* and trustee on one side, and strangers on the other. Therefore, where a *cestui que trust* and his trustee have been both out of possession for the time limited, the party in possession has a good bar against both (*Llewellyn* v. *Mackworth*, Barnard, C. R. 445; 15 Vin. Abr. 125, n. to pl. 1; and see *Townshend* v. *Townshend*, 1 Br. C. C. 550; *Melling* v. *Leek*, 16 C. B. 652; *Clay* v. *Clay*, 3 Br. C. C. 639, n.; Ambl. 615; *Hercy* v. *Ballard*, 4 Br. C. C. 469; *Harmood* v. *Oglander*, 6 Ves. 199; 8 Ves. 106; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 629; Sugd. V. & P. 610—612, 11th ed.). where stranger in possession time bars both trustee and *cestui que trust*;

On the question whether, when a stranger has acquired a title by possession against a trustee, the *cestui que trust* is also barred, see *Scott* v. *Scott*, 4 H. L. C. 1065, discussed in Darb. & Bos. Stat. Lim. 420—425; see also the argument in *Young* v. *Harris*, 65 L. T. 45, where the *cestui que trust* was an infant. Under the provisions of a colonial act, *cestuis que trusts* could enforce their rights even where their trustees were barred (*Williams* v. *Papworth*, 1900, A. C. 563).

The 25th section, providing for express trusts, renders lapse of time unimportant in all cases within the section, that is, between the *cestui que trust* and his trustee, until the trust is disturbed, and that disturbance can only be effected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property so where trustee alienates for value.

3 & 4 Will. 4, c. 27, s. 25.

held by him in trust (*Law* v. *Bagwell*, 4 Dru. & War. 398). In such a case a lapse of the statutory number of years from the date of the conveyance will bar the *cestui que trust;* but it seems that time will not commence to run if the rights of the *cestui que trust* are reversionary, or if he be under disability at the date of the conveyance (*Thompson* v. *Simpson*, 1 Dru. & War. 489; *A.-G.* v. *Magdalen College*, 6 H. L. C. 215).

(4) Charities; law before the statute;

Before the R. P. Lim. Act, 1833, time did not run against charities in a court of equity, neither were charities bound to the times expressed in the statutes 32 Hen. 8, c. 2, and Lim. Act, 1623 (Duke, 161; *A.-G.* v. *Coventry*, 3 Madd. 368; 2 Vern. 399; *A.-G.* v. *Christ's Hospital*, 3 M. & K. 344; *A.-G.* v. *Bristol*, 2 Jac. & W. 321; *A.-G.* v. *Poulden*, 8 Sim. 472; *A.-G.* v. *Smythies*, 2 M. & K. 749; *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; Shelford on Charities, p. 563). At law the old Statute of Limitations operated against all claimants, although they held in trust for charities; but in the Court of Chancery, unless in the case of a purchaser for value, they had no operation (43 Eliz. c. 4; Sugd. V. & P. 944, 945, 11th ed.).

present law;

The R. P. Lim. Act, 1833, does not contain any saving in favour of charities, and they are within its provisions (*Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324).

The Charitable Uses Act, 1725, not extending to Ireland, a testator in 1812 devised a rent-charge as a salary for a schoolmaster, to be appointed by the owner for the time being of the estate on which the rent was charged. A schoolmaster was never appointed. In 1839, an information was filed to carry the said trust into execution. It was held, that the statute could not run until a schoolmaster was appointed (*A.-G.* v. *Persse*, 2 Dru. & War. 69).

express trusts for charities;

Property given upon express trust for a charity is within sect. 25 (*Commrs. of Donations* v. *Wybrants*, 2 J. & Lat. 182). Where the Attorney-General, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they are barred by lapse of time, he is equally barred (*A.-G.* v. *Magdalen College*, 18 Beav. 223; 6 H. L. C. 189). This section barred relief where charity land had not been aliened in fee, but had been held under a lease granted in breach of trust for 500 years at a rent which had been regularly paid (*A.-G.* v. *Davey*, 4 De G. & J. 136; *A.-G.* v. *Payne*, 27 Beav. 168).

purchasers with notice of charitable trusts.

It was formerly held that length of time would not protect a purchaser with notice of charitable trusts (*A.-G.* v. *Christ's Hospital*, 3 M. & K. 344; see *A.-G.* v. *Bristol*, 2 Jac. & W. 321; *A.-G.* v. *Poulden*, 8 Sim. 472). It seems now that time will commence to run in his favour from the date of the conveyance (*A.-G.* v. *Magdalen College*, 6 H. L. C. 189; see *A.-G.* v. *Flint*, 4 Hare, 147; *A.-G.* v. *Davis*, 18 W. R. 1132).

As to the length of time during which an account of rents will be directed in the case of trustees for charities, see the note to sect. 42, *post*, p. 206.

Jud. Act, 1873, s. 25 (2).

The principle of sect. 25 has now been extended to personal estate by Jud. Act, 1873, s. 25, sub-s. 2, *post*, p. 254 (see *Banner* v. *Berridge*, 18 Ch. D. 262).

In cases of fraud, no time shall run whilst the fraud remains concealed.

26. In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for

the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed. 3 & 4 Will. 4, c. 27, s. 26.

(1) *Cases under Sect.* 26...165.
(2) *Cases in Equity as to Fraud*...166.

(1) Pleading concealed fraud.

Before the Jud. Acts, it was held that an ejectment bill might properly be filed in a court of equity on the ground of fraud under this section (*Chetham* v. *Hoare*, 9 Eq. 571); but that a case of concealed fraud could not be set up on petition (*Ex p. Breach*, 12 W. R. 769).

Since the Jud. Acts, it has been held that concealed fraud must be pleaded with the utmost particularity (*Riddell* v. *Strathmore*, 3 Times Rep. 329; *Lawrance* v. *Norreys*, 15 App. Cas. 210). The circumstances alleged must lead to the reasonable inference that fraud was the cause of the deprivation, and exclude other possible causes (*Lawrance* v. *Norreys*, *sup.*). On the argument of a demurrer put in to a bill raising a case of concealed fraud, *James*, L. J., said that the court had then nothing to do with the probability or improbability of the plaintiff's ultimate success at the hearing (*Vane* v. *Vane*, 8 Ch. 395); and see the same point discussed on an application to strike out under Ord. 25, r. 4 (*Boaley* v. *Holder*, 54 L. T. 298). On the whole materials before it, the court struck out as vexatious a claim raising concealed fraud (*Lawrance* v. *Norreys*, 39 Ch. Div. 213; 15 App. Cas. 210).

What is concealed fraud within this section.

To bring a case within the section there must have been (1) fraud, (2) which must have deprived the claimant or his predecessors in title of the estate, (3) and which was concealed, and (4) which concealment could not with reasonable diligence have been discovered sooner (*Willis* v. *Howe*, 1893, 2 Ch. 551).

The fraud must be the fraud of the person setting up the statute, or some person through whom he claims (*Re McCallum, M.* v. *M.*, 1901, 1 Ch. 143, C. A.; *Rigby*, L. J., *dissentiente;* see *Thorne* v. *Heard*, 1895, A. C. 495).

Mere ignorance does not prevent the operation of the statute (*Dawkins* v. *Penrhyn*, 6 Ch. Div. 324). Thus it was held that the occupation of an underground cellar without the knowledge of the owner of the surface was not a case of concealed fraud within this section (*Rains* v. *Buxton*, 14 Ch. D. 537). This section does not mean the case of a party entering wrongfully into possession, but it applies to a case of designed fraud, by which a party, knowing the rightful owner, conceals the circumstances giving the right, and who by means of such concealment is enabled to enter and hold (*Petre* v. *Petre*, 1 Drew. 397; see *Dean* v. *Thwaite*, 21 Beav. 621). The section seems to point to some contrivance by which the real owner has been not merely deprived, but defrauded; in the sense of being induced to believe that he was not owner, and that the person who so entered was owner and entitled to enter (*Willis* v. *Howe*, 1893, 2 Ch. 552). *Quære*, whether the nondisclosure by the grantor to the grantee of a conveyance which the grantor honestly believed to be of no effect would amount to fraud (*Re McCallum, M.* v. *M.*, 1901, 1 Ch. 147, 164; compare *Le Lievre* v. *Gould*, 1893, 1 Q. B. 500). The word "concealed" seems to indicate that there were facts known to the person who enters, and designedly concealed by him from the real owner, which facts if known would enable the real owner to recover (*Willis* v. *Howe*, 1893, 2 Ch. 552). As regards concealment, compare *Bulli Co.* v. *Osborne*, 1899, A. C. 363, and other decisions (*post*, p. 225) to the effect that in cases of concealed trespass it is not necessary, for the purpose of avoiding the statute, to show active concealment.

3 & 4 Will. 4, c. 27, s. 26.

An allegation that, with a view to deprive the true owner of his right, the person in possession conspired with his solicitors to destroy the deeds, was a sufficient allegation of concealed fraud within this section (*Lawrance* v. *Norreys*, 39 Ch. D. 224; see 15 App. Cas. 213). As to whether preventing information as to the title from reaching the true owner would amount to concealed fraud, see 39 Ch. Div. 228; 15 App. Cas. 215. Bringing up an eldest son in the belief that he was a younger son was held to be a case of concealed fraud within this section (*Vane* v. *Vane*, 8 Ch. 383). The procuring instruments of conveyance and devise to be executed by a person of unsound mind is a fraud within this section (*Lewis* v. *Thomas*, 3 Hare, 26; as to a conveyance by a lunatic, see *Price* v. *Berrington*, 3 Mac. & G. 486). But a suit cannot be maintained in equity to set aside a compromise of an action to recover large estates made eighty years before, upon the ground that the compromise was a fraud upon the plaintiff in the action, and that he was a man of such dull intellect (actual lunacy not being proved) that, though cognizant of all the facts, it was necessarily a concealed fraud as to him (*Manby* v. *Bewicke*, 3 Kay & J. 342). In 1825, A., on his insolvency, omitted from his schedule (which he verified on oath) an estate to which he was entitled. In 1853, his assignee filed a bill against the assignees under a subsequent bankruptcy and others for the recovery of the property. It was held, that there had been a concealed fraud within this section (*Sturgis* v. *Morse*, 24 Beav. 541). This decision was affirmed on grounds independent of the question of concealed fraud (3 De G. & J. 1).

Reasonable diligence.

As to what constitutes reasonable diligence in the discovery of concealed fraud, see *Chetham* v. *Hoare* (9 Eq. 571); and the judgment of *Malins*, V.-C., *Vane* v. *Vane* (8 Ch. 390, n.); *Willis* v. *Howe* (43 L. T. 375).

Proviso as to *bonâ fide* purchasers.

A purchaser for value is not entitled to the protection of this proviso, if his agent who negotiated the purchase had in the course of the transaction actual knowledge of the fraud, or had reason to believe that a fraud had been committed (*Vane* v. *Vane*, 8 Ch. 383).

In a case which arose before this statute, circumstances of a fraudulent nature relating to a sale were not discovered until thirty-seven years after the date of the conveyance, and it was held that they furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached. It was said that it is the duty of the court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, time has no effect (*Charter* v. *Trevelyan*, 11 Cl. & Fin. 740).

(2) Cases in equity as to fraud.

When time bars in cases of fraud.

Though courts of equity will interpose in order to prevent those mischiefs which would probably result from persons being allowed at any distance of time to disturb the possession of another, or to bring forward stale demands; yet as its interference proceeds upon principles of conscience, it will not encourage nor in any manner protect the abuse of confidence, and therefore no length of time will bar a fraud (1 Fonbl. Eq. 331; *Cotterill* v. *Purchase*, Forrest, 61; *Alden* v. *Gregory*, 2 Eden, R. 230; *Whalley* v. *Whalley*, 1 Mer. 436; *S. C.*, 3 Bligh, 1; as to length of time being no bar in cases of fraud, see also *Deloraine* v. *Browne*, 3 Bro. C. C. 633; *Smith* v. *Clay*, *Ib.* 639, n.; *Hercy* v. *Dinwoody*, 4 Bro. C. C. 258; 2 Ves. jun. 87; *Yate* v. *Moseley*, 5 Ves. 480; *Moth* v. *Atwood*, 5 Ves. 845; *Purcell* v. *Macnamara*, 14 Ves. 91; *Beckford* v. *Wade*, 17 Ves. 87; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607, 630; *Moore* v. *Blake*, 1 Ball & B. 62; *Medlicott* v. *O'Donnell*, *Ib.* 156; *Gould* v. *Okenden*, 4 Br. P. C. 198, Toml. ed.; *Morse* v. *Royal*, 12 Ves. 355; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 272; *Byrne* v. *Frere*, 2 Molloy, 176; *Hatch* v. *Hatch*, 9 Ves. 292). An agreement on settlement of family disputes, where one party had been guilty of gross fraud and concealment of the rights of the other, was set aside after a great length of time (*Gordon* v. *Gordon*, 3 Swanst. 400). As to fraud in the case of levying fines, see *Langley* v. *Fisher* (9 Beav. 90).

3 & 4 Will. 4, c. 27, s. 27.

A court of equity refused to impeach a transaction on the ground of fraud, where the fact of the alleged fraud had been within the knowledge of the party many years; but held that every new right of action in equity which accrued to the party must be acted on at the utmost within twenty years, except in the case of a trustee whose possession was consistent with the title of the claimant (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 637; see *Redgrave* v. *Hurd*, 20 Ch. D. 13). Where a party is to be constituted a trustee, by the decree of a court of equity founded on fraud or the like, his possession is adverse, and the Statute of Limitations will run from the time the circumstances of the fraud were discovered (2 Sch. & Lef. 633; 2 Ball & B. 129; *Brooksbank* v. *Smith*, 2 Y. & Coll. 58; *Blennerhasset* v. *Day*, 2 Ball & B. 118). But a party who had received money under a misapprehension of his rights was held not bound by it, as in the case of a contract for a disputed title, or the compromise of a litigated right (*Ib.* 128).

See further the note as to Courts of Equity and the Statutes of Limitation, *post*, pp. 253 *et seq.*

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

27. Provided always, and be it further enacted, that nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act.

Acquiescence

If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence (*Leeds* v. *Amherst*, 2 Phil. 123). It may be defined as "quiescence under such circumstances as that assent may be reasonably inferred from it" (*De Bussche* v. *Alt*, 8 Ch. Div. 314). Every presumption that can be fairly made will be raised against a stale demand. It may arise from the acts of the parties, or the very forbearance to make the demand affords a presumption either that the claimant is conscious it is satisfied, or intended to relinquish it (*Pickering* v. *Stamford*, 2 Ves. jun. 280). Parties, however, cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them (*Marker* v. *Marker*, 9 Hare, 16). And the doctrine does not apply where there is a common mistake (2 Mer. 362). Where executors took upon themselves to distribute the personal property of a testator, in thirds, without consulting a legatee, and the shares were paid without her authority, upon her supposition that their construction of the will was right, it was held that the legatee was not precluded from relief on the discovery of the mistake of the executors (*Newton* v. *Ayscough*, 19 Ves. 539; *Brooksbank* v. *Smith*, 2 Y. & C. 59; see *Knatchbull* v. *Fearnhead*, 3 M. & C. 122).

imports knowledge.

Acquiescence generally.

Acquiescence for nearly fifty years in a mortgage transaction, liable to have been impeached, was held a bar to relief (*Hicks* v. *Cooke*, 4 Dow. 17). Long acquiescence by a party acquainted with the facts is a bar to equitable relief for setting aside a lease, upon the ground of fraud or mistake (*Selsey* v. *Rhodes*, 1 Bligh, N. S. 1). An heir-at-law has also been held not entitled to an issue *devisavit vel non* after twenty years' acquiescence in his ancestor's will (*Tucker* v. *Sanger*, M'Clel. 424; 13 Price, 119). An acquiescence of twenty-three years, with a knowledge of the will, is a good bar to a claim by a residuary legatee against an executor for an account, on the ground of neglect or misfeasance, and that independently of the R. P. Lim. Act, 1833 (*Portlock* v. *Gardner*, 11 L. J. Ch. 313). A wife was held to be bound by the declaration of her husband alone of the uses of a fine levied of her lands after having acquiesced fifteen years from his death (*Swanton* v. *Raven*, 3 Atk. 105). Where the shareholders of a canal had acquiesced for forty-seven years in an agreement

3 & 4 Will. 4, c. 27, s. 27.

for letting tolls not warranted by an act of parliament, it was held, that it was not competent for the shareholders to impeach such agreement in respect of the public interest (*Gray* v. *Chaplin*, 2 Russ. 126). Acquiescence will not be held to have taken place, so long as the same circumstances of undue influence on one side, and distress on the other, in which the oppression commenced, continue to operate (*Purcell* v. *Macnamara*, 14 Ves. 106, 121, 122). A claim by mortgagees to make legatees refund was barred after twenty years by acquiescence (*Blake* v. *Gale*, 32 Ch. Div. 571).

Acquiescence in breaches of trust.

Length of time, when it does not operate as a statutory or positive bar, operates simply as evidence of acquiescence. A *cestui que trust* is not less capable of giving assent to a breach of trust when his interest is in reversion than when it is in possession. But where the trust is definite and clear, it seems that a breach of trust will not be held to have been sanctioned or concurred in by the mere knowledge and non-interference on the part of the *cestui que trust* before his interest has come into possession (*Life Association* v. *Siddal*, 3 D. F. & J. 72, 74; see *Brown* v. *Cross*, 14 Beav. 105; *March* v. *Russell*, 3 M. & C. 31).

Acquiescence imports knowledge, for a man cannot be said to have acquiesced in what he did not know; and in cases involving a breach of trust, acquiescence imports full knowledge. A *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed (*Life Association* v. *Siddal*, *sup.*). A *cestui que trust* who, knowing that his trustee has committed a breach of trust, obtains from him part only of that to which he is entitled, does not waive his claim to further relief, unless such an intention can be clearly inferred (*Re Cross*, *Harston* v. *Tenison*, 20 Ch. Div. 122). In the case of a trustee's purchasing the trust property, the question of acquiescence cannot arise until it is ascertained that the *cestui que trust* knew that his trustee had become the purchaser (*Randall* v. *Errington*, 10 Ves. 427, 428; *Morse* v. *Royal*, 12 Ves. 335). If the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust, and either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence (*Walker* v. *Symonds*, 3 Swanst. 64). All *cestuis que trusts*, who (being of age and under no incapacity) have had full information of the conduct of their trustees, which was liable to objection, and openly or tacitly acquiesced in it during a considerable time, are held to have authorized or adopted such conduct, and precluded themselves from all remedy in that respect (*Brice* v. *Stokes*, 11 Ves. 319; *Ryder* v. *Bickerton*, 3 Swanst. 83, n.; *Underwood* v. *Stevens*, 1 Mer. 712; *Trafford* v. *Boehm*, 3 Atk. 444).

Laches.

"Where there is a Statute of Limitations the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than laches. If a party who could object lies by, and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce: but the fact of simply neglecting to enforce a claim for the period which the law permits delay without losing right, I conceive cannot be any equitable bar" (*Archbold* v. *Scully*, 9 H. L. C. 383). A testator bequeathed to his widow a pecuniary legacy and a life annuity. She survived him twenty-eight years. After her death a bill for their recovery, filed by her executrix, was dismissed on the ground of great laches (*Pattison* v. *Hawkesworth*, 10 Beav. 375). See *Sibbering* v. *Balcarras* (3 De G. & Sm. 737), where the court refused to entertain a suit for setting aside the sale of a reversionary interest after the lapse of several years; and see *Spackman* v. *Evans*, L. R. 3 H. L. 220. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has,

3 & 4 Will. 4, c. 27, s. 28.

though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy (*Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 239; adopted, *Allcard* v. *Skinner*, 36 Ch. D. 163).

In the case of legal right, courts of equity will not refuse relief on ground of delay, unless sufficient to create statutory bar (*Three Towns' Co.* v. *Maddever*, 27 Ch. Div. 523; *Re Baker, Collins* v. *Rhodes*, 20 Ch. Div. 230). So in the case of an injunction to aid a legal right (*Fullwood* v. *Fullwood*, 9 Ch. D. 176).

See further the note as to Courts of Equity and the Statutes of Limitation, *post*, pp. 252 *et seq.*

7. *Limitation of Time between Mortgagor and Mortgagee.*

A. *As to the Barring of the Rights of Mortgagors.*

Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.

28. When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money or land or rent by, from or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against

3 & 4 Will. 4, c. 27, s. 28.

the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged* money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

* Lege mortgage.

(1) *Operation of Sect.* 28...170.
(2) *Acknowledgments*...171.
(3) *Disabilities*...172.

37 & 38 Vict. c. 57.

From the 1st January, 1879, sect. 7 of the R. P. Lim. Act, 1874 (given at length *post*, p. 188), has, by sect. 9 of the same act, been substituted for sect. 28 of the R. P. Lim. Act, 1833. Sect. 7 of the R. P. Lim. Act, 1874, fixes the period of limitation for bringing an action for redemption at twelve years, but in other respects is substantially similar to the R. P. Lim. Act, 1833, s. 28. The following note has reference to the latter section.

CASES AS TO BARRING MORTGAGOR'S RIGHTS.

(1) Effect of sect. 28.

A trust for sale of land by way of security for money lent was a mortgage within sect. 28 (*Locking* v. *Parker*, 8 Ch. 30). After the statutory period the mortgagor's rights are barred, not only in the land but also in the purchase-money, whether such money arise under such a trust for sale (*Re Alison, Johnson* v. *Mounsey*, 11 Ch. Div. 284), or under an ordinary power of sale (*Chapman* v. *Corpe*, 41 L. T. 22).

Possession of mortgagee.

A mortgagee in possession of part of the land comprised in the mortgage could, under this section, acquire title to such part, although the remaining part is in possession of the mortgagor (*Kinsman* v. *Rouse*, 17 Ch. D. 104). The rule before R. P. Lim. Act, 1833, was different (*Rakestraw* v. *Bruyer*, Moseley, 189).

A husband separated from his wife, becoming mortgagee in possession of her separate estate for twenty years, cannot set up the statute (*Booth* v. *Purser*, 1 Ir. Eq. R. 33). A solicitor who pays off a mortgage debt due from a client must be taken to act as the agent of the client, and if he receive the rents of the mortgaged property the possession is that of the client, and time will not run against the client (*Ward* v. *Carttar*, 1 Eq. 29). A mortgagee in possession for six years, without making any acknowledgment of the mortgagor's title, then purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer. It was held, that such possession was not adverse during the existence of the life estate, and this section was not a bar to any suit for redemption (*Hyde* v. *Dallaway*, 2 Hare, 528; *Raffety* v. *King*, 1 Keen, 601). A second mortgagee was held not to have acquired a title by adverse possession (*Thorpe* v. *Holdsworth*, 7 Eq. 139). "I am disposed to think that the statute cannot apply so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption, where the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the twenty years" (*per* Lord *Cranworth*, *Alderson* v. *White*, 2 De G. & J. 109).

Where a man by his will creates particular estates and remainders and then mortgages his estate, he and his devisees have only in common

a single period of time to claim against the mortgagee in possession, and the will cannot give to the devisees successive rights (*Browne* v. *Bishop of Cork*, 1 Dru. & Wal. 700; Sugd. R. P. Stat. 38; see *Raffety* v. *King*, 1 Keen, 601). 3 & 4 Will. 4, c. 27, s. 28.

A mortgagee who holds property in pledge is responsible for it in its integrity. Therefore, where a mortgagee of lands allowed the owners of adjacent coal mines to enter and work a mine for the purpose of exploring, which they did, and sold the coals, an account was directed against them all for the benefit of the mortgagor upon a bill to redeem, and the statute was held not to apply to a case of this kind, as between mortgagor and mortgagee (*Hood* v. *Easton*, 2 Giff. 692).

Welsh mortgages.

A Welsh mortgage is a conveyance of an estate redeemable *at any time* on payment of the principal, with an understanding that the profits in the meantime shall be received by the mortgagee without account in satisfaction of interest (see *Talbot* v. *Braddyl*, 1 Vern. 395; *Lawley* v. *Hooper*, 3 Atk. 280; *Yates* v. *Hambly*, 2 Atk. 237). But it is probable that at the present day a court of equity will decree an account against the mortgagee of the rents and profits, whether the value was excessive or not beyond the interest, and notwithstanding the agreement that the profits shall be retained in lieu of interest (*Fulthorpe* v. *Forster*, 1 Vern. 477; see Coote on Mortgages, 356, 5th ed.; 5 Jarm. Conveyancing, by Sweet, 96, 101). A Welsh mortgagee has no remedy to compel redemption or foreclosure (*Longuet* v. *Scawen*, 1 Ves. sen. 406); but if such a mortgagee be permitted to hold for more than the statutory period after the debt has been fully paid, it seems that the mortgagor would be barred (*Fenwick* v. *Reed*, 1 Mer. 125; 5 B. & Ald. 232; and see 2 Spence on Eq. Jurisd. pp. 616—618). As to Welsh mortgages, see further *Teulon* v. *Curtis*, Younge, 610; *Hartpoole* v. *Walsh*, 5 Br. P. C. 267, Toml. ed.; *Balfe* v. *Lord*, 2 Dr. & War. 480; Fisher on Mortgages, pp. 7 *et seq.* 5th ed.

(2) Acknowledgments:

For acknowledgments of the mortgage title under the old law, see *Hodle* v. *Healey*, 6 Madd. 181; *Price* v. *Copner*, 1 S. & S. 347. In a case under the law before R. P. Lim. Act, 1833, an acknowledgment of the mortgagor's title made by the mortgagee after the expiration of the statutory period, revived the equity of redemption (*Pendleton* v. *Booth*, 1 D. F. & J. 81). A similar decision was given in one case under that statute (*Stansfield* v. *Hobson*, 1 D. M. & G. 620). But this seems inconsistent with sect. 34, *post* (see *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297, there quoted; Darb. & Bos. Stat. Lim. 466); and has been doubted (*Markwick* v. *Hardingham*, 15 Ch. Div. 339).

must be made to the mortgagor or his agent;

The section has been held to operate retrospectively as to acknowledgments (*Batchelor* v. *Middleton*, 6 Hare, 75). An acknowledgment by the mortgagee (in writing signed by himself) of his mortgage title to a third person is not sufficient (*Batchelor* v. *Middleton*, 6 Hare, 83, 84; *Markwick* v. *Hardingham*, 15 Ch. Div. 339). When a mortgagor became bankrupt a letter written to him subsequently did not operate as an acknowledgment either of his title or that of the assignee to the equity of redemption (*Markwick* v. *Hardingham*, *sup.*). Where a mortgagee in possession conveyed the land to a purchaser, subject expressly to the equity of redemption of the mortgagor, it was held, that the deed was not such an acknowledgment of the mortgagor's title as to make the estate redeemable (*Lucas* v. *Denison*, 13 Sim. 584). A mortgagee in possession of lands at Hendred, having received a letter from the grandfather of the infant heir of the mortgagor, wrote in answer as follows:—"Concerning the business at Hendred, which you know nearly as well as myself, as there has been nothing kept from you, which I am very willing to settle if your granddaughter is of age, I never told you any otherwise, as I have been informed she is the heiress of what there is. The difference is not worth much. I shall hear from your granddaughter about the business." The letter was an acknowledgment of the heir's right to redeem the mortgage, and when she came of age she was entitled to consider her grandfather as having acted as her agent (*Trulock* v. *Robey*, 12 Sim. 402). It was not necessary,

who is agent;

3 & 4 Will. 4, c. 27, s. 28.

to make a person an agent to receive an acknowledgment, that he should have at the time an actual authority to act (*Ib.*) A letter written by a mortgagee in possession to the mortgagor's solicitors, containing a general denial of the mortgagor's title, with an additional statement that even if the mortgagor were entitled, he would derive no benefit from the account, did not amount to an acknowledgment (*Thompson* v. *Bowyer*, 11 W. R. 975). Letters were held to amount to an acknowledgment in *Richardson* v. *Younge* (10 Eq. 275).

mortgagee's accounts;

It seems that the keeping of accounts by the mortgagee in possession is not an acknowledgment within this section (see *Baker* v. *Whetton*, 14 Sim. 426). In *Re Alison, Johnson* v. *Mounsey* (11 Ch. Div. 284), where the mortgagor was held barred, accounts had been kept by the mortgagee in possession (compare *Jackson* v. *Ogg*, *post*, p. 228).

acknowledgment by one of several mortgagees.

An acknowledgment of a mortgagor's title given by one only of two joint mortgagees, who were, on the face of the mortgage deed, shown to advance the money on a joint account as trustees, was held inoperative. "The provision in this section as to acknowledgment by some of several mortgagees applies only where they have separate interests either in the money or the land" (*per Mellish*, L. J., *Richardson* v. *Younge*, 6 Ch. 478).

(3) Disabilities.

There are no savings for disabilities of the mortgagor or his heirs in regard to the bar created by the 28th section. And sect. 16 (*ante*, p. 152) does not apply; an action to redeem not being "an action to recover land" within that section (*Kinsman* v. *Rouse*, 17 Ch. D. 104; see *Forster* v. *Patterson*, 17 Ch. D. 132, decided under R. P. Lim. Act, 1874).

B. *As to the Barring of the Rights of Mortgagees.*

THE REAL PROPERTY LIMITATION ACT, 1837.

7 Will. 4 & 1 Vict. c. 28.

Mortgagees of "land" within the definition in 3 & 4 Will. 4, c. 27, s. 1, may bring actions to recover land within twenty years after last payment of principal or interest.

Whereas doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," so far as the same relates to mortgages; and it is expedient that such doubts should be removed: It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said act notwithstanding.

By R. P. Lim. Act, 1874, s. 9 (*post*, p. 189), the period of twelve years is substituted for twenty years in R. P. Lim. Act, 1837.

Doubts were entertained whether a mortgagee, who was not proved to have been in possession or receipt of the profits within twenty years, and to whom no acknowledgment in writing had been given according to the 14th section (*ante*, p. 149), was not barred of his ejectment by the 2nd and 3rd sections, inasmuch as the mortgagee's right had accrued more than twenty years previously (*Doe* v. *Williams*, 5 Ad. & Ell. 291; see

Thornton v. *France*, 1897, 2 Q. B. 154). These doubts have been removed by the above enactment. 1 Vict., c. 28.

CASES AS TO THE BARRING OF MORTGAGEE'S RIGHTS.

The R. P. Lim. Act, 1837, does not itself create a bar in any case in which it had not been already created by the act which it explains. It only declares (in conformity, and with manifest reference to the rule which had before prevailed in equity) that nothing in that act shall bar the title of a mortgagee (continuing to be such) who has received any payment on account of principal and interest from the person entitled to the equity of redemption within the statutory period before the commencement of any action (*Heath* v. *Pugh*, 6 Q. B. Div. 362). The reason for the passing of the act was that it was doubted whether 3 & 4 Will. 4, c. 27 (regard being had to sect. 2), had not put the mortgagee, as between himself and the mortgagor, in a worse position than he was prior to the passing of that statute (*Thornton* v. *France*, 1897, 2 Q. B. 156).

Foreclosure.

A foreclosure action is an action for the recovery of land within 1 Vict. c. 28 (*Harlock* v. *Ashberry*, 19 Ch. Div. 539). And if a mortgagee obtains an order for foreclosure absolute, this is a new title (*Heath* v. *Pugh*, 6 Q. B. Div. 360, 361), which accrues within the R. P. Lim. Act, 1833, s. 2, at the date of the order (*Pugh* v. *Heath*, 7 App. Cas. 238). For purposes of practice, however, an action for foreclosure and delivery of possession is not an action for recovery of land within the meaning of the R. S. C., Ord. 18, r. 2.

When time begins to run.

In the case of an equitable charge on a reversionary interest, the statute commences to run against the right of foreclosure from the time when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480; *Re Owen*, 1894, 3 Ch. 220; *Powell* v. *Brodhurst*, 1901, 2 Ch. 167). And see, as to a mortgagee's action to recover a reversionary interest in land comprised in his security, *Henry* v. *Smith*, 2 Dr. & W. 381; and the judgment of Stirling, J., *Re Lake*, 63 L. T. 416. Where a legal mortgage of an estate in possession contains no provision that the mortgagor may enjoy the land in the interval between the execution of the deed and default in payment of the mortgage-money, the mortgagee has an immediate right of entry upon the execution of the deed; and, if he brings ejectment, it must be brought within the statutory period reckoned from that time, if no interest has been paid (*Doe* v. *Lightfoot*, 8 M. & W. 553; see *Wilkinson* v. *Hall*, 3 Bing. N. C. 508; *Fisher* v. *Giles*, 5 Bing. 421; Shep. Touch. 272 (8th edit.); *Thorp* v. *Facey*, 35 L. J. C. P. 349). Under certain circumstances a mortgagor in possession is held to be tenant at will to the mortgagee (see the note to R. P. Lim. Act, 1833, s. 7, *ante*, p. 137), and time will not in that case run against the mortgagee until the tenancy is determined (Darb. & Bos. Stat. Lim. 355). Where a mortgagee is also tenant for life of the whole of the mortgaged estate, the statute does not begin to run against the mortgage title until his death; and the same rule applies where the mortgagee is entitled for life as tenant in common with others to the mortgaged estate (*Wynne* v. *Styan*, 2 Phill. C. C. 303; see *Topham* v. *Booth*, 35 Ch. D. 607).

Possession, by mortgagor;

Twelve years' possession by mortgagor will bar the mortgagee and extinguish his title, although a prior mortgage has been in existence during the earlier part of the time (*Kibble* v. *Fairthorne*, 1895, 1 Ch. 219). The effect of the extinguishment is to vest the legal estate in the mortgagor (*Sands* to *Thompson*, 22 Ch. D. 614). Such legal estate availed for the protection of a person who took a subsequent mortgage from the mortgagor (*Kibble* v. *Fairthorne*, *sup.*).

by person other than mortgagor, adversely,

Where a person other than the mortgagor held adverse possession, the mortgagee was barred (*Hemming* v. *Blanton*, 21 W. R. 636). The C. A. has recently laid down that where at the date of the mortgage a stranger, in whose favour time has begun to run, holds adverse possession, the act does not confer a new right of entry on the mortgagee (*Thornton* v. *France*, 1897, 2 Q. B. 158).

non-adversely.

But where the mortgage is a subsisting one, and was executed before the commencement of the possession of A. claiming to have acquired

1 Vict., c. 28.

title by possession, the R. P. Lim. Act, 1837, applies in favour of the mortgagee; although A. may have acquired a good title against the mortgagor and those claiming under him (*Ludbrook* v. *Ludbrook*, 1901, 2 K. B. 100). In the case of a mortgage executed before the R. P. Lim. Act, 1833, where a person other than the mortgagor was in possession, but such possession was not adverse either at the date of the mortgage or of the passing of the last-mentioned Act, the mortgagee brought ejectment, the mortgagor having within the statutory period paid interest on the mortgage: held, that the R. P. Lim. Act, 1837, preserved to the plaintiff the same right of entry as if the R. P. Lim. Act, 1833, had not passed; and he was entitled to recover, though the mortgagor's right of entry, within the meaning of the R. P. Lim. Act, 1833, had accrued before the mortgage, and was barred under that statute (*Doe* v. *Eyre*, 17 Q. B. 366; *Eyre* v. *Walsh*, 10 Ir. C. L. R. 346; *Ford* v. *Ager*, 2 H. & C. 279; 11 W. R. 1073).

Doe v. *Eyre.*

Person "claiming under" a mortgage.

In another case, where there was no adverse possession at the date of the mortgage, the land was subsequently sold and the purchaser paid the moneys due on the mortgage, and took a conveyance, in which the mortgagor and mortgagee joined, of the premises, and of the mortgagor's interest: held, that the purchaser was a person "claiming under" a mortgage within the R. P. Lim. Act, 1837; and that under the R. P. Lim. Act, 1833, s. 2, time ran from the paying off of the mortgage and interest (*Doe* v. *Massey*, 17 Q. B. 373). *Quære* whether this decision is not inconsistent with *Heath* v. *Pugh* (*sup.*), the mortgage not having continued to subsist (*Thornton* v. *France*, 1897, 2 Q. B. 158).

As to whether the R. P. Lim. Act, 1837, applies to the grantor of an annuity charged on land, see argument in *Searle* v. *Colt* (1 Y. & C. C. C. 36).

Payments within R. P. Lim. Act, 1837.

A payment to come within the R. P. Lim. Act, 1837, must be a payment of principal or interest, and must be made by the mortgagor, or by some person bound to pay principal or interest on his behalf (*Harlock* v. *Ashberry*, 19 Ch. Div. 539)—*i.e.*, bound as between himself and the mortgagor (*Bradshaw* v. *Widdrington*, 1902, W. N. 107). See also *Re Clifden, Annaly* v. *Agar-Ellis* (1901, 1 Ch. 774), where the mortgagee's receipt of the surrender value of a policy included in the mortgage was not a sufficient payment. A payment of rent made by a tenant of the mortgaged property to the mortgagee, in consequence of a notice from him, is not such a payment (*Harlock* v. *Ashberry*, *sup.*). And where a mortgagor assigned the equity of redemption, and subsequently paid interest, the payment did not prevent time running in favour of the assignee (*Newbould* v. *Smith*, 33 Ch. D. 127; 14 App. Cas. 423; which case see also as to payment by an agent). Time did not run against the mortgagee where the same person was entitled to the rents of the mortgaged land and the interest of the mortgage (*Topham* v. *Booth*, 35 Ch. D. 607; see the case where a wife was entitled to a mortgage on her husband's land, *Re Hawes, Burchell* v. *Hawes*, 62 L. J. Ch. 463; and the cases quoted *post*, pp. 194, 212, 221). Where estates A., B. and C. are included in one mortgage, and the owner of A. pays interest, the mortgagee's remedy against B. and C. is preserved (*Chinnery* v. *Evans*, 11 H. L. C. 115). Compare the discussion on the corresponding New Brunswick Statute (*Lewin* v. *Wilson*, 11 App. Cas. 639).

It was said that the mere laches of the mortgagee to demand interest from the tenant for life of the equity of redemption would not prejudice his claim against those in remainder (*Wrixon* v. *Vize*, 2 Dr. & War. 192; *Loftus* v. *Swift*, 2 Sch. & L. 642). Payment of interest by a tenant for life of the equity of redemption to the right person keeps the mortgage alive so that foreclosure can be had (*Barclay* v. *Owen*, 60 L. T. 222. As to payments keeping alive the remedy on covenant, see *Pears* v. *Laing*, 12 Eq. 41; *Dibb* v. *Walker*, 1893, 2 Ch. 429; *Leahy* v. *De Moleyns*, 1896, 1 I. R. 206). But where the tenant for life by deed admitted payment of interest, this was not a sufficient acknowledgment, as against the remainderman, to prevent the statute from operating (*Gregson* v. *Hindley*, 10 Jur. 383). Compare *Re Fitzmaurice* (15 Ir. C. L. R. 445); *Beckett* v. *De la*

Cour (11 L. R. Ir. 187). Where the mortgage debt is settled on A. for life, remainder to B., B. may be barred by non-payment of interest to A. where the debt is vested in trustees with power to give receipts (*Barcroft* v. *Murphy*, 1896, 1 I. R. 590). 3 & 4 Will. 4, c. 27, s. 29.

See, further, the cases as to payments quoted under sect. 40 of R. P. Lim. Act, 1833, *post*, p. 197; sect. 8 of R. P. Lim. Act, 1874, *post*, p. 211; and sect. 5 of the Civ. Proced. Act, 1833, *post*, p. 219.

8. *Limitation of Time as to Church Property and Advowsons.*

No lands or rents to be recovered by ecclesiastical or eleemosynary corporation sole, but within two incumbencies and six years, or sixty years.

29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

Law before the statute.

Before this act, ecclesiastical corporations, and generally all ecclesiastical persons seised in right of their churches, were not within any of the Statutes of Limitation, and therefore could not bar their successors, by neglecting to bring actions for recovery of their possessions within the time prescribed for other persons, although an ecclesiastical person, who was guilty of such neglect, would himself have been barred (Plowd. 358, 538; 11 Rep. 78 b; 7 Roll. R. 151; 2 Bos. & Pull. 546; see 3rd Real Prop. R. 58—62).

Although the Statute of Fines, 4 Hen. 7, c. 24 (*ante*, p. 125), did not operate as a bar to the successors of bishops, rectors, or other ecclesiastical persons entitled to lands in respect of offices for life, yet each particular person was bound by a lapse of five years in his own time after the fine had been levied (*Runcorn* v. *Cooper*, 5 B. & C. 696; *Croft* v. *Howel*, Plowd. 358; 1 Prest. Conv. 235; *Magdalen College case*, 11 Rep. 67).

The Prescription Act, 1832, for shortening the time of prescription in certain cases, extends to any ecclesiastical person, but tithes are excepted from that act (*ante*, p. 2).

Cases under the section.

Where lands belonging to a spiritual corporation sole became vested in the Ecclesiastical Commrs., it was held that, under sect. 57 of the Eccles. Commrs. Act, 1840, this section extended to the commissioners (*Eccles. Commrs.* v. *Rowe*, 5 App. Cas. 736); but it does not extend to an ordinary lay successor to a spiritual corporation (*Irish Land Commrs.* v. *Grant*, 10 App. Cas. 14). Where an ancient rent was payable out of lands A. and B., and the owner sold B. and charged others to indemnify the purchaser, and continued to pay the whole rent, no payment being made by

3 & 4 Will. 4, c. 27, s. 30.

the purchaser, and the period prescribed by this section had elapsed, the purchaser's estate was still liable; for time did not begin to run until the person entitled to the rent discontinued the receipt of it (see sect. 3, *ante*, p. 129; *Dublin* v. *Trimleston*, 12 Ir. Eq. Rep. 251; Sugd. on Real Prop. Stat. 153, 2nd ed.; conf. *Woodcock* v. *Titterton*, 12 W. R. 864).

No advowson to be recovered but within three incumbencies or sixty years.

30. No person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years.

Limitation of the right to recover presentations.

If a stranger present to a benefice, the recovery of that presentation depends on the statutes 13 Edw. 1, c. 5, s. 2, and 7 Anne, c. 18. "And the law stands upon this reasonable foundation—that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby" (3 Steph. Comm. 531).

Limitation of right to recover advowsons.

By stat. 1 Mary, sess. 2, cap. 5 (repealed by S. L. Rev. Act, 1863), it was enacted that the stat. 32 Hen. 8, c. 2, should not extend to a writ of right of advowson, *quare impedit*, assize *of darrein presentment*, nor *jure patronatus*, but the time of seisin to be alleged in such cases should be as it was at the common law before the making of the said statute, which was from the time of the commencement of the reign of Rich. 1. Before the statute of Mary, if the incumbent of an advowson had lived sixty years and died, and a stranger had presented, the patron could not maintain *quare impedit* or *darrein presentment* (see Plowd. 371 b; Co. Litt. 115 a).

The limitation of the right to recover advowsons laid down by R. P. Lim. Act, 1833, s. 30, was in accordance with a suggestion of Blackstone (3 Steph. Com. 565, where the old law is stated; see *Robinson* v. *Bristol*, 20 L. J. C. P. 208).

Bishops' rights.

The limitations prescribed by R. P. Lim. Act, 1833, were expressly applied to a bishop's rights to collate or bestow any ecclesiastical benefice by the Limitation of Actions Act, 1843.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in

consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop. 3 & 4 Will. 4, c. 27, s. 31.

Lapse.

Presentation must be made by a common person within six calendar months after the death of the last incumbent, otherwise the right accrues to the ordinary, which is called a *lapse* (3 Leon. 46; 2 Inst. 273; Wats. Cl. L. c. 12). The six months commence from the time the patron has notice of the avoidance (2 Burn, Eccl. Law, 327; see Benefices Act, 1898, s. 5); but if the clerk of a stranger be instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn, because induction is an act of which he is bound to take notice (*Ib.* 329). If the avoidance be by resignation or deprivation, the six months do not commence till notice of the avoidance given by the ordinary to the patron (Com. Dig. Esglise (H. 9)). But where the incumbent is himself patron, a sentence of deprivation is not necessary to render the first living void, the object of such a sentence being to give notice to the patron (*Apperley* v. *Hereford*, 9 Bing. 681). If the bishop should not present within six months after the lapse to him, then the right to present goes to the archbishop (Com. Dig. Esglise (H. 11)); and if neither the bishop nor archbishop present, then to the Crown, which is not confined to any time (Cro. Car. 335; Plowd. 498). It is clear that, as against the bishop at least, the patron may at any time present, notwithstanding six months have elapsed, provided advantage has not been taken of the lapse (3 Moore & Scott, 114). So that if after a lapse and before the bishop or archbishop has collated his clerk, the patron presents one, the latter shall be instituted (Hutt. 24; Hob. 152, 154; 2 Inst. 273). So after a lapse to the king, if the patron's clerk be presented, instituted, and inducted, and die incumbent, before the king has taken advantage of the lapse, his right is gone (Owen, 2—5; Cro. Eliz. 44, 119; 7 Rep. 28). Advowsons donative, which were abolished by the Benefices Act, 1898, s. 12, were not subject to lapse (Co. Litt. 344 a; see *Fairchild* v. *Gayre*, Cro. Jac. 63; *Britton* v. *Wade*, *ib.* 515), unless augmented by Queen Anne's bounty (1 Geo. 1, stat. 2, c. 10, ss. 6, 14; *Mutter* v. *Chauvel*, 1 Mer. 475; 11 East, 478).

Prerogative presentation.

When an incumbent is made a bishop, the right of presentation to livings held by him vests for that turn in the king, and is called a *prerogative* presentation. This right of the Crown was formerly doubted (*Wentworth* v. *Wright*, Owen, 144), but has since been fully established and acted on, but the right must be exercised in the lifetime of the person promoted, otherwise the turn of the Crown is lost (2 Bl. Rep. 770; *R.* v. *London*, 1 Show. 464; *S. P.*, Show. P. C. 185; Com. Dig. Esglise (H. 6); *Armagh* v. *A.-G.*, 2 Br. P. C. 514). If after a grant of the next presentation to a living the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the king's presentee (*Calland* v. *Troward*, 2 H. Bl. 324; 8 Br. P. C. 71). The right of the Crown to present to an English benefice upon the appointment of the incumbent to a bishopric, is not barred by the Crown having before such appointment granted the advowson to a subject. But no such right exists in the case of an appointment to the bishopric of Christchurch, in New Zealand (*R.* v. *Eton College*, 8 Ell. & Bl. 610).

Universities.

The right of presentation given to the universities by the statutes 3 Jac. 1, c. 5, ss. 18, 19, 20; 1 Will. & M. c. 26, s. 2, and 13 Anne, c. 13, s. 1, arises only in the case of a sole patron, or all of several patrons professing the Roman Catholic religion. Where two are jointly seised of an advowson, the one being a Roman Catholic, the other a Protestant, the sole right is in the latter (*Edwards* v. *Exeter*, 5 Bing. N. S. 652; see *Cottington* v. *Fletcher*, 2 Atk. 155). By statute 13 Anne, c. 13, the presentation to any benefice by any Roman Catholic is void (see *Boyer* v.

3 & 4 Will. 4, c. 27, s. 32.

Norwich, 1892, P. 41; 1892, A. C. 417). And by the Church Patronage Act, 1737, s. 5, every grant made of any advowson or right of presentation, collation, nomination or donation, by any person professing the Catholic religion, or by any mortgagee or trustee of such person, is void. unless it be for valuable consideration to a Protestant purchaser (see Religious Disabilities Act, 1846).

Pluralities.

By stat. 21 Hen. 8, c. 13, if a person having a benefice with cure of souls, of the yearly value of 8*l.* or above, was instituted and inducted into any other benefice with cure of souls, the first benefice became void (see, on the construction of this statute, *Boteler* v. *Allington*, 3 Atk. 453; *Botham* v. *Gregg*, 4 Moore & S. 230; *Halton* v. *Cove*, 1 B. & Ad. 530). The Pluralities Act, 1838, ss. 1—13, has repealed the stat. 21 Hen. 8, c. 13, and made new provisions as to pluralities, which provisions apply generally to all persons and benefices without distinction of value; see also Pluralities Acts Amend. Act, 1885, s. 13. By the 11th section of the Pluralities Act, 1838, institution into a second benefice *ipso facto* avoids the first. See *Storie* v. *Winchester*, 9 C. B. 62; *Ex p. Bartlett*, 12 Q. B. 488, as to avoidance by non-residence under ss. 54, 58 of the same statute, when the clerk is in prison.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

32. In the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit, shall be limited accordingly.

No advowson to be recovered after 100 years.

33. Provided always, and be it further enacted, that no person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title.

It will be observed that there is no saving of the rights of persons under disabilities. It will still be necessary to require abstracts of titles to advowsons to be carried back for a century at least (1 Dart, V. & P. 334, 6th ed.) An abstract of title to an advowson should be accompanied with evidence that the presentations have from time to time been made by the persons appearing to be the owners of the advowson. Sir W. Blackstone observes, that instances are not wanting, wherein two successive incumbents have continued for upwards of 100 years; and states as an instance, that two successive incumbents of the rectory of Chelsfield-cum-Farnborough, in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751 (3 Chit. Bl. Comm. 250; Co. Litt. 115 a).

3 & 4 Will. 4, c. 27, s. 34.

9. *Final Extinction of Right.*

34. At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished.

At the end of the period of limitation the right of the party out of possession to be extinguished.

Effect of this section.

This section of the act is new in principle, as the former Statutes of Limitation were held not to bar the *right* but merely the *remedy;* but this bars the right as well as the remedy (see 1 Wms. Saund. 283 a, n.; 2 B. & Ad. 413; 1 B. & Ald. 93; 1 Ld. Raym. 422). "Under the new act possession gives the right, and not only gives the right, but transfers the estate. All former statutes barred the remedy, but did not bar the estate; they did not create an estate, although they enabled the party to hold against all the world. But the new statute in point of fact gives the estate, to recover which the remedy is barred, for it bars the remedy and binds the estate" (*Incorporated Society* v. *Richards*, 1 D. & War. 289; and see Sugd. R. P. Stats. 77, 2nd ed.; *Re Alison, Johnson* v. *Mounsey*, 11 Ch. Div. 296).

In a case where the freehold title was in question, it was said by *Parke*, B., that the effect of the act was to make a "parliamentary conveyance" of the land to the person in possession after the statutory period had elapsed (*Doe* v. *Sumner*, 14 M. & W. 42). "The statute has executed a conveyance" (*per* Lord *St. Leonards*, *Scott* v. *Nixon*, 3 Dr. & War. 407; see *Burroughs* v. *M'Creight*, 1 J. & Lat. 303; *Sanders* v. *Sanders*, 19 Ch. D. 379). Accordingly the effect of a mortgagee's title being barred is to vest the legal estate in the mortgagor (*Kibble* v. *Fairthorne*, 1895, 1 Ch. 219; *Sands* to *Thompson*, 22 Ch. D. 614). Where a tenant from year to year remained in possession for the statutory period without paying rent, the title of the landlord was barred, not only to the land, but also to the arrears of rent (*Re Jolly, Gathercole* v. *Norfolk*, 1900, 2 Ch. 616).

In the case of a leasehold interest it was held by the C. A. in England that an occupation for the statutory period did not transfer the lease to the occupier, so as to render him liable on the covenants (*Tichborne* v. *Weir*, 67 L. T. 735). On the other hand, where a lessee died intestate, leaving a widow who, without taking administration, entered and remained in possession for more than twelve years, it was held in Ireland that she had become "lessee" within sect. 21 of the Irish Land Act, 1881, the estate in the term having been transferred to her (*Rankin* v. *McMurtry*, 24 L. R. Ir. 297; see *Coyle* v. *McFadden*, 1901, 1 Ir. R. 298).

In a case where the legal estate in trustees was extinguished, the trusts were also extinguished (*Bolling* v. *Hobday*, 31 W. R. 9).

The operation of the section in extinguishing the right to rent-charges was doubted in *Hanks* v. *Palling* (6 E. & B. 659); but there is no sufficient foundation for the doubt (Sugd. R. P. S. 9). It is doubtful whether either heriot service or heriot custom are within the section (*Zouche* v. *Dalbiac*, L. R. 10 Ex. 172).

Extinguished title cannot be revived.

When a title has been extinguished by the statute, the old title cannot be restored by a subsequent acknowledgment (*Kibble* v. *Fairthorne*, 1895, 1 Ch. 219; *Sanders* v. *Sanders*, 19 Ch. Div. 379, where *Stansfield* v. *Hobson*, 3 D. M. & G. 620, to the contrary effect was disapproved; see also *Re Alison, Johnson* v. *Mounsey*, 11 Ch. Div. 296; *Markwick* v. *Hardingham*, 15 Ch. Div. 346; *Lyell* v. *Kennedy*, 18 Q. B. Div. 796); or by subsequent re-entry (*Bryan* v. *Cowdal*, 21 W. R. 693; *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297). The law before this statute was different (*Pendleton* v. *Booth*, 1 D. F. & J. 81). The law as to simple contract debts under

3 & 4 Will. 4, c. 27, s. 34.

Lim. Act, 1623, and Stat. of Frauds Amdt. Act, 1828, is also different (*Spickernell* v. *Hotham*, Kay, 669), as well as the law as to money charged on land, *post*, p. 200.

In a case which was held to fall within R. P. Lim. Act, 1833, s. 8, after the expiration of twenty years, during which no rent had been paid, the tenant, within five years before action, paid some arrears. It was held that under sect. 8 time ran from the last payment of rent, and that sect. 34 had not extinguished the title of the plaintiff who was the reversioner (*Bunting* v. *Sargent*, 13 Ch. D. 330; see, however, *Sanders* v. *Sanders*, 19 Ch. Div. 379; *Re Hobbs, Hobbs* v. *Wade*, 36 Ch. D. 557, and other cases above cited).

Nature of the interest of the person in possession.

It has been suggested that the title gained by a wrongdoer who has been in possession, which may be limited by rights yet remaining unextinguished, is commensurate with the interest which the rightful owners have lost by the operation of the statute, and must therefore have the same legal character, and be freehold, leasehold, or copyhold accordingly (Darb. & Bos. Stat. Lim. 494). As to leaseholds, see *Tichborne* v. *Weir*, 67 L. T. 735; *Rankin* v. *McMurtry*, 24 L. R. Ir. 297; *Coyle* v. *McFadden*, 1901, 1 Ir. R. 298; and as to copyholds, see *A.-G.* v. *Tomline*, 15 Ch. Div. 150. Mr. Hayes' view is as follows: "The wrongdoer must be considered according to the principle of the old law as claiming generally, and therefore as claiming the absolute property (unless indeed he expressly qualify his claim), and the statute as merely diminishing from time to time the danger of eviction, till at length his originally precarious fee becomes, by the exclusion of every stronger claim, a firm inheritance" (1 Hayes, Conv. 270, 5th ed.). The latter view seems to be taken by Dart (V. & P. 464, 6th ed.). See further an article, 11 Jur. N. S. 151 (Part 2).

Person in possession has a devisable interest.

A person in possession of land without other title has, even before time has run in his favour under this statute, a devisable interest (*Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Keeffe* v. *Kirby*, 6 Ir. C. L. R. 591; *Clarke* v. *Clarke*, I. R. 2 C. L. 395; see under the old law, *Doe* v. *Birchmore*, 9 Ad. & Ell. 662).

Before this statute twenty years' possession gave a *primâ facie* title against every one, and a complete title against a wrongdoer who could not show any right, even if such wrongdoer had been in possession many years, provided they were less than twenty (*Doe* v. *Cooke*, 7 Bing. 346; see *ante*, p. 126). The court thought that the effect of this section would be to give the right to the possessor for twenty years even against the party in whom the legal estate formerly was, and but for the act would still be, where he had not obtained the possession till after the twenty years; but that such twenty years' possession must be either by the same person or by several persons claiming one from the other by descent, will or conveyance (*Doe* v. *Barnard*, 13 Q. B. 945, 952).

Possession by trespassers claiming under one another.

Possession by succession of independent trespassers.

A continuous adverse possession for the statutory period by a succession of persons not claiming under one another bars the true owner (*Willis* v. *Howe*, 1893, 2 Ch. 553). In such a case it has been suggested that at the end of the period the last trespasser has a good title (*Dixon* v. *Gayfere*, 17 Beav. 430), but this has been disapproved (*Asher* v. *Whitlock*, L. R. 1 Q. B. 4). And the better view seems to be that at the end of the statutory period the first trespasser has a right to the possession and may maintain ejectment against a subsequent trespasser by whom he has been expelled (Dart, V. & P. 466, 6th ed.; see *Dalton* v. *Fitzgerald*, 1897, 2 Ch. 90; *Asher* v. *Whitlock*, L. R. 1 Q. B. 4; *Doe* v. *Martin*, 1 Car. & M. 32; *Doe* v. *Dyball*, 3 C. & P. 610). If before the statutory period has expired the trespasser abandons possession, and the possession is vacant, the rightful owner is in the same position in all respects as before the trespass (*Trustees Co.* v. *Short*, 13 App. Cas. 798).

Purchaser compelled to accept title depending on the statute.

The court will compel a purchaser to take a title depending upon parol evidence of adverse possession under this statute (*Scott* v. *Nixon*, 3 Dru. & War. 388; *Games* v. *Bonnor*, 54 L. J. Ch. 517). The same principle will be followed in a case where the rights of the Crown are barred under 48

Geo. 3, c. 47 (*Tuthill* v. *Rogers*, 6 Ir. Eq. R. 441; see further, *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 84; *Moulton* v. *Edmonds*, 1 D. F. & J. 250). Where the contract is an open one, a possessory title, to be sufficient, must be shown for forty years (*Jacobs* v. *Revell*, 1900, 2 Ch. 858). 3 & 4 Will. 4, c. 27, s. 35.

10. *Receipt of Rent.*

35. The receipt of the rent payable by any tenant from year to year, or other lessee, shall as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act. Receipt of rent to be deemed receipt of profits.

11. *Abolition of Real and Mixed Actions, &c.*

36. No writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationalibus divisis, writ of right of ward, writ de consuetudinibus, et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonia, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize, of novel disseisin, nuisance, darrein presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed except *a writ of right of dower, or writ of dower unde nihil habet* (*c*) *or a quare impedit* (*d*), *or* an ejectment (*e*), and no plaint in the nature of any such writ or action *except a plaint for freebench or dower*, shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four. Real and mixed actions abolished after the 31st December, 1834.

The words in italics have been repealed (S. L. Rev. Act, 1874).

(*c*) The right to bring real actions was preserved for a limited time by sects. 37 and 38 (*post*) (See *Davies* v. *Lowndes*, 6 M. & G. 529; 1 Phill. C. C. 328; and also *Nesbit* v. *Rishton*, 11 Ad. & Ell. 244; 6 Ad. & Ell. 103; 9 Ad. & Ell. 426; 2 P. & D. 706). It was doubted whether, since the passing of this section, an action of debt would lie for the recovery of the arrears of a rent in fee (*Varley* v. *Leigh*, 2 Exch. 450). It has since been decided that an action lies against the terre-tenant who is a freeholder (*Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Ex p. Graham*, 42

3 & 4 Will. 4, c. 27, s. 36.

Ch. Div. 343; *Searle* v. *Cooke*, 43 Ch. Div. 519; see *Whitaker* v. *Forbes*, 1 C. P. Div. 51; *Pertwee* v. *Townsend*, 1896, 2 Q. B. 129), but not against a tenant for years (*Re Herbage Rents, Charity Commrs.* v. *Green*, 1896, 2 Ch. 811).

Writs of dower and *quare impedit* abolished.

By the Common Law Procedure Act, 1860, s. 26, no writ of right of dower, or writ of dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ, and no *quare impedit* shall be brought after the commencement of that act (10th October, 1860) in any court whatsoever. See now the R. S. C. under the Jud. Acts.

(*d*) As to the old writs of right of dower and dower *unde nihil habet* see Shelford, R. P. Stat., 9th ed., p. 170; Roper, Hus. & Wife, pp. 391—431; as to the old proceeding of *quare impedit* (a proceeding to effectuate a presentation to a living), see Shelford, R. P. Stat., 9th ed., p. 171.

Ejectment.

(*e*) An *ejectment* was a possessory action, wherein the title to land might be tried, in all cases where the party claiming title had a *right of entry*, whether such title was to an estate in fee, fee tail, for life or for years (see 2 Archbold's Pr., by Prentice, 825—883, 13th ed.). This relief is now obtained by means of an action for the recovery of land (see R. S. C., Ord. 18, r. 2, and note thereto in Annual Practice).

[*Sects.* 37 *and* 38, *which contained provisions as to saving rights in respect of real actions, have been repealed by S. L. R. Act*, 1874.]

No descent, warranty, &c. to bar a right of entry.

39. No descent cast (*f*), discontinuance (*g*), or warranty (*h*), which may happen or be made, shall toll or defeat any right of entry or action for the recovery of land.

Descent cast.

(*f*) A mere entry is not possession. Continual or other claim will no longer preserve any right of entry, or distress or action (*ante*, sects. 10, 11, p. 147). By the common law, descents of corporeal inheritances in fee simple took away the entry of the party who had right (Litt. s. 385); as if a disseisor died seised, and the lands descended to his heir, the entry of the disseisee was thereby taken away unless there had been a continual claim (Litt. s. 414); and the like law was of an abatement and intrusion, and of the feoffees or donees of abators or intruders. But by stat. 32 Hen. 8, c. 33, the "dying seised of any disseisor of and in any lands, &c., having no title therein, shall not be deemed a descent to take away the entry of the person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled." If a disseisor died after five years' quiet possession, and the disseisee entered, the heir of the former might have maintained an ejectment, for the right of possession belonged to him, although the mere right was in the disseisee (*Smyth* v. *Tyndall*, 2 Salk. 685). The doctrine of descent cast did not apply, if the claimant was under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because in all these cases there was no laches or neglect in the claimant, and therefore no descent took away his entry (Litt. l. 3, c. 6); nor did it affect copyhold or customary estates, where the freehold is in the lord (*Doe* v. *Danvers*, 7 East, 299); nor cases where the party had not any remedy but by entry as a devisee (Co. Litt. 240 b; 7 East, 321. On descent cast, see Co. Litt. 237 b; Bac. Abr. Descent (F) (G) (H); Com. Dig. Descent (D); Roscoe on Real Actions, 81—87; Adams on Ejectment).

Discontinuance.

(*g*) *A discontinuance* of estates in lands and tenements is defined by Lord *Coke* to be "An alienation made or suffered by tenant in tail, or by any that is seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter" (Co. Litt. 325 a). At common law, an estate might be discontinued five ways:—1. By feoffment. 2. By fine. 3. By common

recovery. 4. By confirmation: and 5. By release with warranty. A grant by deed or fine, of such things as lie not in livery (Litt. s. 618; Co. Litt. 332 a), did not work any discontinuance. A feoffment made after 1st October, 1845, has no tortious operation (Real Prop. Act, 1845, s. 4, *post*). 3 & 4 Will. 4, c. 27, s. 43.

A discontinuance of an estate tail could only be made by a tenant in tail in possession (*Doe* v. *Jones*, 1 B. & C. 243; *Trevilian* v. *Lane*, Cro. Eliz. 56; see 1 Rep. 76 a; Litt. s. 658; Co. Litt. 325 a). But the existence of a term of years prior to the estate of a tenant in tail did not prevent a fine levied by him from operating as a discontinuance (*Doe* v. *Finch*, 1 Nev. & M. 130). As to a prior estate by the curtesy, see *Anderson* v. *Anderson*, 30 Beav. 209; see further the notes to *Doe* v. *Finch*, *sup.*, where much learning on the subject of discontinuance, &c. is collected (*S. C.*, 4 B. & Ad. 283). As to discontinuance, see Bac. Abr. and Com. Dig. *Discontinuance;* Co. Litt. 325 a; 347 b, and notes by Butler; Roscoe on Real Actions, 43—53; 1 Prest. on Conv. and on Abst. Index; Roper on Husband and Wife, c. 2, s. 2; *Doe* v. *Ross*, 7 M. & W. 125.

(*h*) As to the law of warranty, see Com. Dig. *Guaranty;* Co. Litt. 365 a; 393 b, and notes by Butler; Bac. Abr. *Warranty;* Shepp. T. 181—203; *Doe* v. *Jones*, 1 Crompt. & Jerv. 528. By Fines and Recoveries Act, 1833, s. 14, all warranties of lands which shall be made after the 31st December, 1833, by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail (see *post*). Warranty.

[*Sections* 40, 41, 42 *of this act are inserted pp.* 190, 200, post.]

12. *Limits of the Act.*

43. No person claiming any tithes, legacy or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity. Act to extend to the spiritual courts.

The mode in which personal legacies were recovered in the ecclesiastical courts is stated in 3 Hagg. Eccl. R. 161, 162. By the Court of Probate Act, 1857, s. 23, the Court of Probate, to which the jurisdiction of the ecclesiastical courts has been transferred, shall entertain no suit for legacies.

44. Provided always, and be it further enacted, that this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit* to or bestow any church, vicarage or other ecclesiastical benefice, extend to Ireland. Act not to extend to Scotland nor to advowsons in Ireland.

* *Lege* present.

The provisions of the R. P. Lim. Act, 1833, relating to advowsons, &c., were extended to Ireland by Grand Juries (Ireland) Act, 1843, and 7 & 8 Vict. c. 27, and the words of this section excluding Ireland have been repealed (S. L. Rev. Act, 1874). See 32 & 33 Vict. c. 42.

This act applies to New South Wales (*Day* v. *Day*, L. R. 3 P. C. 751; *Trustees Co.* v. *Short*, 13 App. Cas. 793); and to New Zealand (*Plimmer* v. *Wellington*, 9 App. Cas. 708), but does not apply to Jamaica (*Pitt* v. *Ducre*, 3 Ch. D. 295). Where a Hindoo banker claimed as a creditor in an English administration action, the English statute applied (*Finch* v. *Finch*, 35 L. T. 235). But the Indian statute was held to govern the case of The colonies.

3 & 4 Will. 4, c. 27, s. 44.

money in an English court representing land in India (*Re Peat*, 7 Eq. 302). As to which statute, see also *Hay* v. *Gordon* (21 W. R. 11). See also the questions raised as to bonds charged on the revenues of Oudh in *Doss* v. *Secretary, &c. of India* (1875, W. N. 59); and as to the Bombay Civil Service Fund, in *Edwards* v. *Warden* (1 App. Cas. 281). By the law of Lower Canada, the period of prescription is thirty years (*Herrick* v. *Sixby*, L. R. 1 P. C. 436; *Macdonald* v. *Lambe*, *Ib.* 539; see *Labrador Co.* v. *The Queen*, 1893, A. C. 104). As to adverse possession in Nova Scotia, see *Des Barres* v. *Shey* (22 W. R. 273); and in Ceylon, see *Clark* v. *Elphinstone* (6 App. Cas. 164). See as to the period of limitation in New Brunswick, *Lewin* v. *Wilson*, 11 App. Cas. 639.

THE REAL PROPERTY LIMITATION ACT, 1874, ss. 1—7, 9, 11, 12.

37 & 38 Vict. c. 57.—*An Act for the further Limitation of Actions and Suits relating to Real Property.*

[7th August, 1874.]

No land or rent to be recovered but within twelve years after the right of action accrued.

1. After the commencement of this act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

By sect. 9 of this act the above section has been substituted for R. P. Lim. Act, 1833, s. 2 (*ante*, p. 122, where see note). Under the same 9th section, the provisions of R. P. Lim. Act, 1833 (except the repealed sections, but including the provisions substituted for such repealed sections), are to be construed together with this act. Accordingly the word "rent" in the present section (interpreted in accordance with sect. 1 of R. P. Lim. Act, 1833) was held to include an annuity charged upon land by deed (*Hughes* v. *Coles*, 27 Ch. D. 231), and interest on land tax redemption money charged on land by statute (*Skene* v. *Cook*, 1902, 1 K. B. 682). The period of twelve years prescribed by the present section as the period of limitation has been applied in the case of tenancies at will (*Sands* to *Thompson*, 22 Ch. D. 614; *Brighton* v. *Brighton Guardians*, 5 C. P. D. 368); of the past instalments of an annuity charged on land (*Hughes* v. *Coles*, 27 Ch. D. 231; see *Skene* v. *Cook*, *sup.*); and of ordinary adverse possession (*Bobbett* v. *S. E. R. Co.*, 9 Q. B. D. 424; *Bevan* v. *London Cement Co.*, 67 L. T. 615; *Marshall* v. *Taylor*, 1895, 1 Ch. 641; *Midland R. Co.* v. *Wright*, 1901, 1 Ch. 738).

Provision for case of future estates (*i*).

2. A right to make any entry or distress, or to bring an action (*a*) or suit to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in rever-

sion (β) or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land (γ) or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such lands, or in receipt of such rent (k): But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer, and if the right of any such person (l) to make such entry or distress, or to bring any such action or suit, shall have been barred under this act, no person (m) afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

37 & 38 Vict. c. 57, s. 2.

Time limited to six years when person entitled to the particular estate out of possession, &c.

(i) By sect. 9 of this act the above section has been substituted for sect. 5 of R. P. Lim. Act, 1833; and the case of future estates and interests now depends upon the above section construed together with the fourth branch of sect. 3 and sect. 20 of R. P. Lim. Act, 1833, *ante*, pp. 130, 156 (*Re Devon Settled Estates*, 1896, 2 Ch. 567).

The language of sect. 5 of R. P. Lim. Act, 1833, has been repeated in the part of the present section which precedes (k), with the addition, however, of the following words in the following places, viz., at (α) "or suit"; at (β) "or remainder or other future estate or interest"; at (γ) "or rent."

Sect. 5 of R. P. Lim. Act, 1833, was held to apply only to cases where a person other than the reversioner was entitled to the particular estate (*Doe* v. *Moulsdale*, 16 M. & W. 689, see p. 698). The saving of the section was applied to a term to secure an annuity (*Re Bermingham*, I. R. 5 Eq. 147). Under R. P. Lim. Act, 1833, it was held, that upon the renewal of a lease the landlord's estate became an estate in possession within sects. 3 and 5 (*Eccl. Commrs.* v. *Rowe*, 5 App. Cas. 736, 741; disapproving of dicta in *Corpus Christi Coll.* v. *Rogers*, 49 L. J. Ex. 4). The rule is different where a valid underlease is subsisting at the date of the renewal (*Eccl. Commrs.* v. *Treemer*, 1893, 1 Ch. 166).

37 & 38 Vict. c. 57, s. 2.

In the case of an equitable charge on a reversionary interest in land, time commences to run under this statute against the right to foreclose from the time when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480; see *Re Owen*, 1894, 3 Ch. 220), and foreclosure may be granted although the personal remedy is barred (*Ib.*, see *Powell* v. *Brodhurst*, 1901, 2 Ch. 167; and compare *Barnes* v. *Glenton*, 1899, 1 Q. B. 891).

(*k*) The proviso which follows here did not occur in R. P. Lim. Act, 1833, s. 5. Where A., tenant for life, aliened, and the alienee entered, and seventeen years afterwards A. died, and the remainderman brought ejectment more than six but less than twelve years after A.'s death, the action was not barred. The proviso did not apply, inasmuch as the alienee and not A. was held to be "the person last entitled to the particular estate." And under the earlier part of the section the plaintiff had twelve years from A.'s death (*Pedder* v. *Hunt*, 18 Q. B. Div. 565).

By virtue of a settlement land was limited to A. for life, remainder to B. for life, remainder in fee to C., whose estate arose under the exercise of a general power of appointment vested in A. by the settlement. Possession by a stranger had barred A.'s title at his death in 1888. B. died in 1891 without having recovered possession. In 1896 it was held that C.'s title was not then barred, the case falling within the above proviso. The court declined to hold that sect. 1 of the Act of 1874 barred C. as being a person claiming under A., or to hold that the general power of appointment was another "right" of A. so as to bring the case within sect. 20 of the Act of 1833 (*Re Devon Settled Estates*, 1896, 2 Ch. 562).

(*l*) This seems to mean the person becoming entitled in possession to a future estate or interest.

(*m*) This provision seems intended to apply only to persons claiming under the person barred under the earlier part of the section.

The effect of R. P. Lim. Act, 1833, in the cases (1) where the owner of an estate in possession grants out of it a particular estate with reversion or remainders following, after time has commenced to run against him; (2) where the owner of an estate in remainder deals with it while time is running against him; and (3) where a tenant for life and remainderman deal with the estate while time is running against the tenant for life, is discussed Darb. & Bos. Stat. Lim. 318 *et seq.*

In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say), infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

By sect. 9 of this act, sects. 3, 4 and 5 have been substituted for sects. 16 and 17 of R. P. Lim. Act, 1833 (*ante*, pp. 152, 155, where see notes). The saving of this section was applied in the case of *Kennedy* v. *Lyell*, 15 Q. B. D. 498. Where the statute once begins to run as against a tenant in tail, and at that time there is no disability on his part, it does not cease to run by reason of subsequent disability on his part or on the part of issue in tail claiming under him (*Murray* v. *Watkins*, 62 L. T. 796). See the cases under Lim. Act, 1623, s. 2, quoted *ante*, p. 153.

As to the disability of coverture, see now M. W. P. Act, 1882, s. 1, sub-s. 2; *Lowe* v. *Fox* (15 Q. B. Div. 667); *Weldon* v. *Neal* (51 L. T. 289; 32 W. R. 828). And for a case where such disability depending on the old law was alleged, see *Hounsell* v. *Dunning*, 1902, 1 Ch. 512. 37 & 38 Vict. c. 57, s. 4.

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims. No time to be allowed for absence beyond seas.

See the notes to R. P. Lim. Act, 1833, ss. 16 and 19, *ante*, pp. 152, 156.

5. No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired. Thirty years utmost allowance for disabilities.

See the note to R. P. Lim. Act, 1833, s. 17, *ante*, p. 155. A claim was barred under this section (*Hounsell* v. *Dunning*, 1902, 1 Ch. 512). As to the application of the present section to money paid into court under the Lands Clauses Act, 1845, s. 79, see *Ex p. Chamberlain* (14 Ch. D. 323).

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall In case of possession under an assurance by a tenant in tail which shall not bar the remainders, they shall be barred at the end of twelve years after that period at which the assurance, if then executed, would have barred them.

37 & 38 Vict. c. 57, s. 7.

be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

By sect. 9 of this act, the above section has been substituted for R. P. Lim. Act, 1833, s. 23 (*ante*, p. 158, where see note).

Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession or from the last written acknowledgment.

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

By sect. 9 of this act, the above section has been substituted for R. P.

Lim. Act, 1833, s. 28, as to which see *ante*, p. 169. A mortgagor having under the above section lost his right to redeem land, could not redeem personalty included in the same mortgage (*Charter* v. *Watson*, 1899, 1 Ch. 174). 37 & 38 Vict. c. 57, s. 9.

The twelve years bar under this section will not be extended by reason of any disability of the mortgagor (*Forster* v. *Patterson*, 17 Ch. D. 132; see under the earlier law, *Kinsman* v. *Rouse*, 17 Ch. D. 104).

[*For sections* 8 *and* 10, *dealing with money charged on land, see* post, *p.* 211.]

Act to be read with 3 & 4 Will. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this act.

9. From and after the commencement of this act all the provisions of the act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this act, and shall take effect as if the provisions hereinbefore contained were substituted in such act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

7 Will. 4 & 1 Vict. c. 28, to be read with this act.

Short title.

11. This act may be cited as the "Real Property Limitation Act, 1874."

Commencement of act.

12. This act shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-nine.

THE LAND TRANSFER ACT, 1897.

(60 & 61 Vict., c. 65, s. 12.)

As to title by possession.

12. A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly. Provided that where a person would, but for the provisions of the principal act [*viz.*, *the Land Transfer Act*, 1875], or of this section, have obtained a title by possession of registered land, he may apply for an order for rectification of

60 & 61 Vict. c. 65, s. 12.

the register under section ninety-five of the principal act, and on such application to the court may, subject to any estates or rights acquired by registration for valuable consideration in pursuance of the principal act or this act, order the register to be rectified accordingly. And provided also that this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.

The Land Transfer Act, 1897, provides for the compulsory application throughout England of the system of registration established by the Land Transfer Act, 1875, and also for the amendment of the last-mentioned act.

Further, under sect. 18 of the L. T. Act, 1875, all registered land (unless the contrary is expressed on the register) is deemed to be subject to such of certain rights mentioned in the section as may be for the time being subsisting. And under sect. 18 of the L. T. Act, 1897, these rights include (subject to the provisions of the L. T. Act, 1897) rights acquired or in course of being acquired under the Limitation Acts.

The final proviso in sect. 12 of the L. T. Act, 1897, should be compared with sect. 8 of the L. T. Act, 1875, dealing with the registration of a possessory title.

The construction of the above enactments remains to be considered by the courts. Under the differently-worded statutes in force in British Honduras the title of an adverse possessor who was not on the register was held to prevail against the title of the registered holder (*Belize Estate Co.* v. *Quilter*, 1897, A. C. 367).

II.—Limitation of Time for the Recovery of Money charged on Land, Legacies, Arrears of Dower, Rent, and Interest.

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THE REAL PROPERTY LIMITATION ACT, 1833.

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Money charged upon land and legacies to be deemed satis-

40. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty

years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, *or his agent*, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

3 & 4 Will. 4, c. 27, s. 40.

fied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the meantime.

The Law of Property Amendment Act, 1860, s. 13, enacts, "that after the thirty-first day of December, one thousand eight hundred and sixty, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given."

This section extended to cases of claims to estates of intestates.

From the 1st of January, 1879, sect. 8 of R. P. Lim. Act, 1874 (*post*, p. 211), has, by sect. 9 of the same act, been substituted for sect. 40 of R. P. Lim. Act, 1833. Sect. 8 of R. P. Lim. Act, 1874, fixes the period of limitation for the recovery of money charged upon land and legacies at twelve years, but in other respects is similar to R. P. Lim. Act, 1833, s. 40. The following note has reference to R. P. Lim. Act, 1833, s. 40, and Law of Prop. Amdt. Act, 1860, s. 13.

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(1) MORTGAGES.

Foreclosure actions.

A foreclosure action is not an action to recover the mortgage money within sect. 40, but is an action to recover land within sects. 2 and 24 of R. P. Lim. Act, 1833 (*Harlock* v. *Ashberry*, 19 Ch. Div. 539; *Wrixon* v. *Vize*, 3 Dru. & War. 104; *Heath* v. *Pugh*, 6 Q. B. Div. 345; 7 App. Cas. 235). For the older law, see *Doe* v. *Williams* (5 Ad. & El. 296); *Dearman* v. *Wyche*, 9 Sim. 570); *Du Vigier* v. *Lee* (2 Ha. 326); *Sinclair* v. *Jackson*

3 & 4 Will. 4, c. 27, s. 40.

(17 Beav. 405). In the case of an equitable charge on a reversionary interest in land, the statute runs against the right to foreclose from the time when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480; *Re Owen*, 1894, 1 Ch. 220). See under the old law *Humble v. Humble*, 24 Beav. 535; where a claim to have their debt raised, made by mortgagees holding a mortgage on a reversionary interest in real estate, was barred by sect. 40.

Presumption of payment before 3 & 4 Will. 4, c. 27.

Before R. P. Lim. Act, 1833, if the mortgagor continued in possession, and there had been neither payment nor demand of any principal or interest for twenty years, it was sufficient to raise the presumption of payment (1 Ch. R. 59, 105; *Trash* v. *White*, 3 Br. C. C. 289; *Christopher* v. *Sparke*, 2 Jac. & W. 228; *Cooke* v. *Soltau*, 2 Sim. & Stu. 154; *contra Joplis* v. *Baker*, 2 Cox, 118; *Leman* v. *Newnham*, 1 Ves. sen. 51); but such presumption was liable to be rebutted by circumstances, and payment of interest on part of the debt was sufficient to keep the whole alive (*Loftus* v. *Smith*, 2 Sch. & Lef. 642).

(2) Judgments.

Sect. 40 applied to a case in which a judgment was sought to be enforced against the personal estate, as well as to a case in which it was sought to be enforced against the land of the debtor (*Watson* v. *Birch*, 15 Sim. 523; see *Jay* v. *Johnstone*, 1893, 1 Q. B. 190; *Henry* v. *Smith*, 2 Dru. & War. 391). Where an action of debt is brought on a judgment and judgment recovered, time runs against the former judgment from its own date (*Watters* v. *Lidwill*, 9 Ir. L. R. 362; *Kealy* v. *Bodkin*, *Ib.* 383).

Revivor.

Proceedings to revive a judgment (as to which see C. L. P. Act, 1852, ss. 128—134; 19 & 20 Vict. c. 97, s. 10) were also held within this section (*Watters* v. *Lidwill*, 9 Ir. L. R. 362; *Williams* v. *Welch*, 3 Dowl. & L. 565; *Wall* v. *Walsh*, I. R. 4 C. L. 103). As to the effect of such proceedings on the running of time, see *Farrell* v. *Gleeson* (11 Cl. & Fin. 702); *Farran* v. *Beresford* (10 Cl. & Fin. 319); *Re Blake* (2 Ir. Ch. R. 643); see Darb. & Bos. Stat. Lim. 176. And as to what lands were bound by the proceedings, see *Murray* v. *Clarke* (4 Ir. C. L. R. 610); *Kirkwood* v. *Lloyd* (11 Ir. Eq. R. 561; 12 Ir. Eq. R. 585); *Re Bodkin* (12 Ir. Ch. R. 61); *Ryan* v. *Cambie* (2 Ir. Eq. R. 328); *Franks* v. *Mason* (9 Ir. Eq. R. 358).

Leave to issue execution.

The above-mentioned sections of the C. L. P. Act, 1852, have now been repealed; and where time has elapsed since the date of a judgment which it is desired to enforce, the practice is now regulated by R. S. C. Ord. 42, rr. 22, 23. An order for leave to issue execution made under the latter rule would seem not to affect the running of time (*Evans* v. *O'Donnell*, 16 L. R. Ir. 452).

Decree in equity.

A decree of a court of equity for the payment of a specific sum was included under judgment in this section (*Dunne* v. *Doyle*, 10 Ir. Ch. R. 502).

Judgment on *post obit* bond, when time begins to run.

The statute does not begin to run against a judgment entered on a *post obit* bond, until the death occurs upon which the bond is payable (*Barber* v. *Shore*, 1 Jebb & S. 610; *Tuckey* v. *Hawkins*, 4 C. B. 655; *Gilman* v. *Chute*, 11 Ir. L. R. 442; *Kennedy* v. *Whaley*, 12 Ir. L. R. 54). As to the running of time in the case of judgments entered on bonds, see *Re Kingston* (I. R. 3 Eq. 485); *Re Keay* (I. R. 3 Eq. 659).

Presumption of satisfaction of judgments before 3 & 4 Will. 4, c. 27.

Before this statute it appears that if a judgment creditor had lain by for twenty years without any effort to enforce his judgment, and it had not been acknowledged by the debtor within that time, it was presumed to be satisfied (Peake's Ev. 25, n.; Coote on Mortgages, 151, 4th ed.; see 4 Anne, c. 16, s. 12; *Kemys* v. *Ruscomb*, 2 Atk. 45; *Willaume* v. *Gorges*, 1 Campb. 217; see also *Grenfell* v. *Girdlestone*, 2 Y. & C. 662; *White* v. *Parnther*, 1 Knapp, 228, 229).

(3) Vendor's Lien.

A vendor's lien for unpaid purchase-money is within this section (*Toft* v. *Stephenson*, 7 Hare, 1; 1 D. M. & G. 28). As to when time commences to run, see *Toft* v. *Stephenson*, 5 D. M. & G. 735.

3 & 4 Will. 4, c. 27, s. 40.

Where a vendor delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be conveyed (*Chapman* v. *Tanner*, 1 Vern. 267; *Pollexfen* v. *Moore*, 3 Atk. 272; and see 1 Br. C. C. 302, 424, and 6 Ves. jun. 483; *Mackreth* v. *Symmons*, 15 Ves. 329), and a receipt is endorsed on the conveyance (*Coppin* v. *Coppin*, 2 P. W. 291; 3 Russ. 488), or be not conveyed (*Smith* v. *Hibbard*, 2 Dick. 730; *Charles* v. *Andrews*, 9 Mod. 152), and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold (*Winter* v. *Anson*, 3 Russ. 488), gives the vendor a lien on the land for the money. The doctrine applies in the case of other property besides land, *e.g.*, a share in proceeds of sale of leaseholds (*Davies* v. *Thomas*, 1900, 2 Ch. 462; see *Levy* v. *Stogdon*, 1898, 1 Ch. 478). But the application of the doctrine depends upon the intention of the parties (*Re Albert, &c. Co.*, 11 Eq. 179).

Nature of the lien.

When lost.

Thus, where a vendor took a mortgage of part of the estate, his lien over the rest of the estate was held to be excluded (*Capper* v. *Spottiswoode*, Taml. 21); and where he took a mortgage of the whole estate for part of the unpaid purchase-money his lien for the balance was lost (*Bond* v. *Kent*, 2 Vern. 281; see 1 Sch. & Lef. 135). So there is no lien where the vendor takes a mortgage of another estate (6 Ves. 760), or a charge upon stock (*Nairn* v. *Prowse*, 6 Ves. 752); nor where the consideration for the conveyance was expressed to be the covenant for the payment of an annuity and a sum in gross in the event of the purchaser's marriage (*Clark* v. *Royle*, 3 Sim. 499; see *Stuart* v. *Ferguson*, 1 Hayes, 452; *Parrott* v. *Sweetland*, 3 M. & K. 655; *Dixon* v. *Gayfere*, 21 Beav. 118; 1 De G. & J. 655; *Matthew* v. *Bowler*, 6 Ha. 110; *Buckland* v. *Pocknell*, 13 Sim. 406); nor where land was purchased under the Lands Clauses Act, and the consideration was a yearly rent-charge (*Jersey* v. *Briton Ferry Co.*, 7 Eq. 409); nor where the purchase-money of lands sold to a company was expressed to be payable out of moneys to be received by the company on sale of shares (*Re Brentwood Co.*, 4 Ch. Div. 562); nor as against the mortgagees of the purchaser where vendor joined in the mortgage (*Cood* v. *Pollard*, 9 Price, 544; *Smith* v. *Evans*, 28 Beav. 59). For the lien in the case of purchases with trust money, see *White* v. *Wakefield* (7 Sim. 401); *Muir* v. *Jolly* (26 Beav. 143). Vendors were held to have lost their lien by permitting the purchaser to register his conveyance with a view to a sub-sale (*Kettlewell* v. *Watson*, 26 Ch. Div. 501; see *Ex p. Parker*, 1 Glyn. & J. 228).

When not lost.

The lien, however, may subsist notwithstanding a personal security is given for the money, whether by bill of exchange (*Hughes* v. *Kearney*, 1 Sch. & Lef. 132; *Grant* v. *Mills*, 2 Ves. & B. 306; *Ex p. Peake*, 1 Madd. 346); or promissory note (*Gibbons* v. *Baddall*, 2 Eq. Cas. Abr. 682, n. b; *Ex p. Loaring*, 2 Rose, 79); or bond (*Winter* v. *Anson*, 3 Russ. 488; *Collins* v. *Collins*, 31 Beav. 347). Nor is the lien lost by an improper payment to the vendor's solicitors (*Wrout* v. *Dawes*, 25 Beav. 369).

Against whom it prevails.

The lien prevails against the purchaser and his heir; against volunteers claiming under him; against sub-purchasers with notice; sometimes against sub-purchasers without notice (*Rice* v. *Rice*, 2 Drew. 85; Sugd. V. & P. 682, 14th ed.); and against assignees whether in bankruptcy or claiming under an assignment for the benefit of creditors (*Fawell* v. *Heelis*, Amb. 724); and against a person appointed under Lunacy Act, 1899, s. 116, to get in a lunatic's estate (*Davies* v. *Thomas*, 1900, 2 Ch. 464).

Is assignable.

The lien is assignable by parol (*Dryden* v. *Frost*, 3 M. & C. 670), but the assignee will take it subject to any prior incumbrances created by the vendor (*Lacy* v. *Ingle*, 2 Ph. 413).

In the case of sales to a railway company.

A vendor of land to a railway company who have entered and used it for the purpose of their railway, is entitled to the same lien on land for the unpaid purchase-money and the same remedies for enforcing it as an ordinary vendor (see *Munns* v. *Isle of Wight R. Co.*, 5 Ch. 414, where an order was made for a receiver, and the cases there quoted; *Wing* v.

3 & 4 Will. 4, c. 27, s. 40.

Tottenham Co., 3 Ch. 740, where the vendor was held entitled to a sale). The company will not be restrained from running trains over the land until the sale (*Lyatt* v. *Stafford Co.*, 13 Eq. 261). The vendor has no lien for the costs of an arbitration under the Lands Clauses Consolidation Act (*Ferrers* v. *Stafford Co.*, 13 Eq. 524).

Real Estate Charges Acts.

The word "mortgage" in Real Estate Charges Act, 1854, has been extended so as to include the lien, both in the case of testators and intestates (see R. E. C. Acts, 1867 and 1877, *post*; *Broadbent* v. *Groves*, 24 Ch. D. 94). As to a lien on real estate for an unpaid legacy, see *Barker* v. *Barker* (10 Eq. 438).

At common law.

An unpaid vendor has not at law any lien on the title deeds for his purchase-money (*Goode* v. *Burton*, 1 Ex. 189; see also *Hope* v. *Booth*, 1 B. & Ad. 498; *Baker* v. *Dewey*, 1 B. & C. 704; *Lampon* v. *Corke*, 5 B. & Ad. 606; *Oxenham* v. *Esdaile*, 3 Y. & J. 362; *Hooper* v. *Ramsbottom*, 4 Camp. 121; *Harding* v. *Ambler*, 3 M. & W. 279).

Purchaser's lien.

A purchaser may have a lien on the land for the deposit paid by him to the vendor (*Rose* v. *Watson*, 10 H. L. C. 683; *Levy* v. *Stogdon*, 1898, 1 Ch. 478; 1899, 1 Ch. 5; *Whitbread* v. *Watt*, 1902, 1 Ch. 835), which may be lost by his repudiation of the contract (*Cornwall* v. *Henson*, 1899, 2 Ch. 710).

(4)

MONEY CHARGED UPON OR PAYABLE OUT OF LAND.

It was questioned in *Pawsey* v. *Barnes* (20 L. J. Ch. 393), whether the share of the produce of real estate, devised to trustees upon trust to sell, was a sum charged upon or payable out of land within this section. Such a share was held to be "money payable out of land," within sect. 42, *post* (*Bowyer* v. *Woodman*, 3 Eq. 313). In *Mutlow* v. *Bigg* (18 Eq. 246), land was devised on trust for sale, and part having been sold, but part remaining unsold, an action was brought for execution of the trust. V.-C. *Hall* held that sect. 40 had no application, except as regards the part sold.

Money due on a bond by an ancestor is not a sum of money payable out of land within this section (*Roddam* v. *Morley*, 2 K. & J. 336; see *Morley* v. *Morley*, 5 D. M. & G. 610).

Same hand to pay and receive.

The statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who by the delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest of the charge ought to be paid is receivable by, and belongs to, the same person who is entitled to the interest (*Burrell* v. *Egremont*, 7 Beav. 206); as where a tenant for life paid off a charge on settled estates (*Ib.*; see *Kensington* v. *Bouverie*, 7 D. M. & G. 144; *Baldwin* v. *Baldwin*, 4 Ir. Ch. R. 501; *Carbery* v. *Preston*, 13 Ir. Eq. R. 455); or where the person entitled beneficially to the rents of the mortgaged land was also entitled to the interest of the mortgage, although the trustees were different (*Topham* v. *Booth*, 35 Ch. D. 607). In these cases payment of interest has been presumed. The same principle was applied where a married woman living with her husband was entitled to the interest of mortgage money charged on her husband's land (*Re Hawes*, *Burchell* v. *Hawes*, 62 L. J. Ch. 463; see *Re Dixon*, *Heynes* v. *Dixon*, 1900, 2 Ch. 561). To bring a charge within the operation of this section, there must be a hand to receive as well as a hand to pay, and the party to receive must be capable of releasing and giving a discharge (*M'Carthy* v. *Daunt*, 11 Ir. Eq. R. 29; *Carroll* v. *Hargrave*, I. R. 5 Eq. 123). See further, the cases quoted under sect. 8 of R. P. Lim. Act, 1874 (*post*, p. 212); under R. P. Lim. Act, 1837 (*ante*, p. 174); and under Civil Proc. Act, 1833, s. 5 (*post*, p. 220).

The section has no application in the case of an annuity charged on real estate in Jamaica (*Pitt* v. *Dacre*, 3 Ch. Div. 295).

(5)

LEGACIES.

This section was applicable to legacies payable out of personal estate only (*Paget* v. *Foley*, 2 Bing. N. C. 679; *Sheppard* v. *Duke*, 9 Sim. 569; *Henry* v. *Smith*, 2 Dru. & War. 391; *O'Hara* v. *Creagh*, 1 Long. & T. 65). The section extended to a residue (*Prior* v. *Horniblow*, 2 Y. & Coll. 201); or share of residue (*Christian* v. *Devereux*, 12 Sim. 271); and to an annuity payable out of personalty (*Re Ashwell*, Johns. 112; see *Dower* v. *Dower*,

15 L. R. Ir. 264). As to whether such annuity unsecured by bond or covenant would have been extinguished by twenty years' non-payment, see Sugd. R. P. Stat. 138; Darb. & Bos. Stat. Lim. 181, 182. Where the person liable for payment of a legacy and the person entitled to receive it are the same, no question of limitation could arise (*Binns* v. *Nicholls*, 2 Eq. 256; see *Blachford* v. *Worsley*, 27 Ch. D. 676). Compare the cases as to charges (*sup.*), and as to specialties (*post*, p. 220). As to the effect of an order in lunacy in preserving the right to recover a legacy, see *Re Walker* (7 Ch. 120); and generally as to the running of time in the case of actions to recover legacies, see especially the cases as to a present right to receive a legacy, p. 196, *post*. **3 & 4 Will. 4, c. 27, s. 40.**

An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such having been barred, it could not be claimed under the charge of debts (*Piggott* v. *Jefferson*, 12 Sim. 26).

Presumption of payment of legacies before 3 & 4 Will. 4, c. 27.

Before this act lapse of time was frequently held a bar to a suit for a legacy upon the ground of raising a presumption of payment (*Higgins* v. *Crawford*, 2 Ves. jun. 572; *Pickering* v. *Stamford*, *Ib.* 582; *Jones* v. *Turberville*, *Ib.* 11; *Montressor* v. *Williams*, 1 Rop. on Leg. 792, 2nd ed.; *Campbell* v. *Graham*, 1 R. & M. 453; 2 Cl. & Finn. 429). For cases where the presumption was not raised, see *Shields* v. *Rice* (3 Jur. 970); *Lee* v. *Brown* (4 Ves. 362); *Prior* v. *Horniblow* (2 Y. & Coll. 206); *Ravenscroft* v. *Frisby* (1 Coll. 16).

(6)

Express trusts —of money payable out of land;

According to the law as it stood before 1879, sect. 25 of the R. P. Lim. Act, 1833, qualified sect. 40 where land was vested in trustees upon express trust to secure payment of debts (*Dillon* v. *Cruise*, 3 Ir. Eq. R. 70; *Hunt* v. *Bateman*, 10 Ir. Eq. R. 360; see *Dundas* v. *Blake*, 11 Ir. Eq. R. 138; *Heenan* v. *Bury*, 2 J. & Lat. 303); or of charges (*Young* v. *Waterpark*, 13 Sim. 204; 15 L. J. Ch. 63; *Blair* v. *Nugent*, 3 J. & Lat. 658; *Lawton* v. *Ford*, 2 Eq. 97; see *Burrowes* v. *Gore*, 6 H. L. C. 907); or of legacies or annuities (*Watson* v. *Saul*, 1 Giff. 188; *Ward* v. *Arch*, 12 Sim. 472). But now the R. P. Lim. Act, 1874, s. 10, provides that after 1st January, 1879, no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, except within the time within which the same would be recoverable if there were not any such trust (see *post*, p. 213).

—of money payable out of personalty.

The case of sums of money secured by an express trust of personalty vested in a trustee, but which sums are not charged upon or payable out of land, appears to be unaffected by the last-mentioned section; and in the case of such sums it was held, previously to the R. P. Lim. Act, 1874, that the trust of personalty prevented the statute from operating as a bar (see *Playfair* v. *Cooper*, 17 Beav. 187; compare the Jud. Act, 1873, sect. 25 (2); *Banner* v. *Berridge*, 18 Ch. D. 262). It seems that the last-mentioned rule did not apply to the case where the trust of personalty was one imposed upon an executor (*Cadbury* v. *Smith*, 9 Eq. 42; *Scott* v. *Jones*, 4 Cl. & Fin. 382; *Re Stephens*, *Warburton* v. *Stephens*, 43 Ch. D. 45). But the executor may become a trustee (see *Charlton* v. *Durham*, 4 Ch. 433; Darb. & Bos. Stat. Lim. 171); *e.g.*, where he has severed a legacy (*Phillipo* v. *Munnings*, 2 M. & C. 309; explained in *Harcourt* v. *White*, 28 Beav. 309; *Tyson* v. *Jackson*, 30 Beav. 384; see *Re Smith*, *Henderson Roe* v. *Hitchins*, 42 Ch. D. 302); or has executed a declaration of trust (*Re Rowe*, *Jacobs* v. *Hind*, 60 L. T. 599). The executor may become a trustee by assenting to a legacy given to him in trust (*Dix* v. *Burford*, 19 Beav. 412); but not by assenting to an absolute legacy (*Re Rowe*, *sup.*); or by signing a residuary account (*Re Rowe*, 61 L. T. 581; see *Tyson* v. *Jackson*, 30 Beav. 384). The ordinary implied trust which affects personal estate held by an executor for the benefit of legatees does not prevent the running of time (*Re Davis*, *Evans* v. *Moore*, 1891, 3 Ch. 124; *Re Barker*, *Buxton* v. *Campbell*, 1892, 2 Ch. 491; see *Re Lacy*, *Royal Association* v. *Kydd*, 1899, 2 Ch. 149).

3 & 4 Will. 4, c. 27, s. 40.

In the case of proceedings against trustees commenced after 1889, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888 (*post*, p. 247).

Trustee Act, 1888.

(7) Claims to estates of intestates.

The case of claims to the estates of persons dying intestate is dealt with by Law of Prop. Amdt. Act, 1860, s. 13 (*ante*, p. 191), which is not affected by R. P. Lim. Act, 1874. The last-mentioned section is retrospective (*Willis* v. *Howe*, 43 L. T. 375; *Re Johnson*, *Sly* v. *Blake*, 29 Ch. D. 964), and applies to a partial as well as an entire intestacy (*Willis* v. *Howe*, *sup.*). An action was barred by this section in *Martin* v. *Beauchamp* (1888, W. N. 247); also in *Re Lacy*, *Royal Association* v. *Kydd* (1899, 2 Ch. 149), where an executor was held not to be an express trustee of leaseholds for next of kin. The section is no bar to a claim made by the next of kin to leaseholds of the intestate which had been occupied for more than twenty years by the administrator (who was also heir-at-law to the intestate), under a belief that the property was freehold (*Reed* v. *Fenn*, 35 L. J. Ch. 464). See also, as to lapse of time in the case of claims to an intestate's estate, *Cresswell* v. *Dewell* (4 Giff. 460); and the cases as to a present right to receive, below.

(8) "Present right to receive."

Tindal, C. J., said, "By the words, 'present right to receive the same,' we understand an immediate right without waiting for the happening of any future event" (*Farran* v. *Beresford*, 10 Cl. & Fin. 334). The words are not equivalent to "present right to enforce payment of the same" (*Hornsey Board* v. *Monarch Society*, 24 Q. B. Div. 5; see further, *Dillon* v. *Cruise*, 3 Ir. Eq. R. 82; 2 Jebb & Symes, 109; *Ryan* v. *Combie*, 2 Ir. Eq. R. 334). In the case of charges it was said that in each case the moment to be looked at was the moment when the charge came into present operation (*Hornsey Board* v. *Monarch Society*, 24 Q. B. Div. 9).

In the case of a legacy payable out of personal estate or in the case of a share of an intestate's estate, the "present right to receive" means the right to receive from the executor or administrator, and does not accrue in the case of a reversionary or outstanding asset before the same has been actually recovered or reduced into possession by him (*Re Johnson*, *Sly* v. *Blake*, 29 Ch. D. 971). If the executor sells the reversionary interest, time runs from the receipt by him of the proceeds (*Ludlam* v. *Ludlam*, 63 L. T. 332). Accordingly claims made more than twenty years after the death were held not barred as to assets received by the defendant within twenty years before action, in the case of legatees claiming residue (*Adams* v. *Barry*, 2 Coll. 290; see *Re Davis*, *Evans* v. *Moore*, 1891, 3 Ch. 119, a decision under R. P. Lim. Act, 1874); and in the case of next of kin claiming administration (*Re Johnson*, *Sly* v. *Blake*, 29 Ch. D. 964). See form of decree in *Larkins* v. *Phipps* (1873, W. N. 207). In the case of an immediate legacy, it was said that the right to receive it did not arise until twelve months after the testator's death (*Earle* v. *Bellingham*, 24 Beav. 448; see *Benson* v. *Maude*, 6 Mad. 15); but it seems that the statute would commence to run before that time (*Hornsey Board* v. *Monarch Society*, 24 Q. B. Div. 10).

Where a fund is set apart to answer an annuity, the statute cannot be set up against the residuary legatee on the death of the annuitant forty years afterwards; but it can as against a pecuniary legatee whose legacy was payable on the testator's death (*Bright* v. *Larcher*, 27 Beav. 130; 4 De G. & J. 608). Where a legacy was bequeathed payable out of a reversionary fund, a present right to receive the legacy did not accrue until the reversion fell in (*Earle* v. *Bellingham*, 24 Beav. 448; compare *Blachford* v. *Worsley*, 27 Ch. D. 676). But where a testator charged a future legacy on a contingent reversionary interest in land, the "present right to receive" accrued when the legacy became payable, not on the subsequent falling in of the reversionary interest (*Re Owen*, 1894, 3 Ch. 220). Where a testator's estate is so heavily charged with mortgages that it is uncertain whether a legatee will ever be paid his legacy, it seems to be doubtful whether it can be said that he has a present right to receive it within this

statute (*Ravenscroft* v. *Frisby*, 1 Coll. C. C. 22). Legatees whose legacies were charged on real estate, subject to prior charges, were not affected by lapse of time so long as any of the prior charges subsisted (*Faulkner* v. *Daniel*, 3 Hare, 212; see, however, *Proud* v. *Proud*, 11 W. R. 101). 3 & 4 Will. 4, c. 27, s. 40.

The present right to receive must accrue to some persons capable of giving a discharge for or release of the same; and accordingly, where a legacy was bequeathed to an infant, time was held to run from the period when she attained her majority (*Piggott* v. *Jefferson*, 12 Sim. 26). When time has commenced to run against the right of a legatee to recover his legacy, and the executor is subsequently found a lunatic, time will nevertheless continue to run (*Boldero* v. *Halpin*, 19 W. R. 320). Disabilities.

(9) PART PAYMENT.

The words in sect. 40, "by the person by whom the same shall be payable or his agent," apply equally to the making of a payment and the signing of an acknowledgment (*Chinnery* v. *Evans*, 11 H. L. C. 115, 124; see *Harlock* v. *Ashberry*, 19 Ch. Div. 539). In the latter case, it was said that the underlying principle of all statutes of limitation is that a payment to take a case out of the statute must be a payment by a person liable as an acknowledgment of right (*Ib.* p. 545). Compare the discussion of the corresponding New Brunswick statute (*Lewin* v. *Wilson*, 11 App. Cas. 639).

Payment by a mere stranger will not do (*Homan* v. *Andrews*, 1 Ir. Ch. Rep. 106; *Linsell* v. *Bonsor*, 2 Bing. N. C. 245; *Chinnery* v. *Evans*, 11 H. L. C. 115). The person designated in this section as the person by whom money is payable must evidently mean, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed. The money is payable by him in the only sense in which it is payable by any one. Unless he pay it he will lose his land; and it is obviously in that sense that the statute in such a case speaks of the money as payable (*Toft* v. *Stephenson*, 1 D. M. & G. 40; quoted in *Pears* v. *Laing*, 12 Eq. 54). Where a mortgagor assigned the equity of redemption, and subsequently paid interest, the payment did not prevent time running in favour of the assignee (*Newbould* v. *Smith*, 33 Ch. Div. 127; 14 App. Cas. 423). The payment of interest on a mortgage, made by the receiver of the mortgagor, is a payment by an agent of the party liable within this section (*Chinnery* v. *Evans*, 11 H. L. C. 115). But the entering by the mortgagee into the receipt of the rents and profits of the mortgaged property is not a payment by the mortgagor, or by any one on his behalf (*Harlock* v. *Ashberry*, 19 Ch. Div. 539; *Cockburn* v. *Edwards*, 18 Ch. Div. 457, overruling on this point *Brocklehurst* v. *Jessop*, 7 Sim. 442; see *White* v. *Hillacre*, 3 Y. & Coll. 597; *Williams* v. *Welch*, 3 D. & L. 565). On the death of a mortgagor, his widow (who was entitled to dower) took possession of the mortgaged estate with the consent of the heir, and paid interest on the mortgage. It was held, that the heir was bound by the payments, the widow being regarded either as his agent, or else as a stranger, in which case the heir himself was barred (*Ames* v. *Mannering*, 26 Beav. 583). Where a mortgagor of a legacy, and another as surety, gave a bond to the mortgagee as a collateral security for the amount, payment of interest by the co-obligor and surety, who was also tenant for life of land on which the legacy was charged, kept the debt alive against the principal debtor, notwithstanding Merc. Law Amdt. Act, 1859, ss. 5, 14 (*Seager* v. *Aston*, 26 L. J. Ch. 302). Payment of interest by a tenant for life of an equity of redemption will keep the mortgage alive so that foreclosure may be had (*Barclay* v. *Owen*, 60 L. T. 222). But under special circumstances, payment of interest by a tenant for life was held not to bind the remainderman (*Beckett* v. *De la Cour*, 11 L. R. Ir. 187). Where a mortgagor assigned an annuity to the mortgagee to secure part of the mortgage debt, and the mortgagee received the annuity to an amount which exceeded that part and interest, the surplus was a payment sufficient to keep the mortgage debt alive (*Staley* v. *Barrett*, 26 L. J. Ch. 321; compare *Re Clifden, Annaly* v. *Agar-Ellis*, 1900, 1 Ch. 774). Where a testator devised part of his real estates charged with the payment of

3 & 4 Will. 4, c. 27, s. 40.

half his debts to A., and the other part charged with the payment of the other half of his debts to B., payments by A. of interest on a bond debt of the testator did not keep alive the debt against B. (*Dickenson* v. *Teasdale*, 1 D. J. & S. 52). If estates A., B., and C. are included in one mortgage, and payments of interest are made out of the rents of A., these payments are sufficient to keep alive the remedy of the mortgagee against estates B. and C. (*Chinnery* v. *Evans*, 11 H. L. C. 115). See also *Pears* v. *Laing*, 12 Eq. 41. And see further, the case quoted under R. P. Lim. Act, 1837, *ante*, p. 174; the Civil Procedure Act, 1833, s. 5, *post*, p. 219; and under sect. 8 of the R. P. Lim. Act, 1874, *post*, p. 212.

Payment of interest has been presumed when the hand to pay and to receive such interest is the same (see cases quoted *ante*, p. 194).

Part-payment by the administrator out of a particular asset which has been recovered by him within the statutory period, will not revive the right to sue for general administration, which was at the time of payment barred (*Re Johnson, Sly* v. *Blake*, 29 Ch. D. 964). Payment of interest under an order made in a foreclosure action to which infants were parties was considered as having been made without prejudice to their rights (*Thwaites* v. *M'Donogh*, 2 Ir. Eq. R. 97).

(10) Acknowledgments in writing.

Under the 40th section, the acknowledgment of the right must be given in writing, signed by the person by whom the same shall be payable or his *agent*, to the person entitled or his *agent*. Under the 42nd section, the acknowledgment must be given to the party entitled to the interest or *his agent*, signed by the person by whom the same was payable or *his agent*. The words of these two sections being nearly the same, most of the decisions as to acknowledgments under both these sections are arranged in one note. As to acknowledgments under the 14th and 28th sections, see *ante*, pp. 150, 171.

Who is agent.

In reference to this and the other sections, where the acknowledgment to or by the party interested or *his agent* is made sufficient (see *ante*, p. 150), it will be necessary to consider who is in law the agent and by what acts he is so constituted, where no direct proof of agency is produced. An agent need not be authorised in writing (*Coles* v. *Trecothick*, 9 Ves. 250). Wherever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority (*James* v. *Bright*, 5 Bing. 533). When one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command (*Foster* v. *Bates*, 12 M. & W. 233). See *Trulock* v. *Robey* (12 Sim. 407; *ante*, p. 171), where it was said: "It is not necessary to make a person an agent, that he should have an actual authority to act; it is quite sufficient that the grandfather acted as the agent of his grandchild; and that she, when she came of age, adopted what he had done on her behalf." And see generally, as to the extent and nature of an agent's authority, *Pole* v. *Leask* (28 Beav. 562, affirmed in H. L. 9 Jur. N. S. 829). In *Toft* v. *Stephenson* (1 D. M. & G. 28), an inquiry was directed as to the agency of an attorney who had acknowledged a debt.

The principle of some of the cases, as *Whippy* v. *Hillary* (3 B. & Ad. 399), and *Routledge* v. *Ramsay* (8 Ad. & Ell. 221), decided upon the Stat. of Frauds Amdt. Act, 1828, although in language different from that of R. P. Lim. Act, 1833, ss. 40, 42, may be applicable to some cases arising under the latter statute (*Holland* v. *Clark*, 1 Y. & Coll. N. C. 169). See the cases under Stat. of Frauds Amdt. Act, 1828, quoted *post*, pp. 236 *et seq.*

By whom an acknowledgment may be made.

All that the R. P. Lim. Act, 1833, ss. 40, 42, requires is, that *some* acknowledgment of the right to the sum claimed shall have been given in writing, signed by the person who represents the estate out of which it is payable, or by his agent. Thus, where an estate was devised to a trustee in trust to sell and pay the testator's debts, and subject thereto in trust for A., an acknowledgment of a debt in writing, *signed by the trustee* or his agent, was held to be sufficient to preserve the creditor's right of suit for twenty years after the acknowledgment was given; but such an

acknowledgment will not impose on the trustee any personal liability to pay the debt (*St. John* v. *Boughton*, 9 Sim. 219). An acknowledgment signed by the attorney of the trustees of the will of a deceased purchaser of land who had entered before payment of purchase-money was sufficient (*Toft* v. *Stephenson*, 1 D. M. & G. 28). An acknowledgment by one of two trustees of real estate was not sufficient (*Astbury* v. *Astbury*, 1898, 2 Ch. 111). An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage, does not preclude a *puisne* mortgagee from relying on the statute (*Bolding* v. *Lane*, 1 D. J. & S. 122; see the remarks on this decision in *Chinnery* v. *Evans*, 11 H. L. Cas. 115; and *Astbury* v. *Astbury*, 1898, 2 Ch. 117; where it is suggested that an acknowledgment by an executor will not bind a different person who is devisee of the real estate). In *Re Fitzmaurice* (15 Ir. Ch. R. 445), where the tenant for life of the equity of redemption in a mortgaged estate, gave a written acknowledgment to the mortgagee, it was held that the mortgagee's right to recover more than six years' interest was kept alive against the remainderman (see *Beckett* v. *De la Cour*, 11 L. R. Ir. 187; and compare *Gregson* v. *Hindley*, 10 Jur. 383; *Barclay* v. *Owen*, 60 L. T. 222). An acknowledgment by a debtor given after he has transferred his property for the benefit of creditors is not sufficient (*Lyall* v. *Fluker*, 1873, W. N. 208). 3 & 4 Will. 4, c. 27, s. 40.

To whom.

In admitting acknowledgments, under the 40th section, to the person entitled or his agent, the court has not restricted itself within narrow limits. If it be made in a schedule, affidavit, or answer, it is sufficient, although it may be said that in those cases it is made to the court and not to the party. *Sugden*, L. C., thought the decisions right, and that they proceeded upon a *liberal* but yet a fair and just construction of the statute (*Blair* v. *Nugent*, 3 J. & Lat. 677). An acknowledgment in an answer in Chancery was sufficient (*Ib.* 673). In a case where it was contended that an acknowledgment by the debtor to a third person took a case out of this section, *Alderson*, B., said that will not do; there must be that from which a continuing contract may be inferred. If a man were to write a letter to a third person acknowledging the debt, it would not take it out of the statute. The Stat. of Frauds Amdt. Act, 1828, explains that (*Grenfell* v. *Girdlestone*, 2 Y. & Coll. 676). In order that an acknowledgment may have the effect of taking a demand out of the operation of the 42nd section of this statute, the acknowledgment must appear to have been made with a view of rendering the party making it liable to the demand, and it must have been made to the party entitled to make the demand (see *Grenfell* v. *Girdlestone*, 2 Y. & Coll. 676). So letters written by one of two executors to the plaintiff were held not a sufficient acknowledgment, because they had been written by the party not for the purpose of charging himself, but of throwing the burden of payment on the co-executor; and it was said that it was questionable whether they would avail the plaintiff, inasmuch as they were written before the plaintiff had taken out administration to his wife (*Holland* v. *Clark*, 1 Y. & Coll. C. C. 151).

What amounts to an acknowledgment.

A correspondence between the treasurer of a harbour company and a person holding a mortgage on the works and tolls of the company was a sufficient acknowledgment (*Jortin* v. *S. E. R. Co.*, 6 D. M. & G. 270). A written proposal of terms, adding, "This being done, it is hoped the judgment against B. will be satisfied," was a sufficient acknowledgment of the judgment debt (*Vincent* v. *Willington*, 1 Long. & T. 456). It seems that an affidavit made in the suit may be a sufficient acknowledgment within the 42nd section of this act (*Tristram* v. *Harte*, 1 Long. & T. 186). An acknowledgment of a debt in the will of the debtor is sufficient (*Millington* v. *Thompson*, 3 Ir. Ch. R. 236; see, however, *Re Hoyle*, *Hoyle* v. *Hoyle*, 67 L. T. 234).

Master's report.

The report of a master on a reference as to incumbrances, finding the existence of a debt, was not a sufficient acknowledgment (*Hill* v. *Stanwell*, 2 Ir. L. R. 302). In this case the creditor who was held to be barred was not a party to the suit (see *Wrixon* v. *Vize*, 3 Dru. & War. 123).

Insolvent's schedule.

An admission of debt in an insolvent's schedule has been held to

3 & 4 Will. 4, c. 27, s. 40.

be a sufficient acknowledgment within sect. 40 (*Barrett* v. *Birmingham*, 4 Ir. Eq. R. 537; *Morrough* v. *Power*, 5 Ir. L. R. 494; *Hanan* v. *Power*, 8 Ir. L. R. 505).

When must the acknowledgment under sect. 40 be made.

Sect. 40 operates only as a suspension of the remedy and not as an extinguishment of the right. So an acknowledgment after the statutory period has elapsed is sufficient (*Harty* v. *Davis*, 13 Ir. L. R. 23; *Re Clifden, Annaly* v. *Agar-Ellis*, 1900, 1 Ch. 774; see *Waring* v. *Waring*, 5 Ir. Ch. R. 6; but see *contra*, *Gregson* v. *Hindley*, 10 Jur. 383; *Homan* v. *Andrews*, 1 Ir. Ch. R. 106; see on this point the rule as to land, *ante*, p. 179; and as to simple contract debts, *post*, p. 235).

No arrears of dower to be recovered for more than six years.

41. No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

In equity, as at law, there was before this act no limitation to a claim of the *arrears* of dower (*Oliver* v. *Richardson*, 9 Ves. 222; see *Mordaunt* v. *Thorold*, 3 Lev. 375; *Curtis* v. *Curtis*, 2 Br. C. C. 620; *Dormer* v. *Fortescue*, 3 Atk. 130; *Tilley* v. *Bridger*, 2 Vern. 519; Prec. in Ch. 252; *Wakefield* v. *Child*, 1 Fonbl. Eq. 159, n.; the Dower Act, 1833, *post*; *Bamford* v. *Bamford*, 5 Hare, 203; and *Marshall* v. *Smith*, 5 Giff. 37).

No arrears of rent or interest to be recovered for more than six years.

42. No arrears of rent (*a*) or of interest in respect of any sum of money charged upon or payable out of any land or rent (*b*), or in respect of any legacy (*c*), or any damages, in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due (*d*), or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent (*e*): provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

How far this section retrospective.

(*a*) As to how far this section was retrospective, see *Paddon* v. *Bartlett* (3 Ad. & Ell. 884); *Peyton* v. *M'Dermot* (1 Dru. & Wal. 198); *Vincent* v. *Willington* (1 Long. & T. 456).

3 & 4 Will. 4, c. 27, s. 42.

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(1) ARREARS OF RENT.

By the Lim. Act, 1623, s. 3, actions of debt for arrearages of rent must have been commenced and sued within six years after the cause of such actions had accrued. This statute was confined to actions for arrears of rent upon a demise without deed, and did not extend to cases of rent reserved by specialty (*Freeman* v. *Stacey*, Hutton, 109). Old law.

Sect. 42 was held in Ireland to include tithe rentcharge (*Eccl. Commrs.* v. *Sligo*, 5 Ir. Ch. R. 46; *Conolly* v. *Gorman*, 1898, 1 I. R. 20). Only two years' arrears of an ordinary tithe rentcharge can be recovered (54 Vict. c. 8, s. 10, sub-s. 2). As to uncommuted tithes, see 53 Geo. 3, c. 127, and 5 & 6 Will. 4, c. 74 (both repealed except as to uncommuted tithes by S. L. Rev. Acts, 1887 and 1888); *Robinson* v. *Purday* (16 M. & W. 11). Tithe rentcharge and tithes.

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under this act the amount to be recovered is limited to six years (*Archbold* v. *Scully*, 9 H. L. C. 360); this limit applying in all actions for arrears of rent other than actions on a specialty. In an action on a specialty for arrears of rent, Civil Procedure Act, 1833, s. 3, applied, and twenty years' arrears were recovered (*Paget* v. *Foley*, 2 Bing. N. C. 679; *Hunter* v. *Nockolds*, 2 D. M. & G. 592, *post*, p. 202). See now R. P. Lim. Act, 1874, s. 8 (*post*, p. 211), and *Darley* v. *Tennant* (53 L. T. 257). In the case of a lessee who has forfeited his lease by non-payment of rent, the question as to what amount of arrears he will be required to pay to entitle himself to relief in equity, or to have proceedings stayed at law, is discussed (Darb. & Boe. Stat. Lim. 214). For the period during which an account of mesne rents will be directed in equity, see *post*, p. 205. The words "arrears of rent" in this section were held to include a portion charged by will upon land, and payable by periodical instalments (*Uppington* v. *Tarrant*, 12 Ir. Ch. R. N. S. 268, 269). Rent reserved.

Arrears of a fee-farm rent were held to be not recoverable for more than six years (*Humfrey* v. *Gery*, 7 C. B. 567). Fee-farm rent.

The 2nd section of the act provides for the case where the right or title to an annuity is disputed (see *ante*, p. 123). The 42nd section provides for the case where the title to the annuity is *not* disputed, but the distress is made for the arrears due (*James* v. *Salter*, 3 Bing. N. C. 552). An annuity charged on land by will comes within the meaning of the word rent in the 42nd section, as explained by the interpretation clause of this act, *ante*, p. 110, and therefore no more than six years' arrears are recoverable (*Ferguson* v. *Livingston*, 9 Ir. Eq. R. 202; *Francis* v. *Grover*, 5 Ha. 39); so also when the annuity is charged on realty and personalty (*Re Nugent*, 19 L. R. Ir. 140). In *Wheeler* v. *Howell* (3 K. & J. 189), arrears of an annuity charged on a reversionary interest in land were held to be recoverable more than six years after the same became payable. See, however, *Vincent* v. *Going* (1 J. & Lat. 697); *Sinclair* v. *Jackson* (17 Beav. 405). Under Civil Proc. Act, 1833, s. 3, it was held that arrears of an annuity charged on land and secured by deed might, in an action on the specialty, be recovered for twenty years, notwithstanding R. P. Lim. Act, 1833, s. 42 (*Strachan* v. *Thomas*, 12 Ad. & El. 536). See now *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, 22 Ch. D. 579; *Hughes* v. *Coles*, 27 Ch. D. 231; *post*, pp. 211, 213). Annuities.

3 & 4 Will. 4, c. 27, s. 42.

An annuity bequeathed out of personalty only is not within this section (*Rock* v. *Callen*, 6 Ha. 531; *Re Ashwell*, Johns. 112). Lord *St. Leonards* considered that the words in this section "arrears of interest in respect of any legacy" might well be held to include an annuity which is payable out of personalty and no charge upon the land (R. P. Stat. 138).

As to the period for which an account of rents will be directed in equity, see the note p. 205, *post*.

(2) Arrears of interest.

(*b*) "Sect. 40 enumerates mortgages, liens, judgments; but sect. 42 adopts the previous general description of money 'charged upon or payable out of land,' a description which includes every security, omitting the enumeration which it was unnecessary to repeat. The enactments are identical. It is impossible to draw any distinction between the sums of money mentioned in the one section and in the other" (Sugd. R. P. Stat. 139: see *Bolding* v. *Lane*, 4 Giff. 574).

(a) On mortgages.

A mortgagee of canal works was limited under this section to six years' arrears (*Hodges* v. *Croydon Canal Co.*, 3 Beav. 86); and a mortgagee of a reversionary interest in moneys representing the proceeds of lands devised on trust for sale was similarly limited, the mortgagor's property being "money payable out of land" within this section (*Bowyer* v. *Woodman*, 3 Eq. 313). But a mortgagee of turnpike tolls (which are not within the act), was not limited to six years' arrears (*Mellish* v. *Brooks*, 3 Beav. 22). Nor was any such limit applied to the case of a mortgagee of a reversionary interest in trust funds invested on mortgage (*Smith* v. *Hill*, 9 Ch. D. 143; see *Jordan* v. *Young*, 1878, W. N. 229); or in pure personalty (*Mellersh* v. *Brown*, 45 Ch. D. 225, a foreclosure action); nor to the case of a mortgage of a reversionary interest in funds in court, the mortgage containing a covenant that interest in arrear should be capitalised (*Clarkson* v. *Henderson*, 14 Ch. D. 348).

Cap. 27, sect. 42, and cap. 42, sect. 3.

Hunter v. *Nockolds*.

In some of the cases in England under R. P. Lim. Act, 1833, a difficulty arose in consequence of Civil Proc. Act, 1833, s. 3 (p. 215, *post*); and the courts treated the provision of the second act as an exception out of the enactments of the former (see *Paget* v. *Foley*, 2 Bing. N. C. 690; *Strachan* v. *Thomas*, 12 Ad. & E. 558). In *Du Vigier* v. *Lee* (2 Ha. 326), it was held that a mortgagee, whose mortgage debt was secured also by a bond and covenant, was entitled to recover twenty years' arrears of interest in a foreclosure suit. This decision was, however, overruled by Lord *Cottenham* in *Hunter* v. *Nockolds* (1 Mac. & G. 640; 19 L. J. Ch. 177), where he laid down that the effect of the conjoint enactment is, that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent shall be recovered by way of distress, action, or suit, other than and except in actions on covenant or debt on specialty, in which case the limitation is twenty years (see *Harrison* v. *Duignan*, 2 Dru. & War. 298; *Hughes* v. *Kelly*, 3 Dru. & War. 482). Compare *Sutton* v. *Sutton* (22 Ch. Div. 511), and *Fearnside* v. *Flint* (*Ib.* 579), cases under R. P. Lim. Act, 1874, s. 8 (substituted for sect. 40 of R. P. Lim. Act, 1833), in which the more recent statute was held to control Civil Proc. Act, 1833, s. 3. See *post*, p. 211.

Arrears of interest recoverable in foreclosing.

After *Hunter* v. *Nockolds* it was held, in several cases, that in an action to foreclose real estate, a mortgagee could not recover more than six years of interest, although the mortgage debt was secured by covenant (*Sinclair* v. *Jackson*, 17 Beav. 405; *Shaw* v. *Johnson*, 1 Dr. & Sm. 412; *Round* v. *Bell*, 30 Beav. 121). It made no difference that the property mortgaged was reversionary (*Vincent* v. *Going*, 1 J. & Lat. 697; *Sinclair* v. *Jackson*, 17 Beav. 405: approved by *Hall*, V.-C., *Smith* v. *Hill*, 9 Ch. D. 143; see *contra*, *Wheeler* v. *Howell*, 3 K. & J. 198; *Jordan* v. *Young*, 1878, W. N. 229). As to the interest recoverable in foreclosing personal estate, see *Mellersh* v. *Brown* (45 Ch. D. 225).

In redeeming.

In redemption suits a mortgagor can only redeem on payment of all arrears of interest, even exceeding six years (*Edmunds* v. *Waugh*, 1 Eq. 421; *Dingle* v. *Coppen*, 1899, 1 Ch. 726; *Powell* v. *Brodhurst*, 1901, 2 Ch. 167; see *contra*, *Mason* v. *Broadbent*, 33 Beav. 301). On selling land under his power a

mortgagee can retain, out of money in his hands, more than six years' arrears (*Re Marshfield, Marshfield* v. *Hutchins*, 34 Ch. D. 721). See in the case of personal estate, *Re Hancock, Hancock* v. *Berry*, 59 L. T. 199. And where the executors of a mortgagee sold land and paid proceeds into court in a suit to administer the mortgagee's estate, the mortgagee's representatives were held, on their petition, entitled to be paid more than six years' arrears (*Edmunds* v. *Waugh*, 1 Eq. 418). Arrears, however, were limited to six years in other cases where the mortgaged property was represented by money in court, and petitions were presented for payment out, whether by mortgagee (*Re Stead*, 2 Ch. D. 713) or mortgagor (*Re Slater*, 11 Ch. D. 227). 3 & 4 Will. 4, c. 27, s. 42.

Tacking.

In *Elvy* v. *Norwood* (5 De G. & S. 240), the heir of a mortgagor who had covenanted for himself and his heirs to pay the mortgage debt and interest, could not redeem without paying twenty years' arrears of interest, as the mortgagee was entitled to tack the arrears to the debt as against the heir. Since 3 & 4 Will. 4, c. 104, a mortgagee of freeholds may tack his simple contract debt in a foreclosure suit as against the heir of the mortgagor (*Thomas* v. *Thomas*, 22 Beav. 341). As to a mortgagee of copyholds, see *Rolfe* v. *Chester* (20 Beav. 610). The question of tacking must be raised on the pleadings (*Sinclair* v. *Jackson*, 17 Beav. 405).

Possession of prior incumbrancer.

The exception in this clause of the act is, where a man has an estate and there are several incumbrances on it, and one of the incumbrancers enters into possession, the right of the subsequent creditor to recover interest during the full period of such possession, although that period may exceed six years, is saved, provided he come within one year after the determination of that possession. A judgment creditor who has the first security upon the estate, and gets into possession, is a prior incumbrancer in possession within this proviso (*Henry* v. *Smith*, 2 Dru. & War. 390). The prior incumbrance referred to in this exception is one which affects the estate or interest upon which the subsequent incumbrance is also a charge (*Vincent* v. *Going*, 1 J. & Lat. 697). A., being entitled to a mortgage on certain lands vested in a trustee for him, agrees that a subsequent annuity creditor should have precedence over his debt, and joins in a demise of the lands to a trustee for the annuitant, but his trustee who had the legal estate did not join in the demise. A. remains in possession until the death of the grantor of the annuity. The annuitant was held not debarred from recovering more than six years' arrears, as he fell within the terms of the exception (*Drought* v. *Jones*, 2 Ir. Eq. R. 303, "a doubtful authority"; Sugd. R. P. Stat. 146, n.). See also *Montgomery* v. *Southwell*, 2 Con. & Law. 263.

The nature and object of this exception is explained by Lord *Westbury* in *Chinnery* v. *Evans* (11 H. L. Ca. 115). There a mortgage having been created of certain estates, the mortgagor having subsequently sold the equity of redemption and assigned some outstanding charges to a trustee for the purchaser, and the purchaser having entered into possession, the land was not in the possession of a *bonâ fide* incumbrancer prior to the mortgage within this exception.

(b) On judgments.

Debts secured by judgments are sums of money charged upon or payable out of land within the meaning of this section. In relation to the Statutes of Limitations, the rights of judgment creditors for arrears of interest, as against the real and personal estates of their debtor, are equal and coextensive. As far as the bar of the statute operates for the protection of the real estate, to the same extent the personal estate is protected. The Debtors (Ireland) Act, 1840, s. 26, enacts that every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest shall carry interest, &c. The interest thus given is subject to the limitations of the statute, R. P. Lim. Act, 1833, s. 42 (*Henry* v. *Smith*, 2 Dru. & War. 381; compare *Watson* v. *Birch*, 15 Sim. 523; *Jay* v. *Johnstone*, 1893, 1 Q. B. 190). In the case of an Irish judgment not registered as a mortgage only six years' arrears of interest are recoverable out of the judgment debtor's personal estate

3 & 4 Will. 4, c. 27, s. 42.

(*Macdonnell* v. *Fitzgerald*, 1897, 1 I. R. 556). See as to the Irish judgment creditor's remedy against the land, *Shea* v. *Moore*, 1894, 1 I. R. 158.

A judgment creditor of a tenant in fee in remainder after an estate for life, is not entitled to recover out of the lands arrears of interest which accrued due during the existence of the tenancy for life, and more than six years before the commencement of the suit (*Vincent* v. *Going*, 1 J. & Lat. 697; see *Wheeler* v. *Howell*, 3 K. & J. 198; *Sinclair* v. *Jackson*, 17 Beav. 405).

1 & 2 Vict. c. 110, ss. 17, 18.

Formerly a judgment did not carry interest, but interest might be recovered at law, in the shape of damages, by an action on the judgment (*Gaunt* v. *Taylor*, 3 M. & K. 302). Now by Judgments Act, 1838, ss. 17, 18 (*post*), every judgment debt carries interest at the rate of 4*l.* per cent. from the time of entering up the judgment until the same is satisfied. As to interest on debts generally, see p. 206, *post*.

(c) On unpaid purchase-money.

A contract for the sale of an estate, made in March, 1811, stipulated that the purchase-money should be paid on the 13th May following. The money was not paid, but the purchaser entered into and continued in possession. In 1849, a bill was filed to enforce the vendor's lien on the estate for the purchase-money. It was held that the principal had not become payable, as no title had as yet been shown by the vendor, and that the interest could not be due within sect. 42 until the principal money became payable. *Turner*, L. J., said that the interest became due upon completion, although it was to be calculated from the inception of the contract (*Toft* v. *Stevenson*, 5 D. M. & G. 735).

(d) On charges.

On a reference as to incumbrances on an estate, a claim for a sum charged thereon, carried in under such inquiry by one not a party to the suit, was held to take the charge as to the interest out of this section, and the incumbrancer was entitled to arrears of interest for six years antecedent to the claim (*Greenway* v. *Bromfield*, 9 Hare, 201).

(e) On legacies.

(*c*) Arrears of interest on legacies can only be recovered for six years, calculated from the filing of the bill (*Hughes* v. *Williams*, 3 Mac. & G. 683; *Chappell* v. *Rees*, 1 D. M. & G. 393; *Re Walker*, 7 Ch. 120; see *Thompson* v. *Eastwood*, 2 App. Cas. 215). But where the assets consisted of a reversion, and for the benefit of the estate realization was delayed, legatees received interest from the expiration of one year from the death of testatrix, a period exceeding six years (*Bluchford* v. *Worsley*, 27 Ch. D. 676). As to interest on legacies, see *Lord* v. *Lord* (2 Ch. 782); *Re Richards* (8 Eq. 119); and as to the time from which such interest runs, see *Re Waters* (42 Ch. D. 517); *Re Bignold* (45 Ch. D. 496); *Re Friend, Friend* v. *Young* (1898, W. N. 26); *Re Gardner, Long* v. *Gardner* (1892, W. N. 164); R. S. C., Ord. 55, r. 64.

(3) Express trusts.

(*d*) According to the law as it stood before 1879, it was settled that where there was an express trust sect. 25 of R. P. Lim. Act, 1833, applied, and the claim was not barred by sect. 42. So held in the case of annuities secured on realty (*Ward* v. *Arch*, 12 Sim. 472; *Mansfield* v. *Ogle*, 24 L. J. Ch. 700; *Cox* v. *Dolman*, 2 D. M. & G. 592; *Snow* v. *Booth*, 8 D. M. & G. 69; *Lewis* v. *Duncombe*, 29 Beav. 175; *Knight* v. *Bowyer*, 2 De G. & J. 421; see *Round* v. *Bell*, 30 Beav. 121; *Cunningham* v. *Foot*, 3 App. Cas. 974); in the case of an annuity payable out of personalty (*Playfair* v. *Cooper*, 17 Beav. 187); in the case of a mortgage secured by a term in a trustee (*Shaw* v. *Johnson*, 1 Dr. & Sm. 412); in the case of a simple contract debt charged by will on real estate (*Blower* v. *Blower*, 7 W. R. 101); and in the case of interest on a legacy directed to be raised by a sale of realty (*Gough* v. *Bult*, 16 Sim. 323; *Kellett* v. *Kellett*, I. R. 5 Eq. 298; *Thompson* v. *Eastwood*, 2 App. Cas. 215). Now by R. P. Lim. Act, 1874, s. 10 (*post*, p. 213), an express trust does not prevent time running in case of arrears of rent or of interest in respect of any money or legacy charged upon or payable out of any land or rent. The section does not affect legacies not so charged or payable.

Trustee Act, 1888.

In the case of proceedings against trustees commenced after 1889, regard must now be had to the Trustee Act, 1888, ss. 1, 8 and 12, *post*, p. 247.

(e) See the cases as to acknowledgments, *ante*, p. 198. In *Bolding* v. *Lane* (1 D. J. & S. 122), it was said that the words in this section, "by whom the same was payable," do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears might be enforced. 3 & 4 Will. 4, c. 27, s. 42. Acknowledgments.

Sect. 42 differing from sect. 40 makes no mention of part payment. So that it would seem that part payment of an instalment of interest would not prevent the operation of the statute as to the balance (*Astbury* v. *Astbury*, 1898, 2 Ch. 115). Part payment.

The 42nd section contains no exception in favour of persons under disabilities; and if the act be construed literally, infants and lunatics, and other persons under disabilities, will only be enabled to recover six years' interest (see *De Beauvoir* v. *Owen*, 5 Exch. 182). "Even as to legacies charged upon real estates, there is no saving as to arrears of interest for infancy, or the like. In the case of younger children's portions, although by way of legacy, the interest is often allowed to remain in arrear for several years, for the accommodation of the head of the family; and the statute will, unless it be modified, often bar a just claim unnecessarily, and ultimately injure the person whom it was intended to benefit; and whether a legacy be payable out of real or personal estate, of course interest upon it, where it carries interest, ought not to be barred during the infancy of the legatee" (Sugd. V. & P. 638, 11th ed.). Disabilities.

(4) Account of rents in equity.

A suit for the recovery of mesne rents and profits in equity, was not a suit for the recovery of arrears of rent within sect. 42 (*Hicks* v. *Sallitt*, 3 D. M. & G. 816). On the question how far the account was to be carried back in such suits, the following distinctions were laid down. In cases of express trusts, it was said that the Statutes of Limitation would afford no defence, and that an account would be directed from the accruer of the plaintiff's title (*Sturgis* v. *Morse*, 3 De G. & J. 1; *Wright* v. *Chard*, 4 Drew. 673; *Mathew* v. *Brise*, 14 Beav. 341; see now R. P. Lim. Act, 1874, s. 10, *post*, p. 213). Where there is no express trust, but the person in possession has had notice of the plaintiff's title, it was formerly held, that as at law more than six years' mesne profits could not be recovered, so in equity the account would not be carried back beyond six years from the filing of the bill (*Reade* v. *Reade*, 5 Ves. 744; *Harwood* v. *Oglander*, 6 Ves. 215); and in *Hicks* v. *Sallitt* (3 D. M. & G. 782), where the defendant was a purchaser for value, with notice of the plaintiff's title, *Turner*, L. J., thought that the statute Lim. Act, 1623, might be applicable, by analogy to the action of account at law. An account for six years was granted in *Hickman* v. *Upsall* (4 Ch. Div. 144); see *Burnell* v. *Burnell* (11 Ch. D. 213). But, "where there is no trust, no fraud, no infancy, no suppression, where, in short, there is a mere *bonâ fide* adverse possession, it is not according to the course of the court to carry back the account of rents beyond the filing of the bill" (*Hicks* v. *Sallitt*, 3 D. M. & G. 782, where Lord *Cranworth* refers to the older cases; see *Thomas* v. *Thomas*, 2 K. & J. 79; *Penny* v. *Allen*, 7 D. M. & G. 409; *Morgan* v. *Morgan*, 10 Eq. 99). The principle of the rule, however, is that in order to disentitle the plaintiff to an account of rents before the institution of the suit, there must be neglect in bringing the suit (*Hickman* v. *Upsall*, 4 Ch. D. 148).

(a) From accruer of plaintiff's title.

(b) For six years.

(c) From filing of bill.

Where the plaintiff has been under the disability of infancy during the possession of the defendant, the latter is regarded as a bailiff for the former, and an account will be directed during the period of infancy (*Blomfield* v. *Eyre*, 8 Beav. 250; *Nanney* v. *Williams*, 22 Beav. 452; *Schroder* v. *Schroder*, Kay, 591; *Pascoe* v. *Swan*, 27 Beav. 508; *Pelly* v. *Bascombe*, 4 Giff. 390; *Thomas* v. *Thomas*, 2 K. & J. 79; *Wall* v. *Stanwick*, 34 Ch. D. 763; see *Re Hobbs*, *Hobbs* v. *Wade*, 36 Ch. D. 553, and the older cases discussed in *Howard* v. *Shrewsbury*, 17 Eq. 399). But so far as regards the arrears of rent, it was said that the bill must be filed within six years after the plaintiff comes of age (*Lockey* v. *Lockey*, 1 Eq. Ca. Abr. 304, pl. 10; see as to recovering the land, *Tinker* v. *Rodwell*, 69 Infancy of plaintiff.

3 & 4 Will. 4, c. 27, s. 42.

L. T. 591, *ante*, p. 152). It has been laid down in Ireland, that a person entering on the estate of an infant, whether the infant has been actually in possession or not, will be fixed with a fiduciary position towards the defendant, (1) when he is the infant's natural guardian; (2) when he is so connected by relationship or otherwise with the infant as to impose upon him a duty to protect, or at least not to prejudice, the infant's rights; (3) when he takes possession with knowledge or express notice of the infant's rights (*Quinton* v. *Frith*, I. R. 2 Eq. 396). See cases quoted *ante*, p. 127.

Laches.

Where the plaintiff has been guilty of laches an account will only be directed from the filing of the bill (*Dormer* v. *Fortescue*, 3 Atk. 130; *Pettiward* v. *Prescot*, 7 Ves. 541; *Pickett* v. *Loggan*, 14 Ves. 215; *Schroder* v. *Schroder*, Kay, 591). The right to an account, even in the case of mines, may be lost by laches (*Parrott* v. *Palmer*, 3 M. & K. 632). A party's right to an account may also be restricted in consequences of laches in not finding out a mistake earlier by the means which were in his power (*Denys* v. *Shuckburgh*, 4 Y. & Coll. 42).

In case of charities.

There is no fixed limit of time in directing an account against the trustee of a charity. In each case the court is bound by the particular circumstances (*A.-G.* v. *Exeter*, Jac. 448). An account against a corporation for a breach of trust in receiving charity funds was not confined either to the filing of the information, or to six years before that time (*A.-G.* v. *Brewers' Co.*, 1 Mer. 495; *A.-G.* v. *Stafford*, 1 Russ. 547). And an account of the rents and profits of a charity estate was decreed for a period of 200 years against the corporation, who, by their answer, admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount (*A.-G.* v. *Exeter*, Jac. 443; 2 Russ. 362; 3 Russ. 395; *A.-G.* v. *Caius College*, 2 Keen, 110; *A.-G.* v. *Pretyman*, 4 Beav. 462; see now R. P. Lim. Act, 1874, s. 10, *post*, p. 213). Where, however, charitable trustees have acted honestly, though mistakenly, the court will not make them account for rents received prior to the filing of the information (*A.-G.* v. *Wax Chandlers' Co.*, L. R. 6 H. L. 14; *A.-G.* v. *Christchurch*, 2 Russ. 324). When the court limits an account of the rents and profits of charity estates to the time of filing the information, or to six years before that date, it does not act with reference to the statute. The court proceeds upon the principle that it will not deal harshly with men, who, meaning to discharge their duty faithfully, have nevertheless mistaken it (*A.-G.* v. *Exeter*, 2 Russ. 367). The principles upon which the court acts in taking an account against corporations who are trustees of charities, and have misapplied the funds, are discussed in *A.-G.* v. *Newbury* (3 M. & K. 647); see *A.-G.* v. *Davis*, (18 W. R. 1132).

(5) Interest on debts generally.

Interest on debts at common law.

At common law, independently of statute, it was the general rule that interest was not payable on any debts, unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances (*Higgins* v. *Sargent*, 2 B. & C. 348; *Rhodes* v. *Rhodes*, Johns. 653; see *L. C. D. R.* v. *S. E. R.*, 1892, 1 Ch. 140). An agreement to pay interest was inferred where a tradesman delivered accounts charging interest which were not objected to, and the customer made payments on account (*Re Anglesey, Willmot* v. *Gardner*, 1901, 2 Ch. 548. *Semble*, *Re Lloyd Edwards, Williams* v. *Trench*, 61 L. J. Ch. 22, is overruled on this point). In some early cases it was said that interest might be given where a debt was wrongfully detained (*Eddowes* v. *Hopkins*, 1 Doug. 376; *Arnott* v. *Redfern*, 3 Bing. 353; see the later dicta in *Caledonian Rail. Co.* v. *Carmichael*, L. R. 2 H. L. Sc. 66; *Webster* v. *British Co.*, 15 Ch. Div. 174; *L. C. D. R.* v. *S. E. R.*, 1892, 1 Ch. 153). But this was said to be inconvenient by Lord *Tenterden*, who laid down the rule that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments (*Page* v. *Newman*, 9 B. & C. 381). This rule is not now open

to question (*L. C. & D. R.* v. *S. E. R.*, 1893, A. C. 441). Unless by express agreement, interest can only be claimed on a bill or note as damages (*Ex p. Charman*, 1887, W. N. 184; see Bills of Exchange Act, 1882, ss. 9 (3), 57; *Lawrence* v. *Willcocks*, 1892, 1 Q. B. 696). 3 & 4 Will. 4, c. 27, s. 42.

The Civil Procedure Act, 1833, enacts (sect. 28) that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demandant shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that the interest shall be payable in all cases in which it is now payable by law. The act provides further (sect. 29), that the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions of policies of assurance made after the passing of this act. 3 & 4 Will. 4, c. 42, ss. 28, 29.

Lord Tenterden was the author of the above statute, which was passed with reference to the rule laid down by him in *Page* v. *Newman*, *sup.* (*L. C. & D. R.* v. *S. E. R.*, 1893, A. C. 440). Sect. 28 was declaratory of the law before the statute (*Webster* v. *British Co.*, 15 Ch. Div. 173, 178). Under both sect. 28 and sect. 29, any interest given is by way of damages (*Ib.* 174, 175; see *Re Roberts*, *Goodchap* v. *Roberts*, 14 Ch. Div. 49). Sect. 28.

The act gives the jury a discretion, "if they shall think fit" (*Attwood* v. *Taylor*, 1 M. & G. 322; *A.-G.* v. *Ludlow*, 1 Hall & T. 219). And interest will not be given where there has been no default on the part of the person against whom interest is claimed (*A.-G.* v. *Ludlow*, *sup.*; *Webster* v. *British Co.*, *sup.*). There must be either a written demand or a written instrument under which the sum is payable (*Harper* v. *Williams*, 4 Q. B. 219). A written application for a loan was not such a written instrument (*Taylor* v. *Colt*, 3 H. & C. 452; 13 W. R. 78). The instrument must ascertain the sum and the time (*L. C. & D. R. Co.* v. *S. E. R. Co.*, 1892, 1 Ch. 144). Six months after death is a time certain (*Re Horner*, *Fooks* v. *Horner*, 1896, 2 Ch. 188). Where the instrument does not mention the time certain, but contains provisions which on the happening of an event render the time certain, this is not sufficient within the statute. (*Merchant Co.* v. *Armitage*, L. R. 9 Q. B. 114; *L. C. & D. R.* v. *S. E. R.*, 1892, 1 Ch. 120; see *contra*, *Duncombe* v. *Brighton Co.*, L. R. 10 Q. B. 371). The sum certain must be due absolutely, and in all events (*L. C. & D. R.* v. *S. E. R.*, 1893, A. C. 436). Interest was allowed where the instrument gave data for ascertaining the amount, and a dispute as to such amount was settled by the court (*McIntosh* v. *G. W. R. Co.*, 4 Giff. 683; see *Newton* v. *Nock*, 43 L. T. 197). Written instrument.

A demand in writing may entitle the jury to give interest from date of demand, although the writing claimed interest from a prior date (*Londesborough* v. *Mowatt*, 4 El. & Bl. 1). The demand need not specify the exact amount of the debt (*Mildmay* v. *Methuen*, 3 Drew. 91, a demand for work and labour in an administration suit; *Geake* v. *Ross*, 32 L. T. 666, disapproving *Hill* v. *South Staffordshire Ry. Co.*, 18 Eq. 154; see *Ex p. Kemp*, 1894, 3 Ch. 702). A solicitor may give notice that he will claim interest on his bill of costs delivered (*Berrington* v. *Phillips*, 1 M. & W. 48; see *Ward* v. *Eyre*, 15 Ch. D. 130). And where the client is dead the notice should be given to the representative, even where an administration action is pending (*Re McMurdo*, 1896, W. N. 171). A summons in a winding-up was a sufficient demand (*Ex p. Alison*, 15 Eq. 394). But an answer in a Chancery suit was not (*Ward* v. *Eyre*, *sup.*); Demand in writing.

3 & 4 Will. 4, c. 27, s. 42.

nor a claim in a writ (*Rhymney R. Co.* v. *Rhymney Iron Co.*, 25 Q. B. Div. 146; see *Wilks* v. *Wood*, 1892, 1 Q. B. 687); nor a statement in a tradesman's bill-head that interest will be charged after a certain time (*Re Lloyd Edwards, Williams* v. *Trench*, 61 L. J. Ch. 22; 65 L. T. 453). Where a written notice as to interest was given under this section, and the defendants paid the principal due into court, the court ordered payment of subsequent interest in addition (*Hull Co.* v. *N. E. R. Co.*, 5 M. & G. 872).

Sect. 29.

An action for damages for minerals wrongfully taken is not within sect. 29 (*Phillips* v. *Homfray*, 1892, 1 Ch. 465).

As to the arrears of interest given on damages for a maritime collision, see *The Kong Magnus*, 1891, P. 223.

Rate.

When the rate of interest is not expressed, the rate is a question for the court (*Gibbs* v. *Fremont*, 11 Exch. 25, where 25 per cent. was allowed). The rule was to recommend the jury to give 5 per cent. (*Re Roberts*, 14 Ch. Div. 52; see *Peruvian Guano Co.* v. *Dreyfus*, 1892, A. C. 166); but the court will follow the current rate at the time (*L. C. & D. R. Co.* v. *S. E. R. Co.*, 1892, 1 Ch. 120, 137; see *Wainwright's case*, 62 L. T. 30, where 4 per cent. was given). The rate usually allowed on bills of exchange is 5 per cent. (Byles, 16th ed. 443; see *Lawrence* v. *Willcocks*, 1892, 1 Q. B. 696). Judgment debts carry interest at 4 per cent. (Judgments Act, 1838, s. 17, *post*, where see note; and see R. S. C. Ord. 42, r. 16; Ord. 55, r. 62); and on the recovery of judgment on a covenant the covenant is merged in the judgment (*Ex p. Fewings*, 25 Ch. Div. 338; *Re European Co.*, 4 Ch. Div. 33). But a mortgagee may on the construction of his deed be entitled to retain his security until paid interest at a rate higher than 4 per cent. (*Economic Society* v. *Usborne*, 1902, A. C. 147; see *Popple* v. *Sylvester*, 22 Ch. D. 98; *Arbuthnot* v. *Bunsilall*, 62 L. T. 234). Where judgment is signed in default of appearance on a claim for a liquidated demand, the rate of interest not being specified, the rate up to judgment is 5 per cent. (R. S. C. Ord. 13, rr. 3 and 4).

Rate of interest in equity.

In equity a purchaser paid interest on his purchase-money at 4 per cent. (*Calcraft* v. *Roebuck*, 1 Ves. Jun. 221); and a deposit was ordered to be returned with interest at 4 per cent. (*Re Marshall and Salt*, 1900, 2 Ch. 206). Executors of a surety retained out of a legacy bequeathed by him to the principal debtor the amounts paid by their testator with interest at 4 per cent. (*Re Watson, Turner* v. *Watson*, 1896, 1 Ch. 937). Children brought advances into hotchpot with interest at the same rate (*Re Rees*, 17 Ch. D. 701). That rate represented the average interest payable in respect of trust investments (*Re Lambert, Middleton* v. *Moore*, 1897, 2 Ch, 180). But since 1894 the rate in the Chancery Division has been reduced (except as regards debts) from 4 per cent. to 3 per cent.; at which last-mentioned rate interest has been charged on advances (*Re Lambert, supra*; see, however, *Re Hargreaves, Hargreaves* v. *Hargreaves*, 1902, W. N. 18); and on shares in a partition action (*Re Dracup, Field* v. *Dracup*, 1894, 1 Ch. 59); and in applying the rule in *Re Chesterfield's Trusts* (*Re Goodenough, Marland* v. *Williams*, 1895, 2 Ch. 537; see *Re Cleveland, Hay* v. *Woolmer*, *ib.* 542; *Rowlls* v. *Bebb*, 1900, 2 Ch. 118). As to the rate to be adopted in applying *Howe* v. *Dartmouth*, see *Re Nicholson*, 1895, W. N. 106. As to the rate between *cestui que trust* and trustee, see *post*, p. 209.

Interest in equity.

The earlier cases in equity as to interest are collected, C. P. Coop. 209—250, n. The Court of Chancery followed the law in dealing with legal claims (*Booth* v. *Leycester*, 3 M. & C. 459). But it usually decreed interest in cases of purely equitable demands, *e.g.*, suits for equitable waste, or against trustees who misapplied trust moneys (*L. C. & D. R. Co.* v. *S. E. R. Co.*, 1892, 1 Ch. 142; see further *Hyde* v. *Price*, 8 Sim. 578; *Re Powell*, 10 Hare, 134; *Martyn* v. *Blake*, 3 Dru. & War. 125; *Mansfield* v. *Ogle*, 4 De G. & J. 38; *Spartali* v. *Constantinidi*, 20 W. R. 823). Interest was given as damages for non-payment of money (*Marsh* v. *Jones*, 40 Ch. Div. 563). On setting aside a sale by a trustee to himself interest was not charged on rents (*Silkstone Co.* v. *Edey*, 1900, 1 Ch. 167). It is against the practice of a court of equity to allow anything in the nature of compound interest (*Re Magheramorne, Hogg* v. *Hogg*, 1901, W. N. 152). As

to the interest allowed on portions, see *Balfour* v. *Cooper*, 23 Ch. Div. 472; Lewin, 10th ed. 471. 3 & 4 Will. 4, c. 27, s. 42.

As regards interest between trustee and *c. q. t.*, the true principle has been said to be, that a trustee must be charged with such interest as he either has received, or ought to have received, or which he may fairly be presumed to have received (*A.-G.* v. *Alford*, 4 D. M. & G. 851). Thus a trustee who kept moneys in his hands and used them as his own has been charged at the rate of 5 per cent. (*Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, *Ib.* 461; *Burdick* v. *Garrick*, 5 Ch. 233; *Re Jones*, *Jones* v. *Searle*, 49 L. T. 91; *Re Davis*, *D.* v. *D.*, 1902, W. N. 81; see *Vyse* v. *Foster*, 8 Ch. 329; and compare Rule 11 of the rules under the Judicial Trustee Act, 1896). More recently 4 per cent. has been charged (*Re Emmet*, *E.* v. *E.*, 17 Ch. D. 142). And where promoters were compelled to make good to the company a secret profit they were charged with interest at 3 per cent. (*Re Olympia, Ltd.*, 1898, 2 Ch. 171; see, however, *Gluckstein* v. *Barnes*, 1900, A. C. 255). Where the trustee had not had the use of the money he was in recent cases charged only with 3 per cent. (*Re Barclay*, *Barclay* v. *Andrew*, 1899, 1 Ch. 674; *Gilroy* v. *Stephen*, 51 L. J. Ch. 834; 46 L. T. 761; see *Re Stuart*, *Smith* v. *Stuart*, 1897, 2 Ch. 593). Compound interest has been charged against a trustee where there was a direction to accumulate (*Re Emmet*, *E.* v. *E.*, 17 Ch. D. 142; *Re Barclay*, *sup.*); where he had employed the money in trade (*Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, *Ib.* 461; see *Burdick* v. *Garrick*, 5 Ch. 242); and where the *c. q. t.* was an infant, and the income was not required for maintenance. (*Jones* v. *Foxall*, *sup.*; *Vyse* v. *Foster*, L. R. 7 H. L. 346; *Gilroy* v. *Stephen*, 51 L. J. Ch. 834; 46 L. T. 761). See further Lewin, 10th ed. 380 *et seq.* Interest between trustee and *c. q. t.*

As to interest between banker and customer, see *Crosskill* v. *Bower*, (32 Beav. 86); *Williamson* v. *Williamson* (7 Eq. 542); and between principal and agent (*Turner* v. *Burkinshaw*, 2 Ch. 488; *Burdick* v. *Garrick*, 5 Ch. 233; *G. W. R. Co.* v. *Cunliffe*, 9 Ch. 525; *Baring* v. *Stanton*, 3 Ch. D. 502). Where unconscionable bargains have been entered into with money lenders, the court will only allow the sums actually advanced to be recovered together with interest at 5 per cent. (*Miller* v. *Cook*, 10 Eq. 641; *Tyler* v. *Yates*, 6 Ch. 665; *Aylesford* v. *Morris*, 8 Ch. 484). There is no general rule as to the rate of interest the court will allow on repayment of money expressed to be the consideration of an absolute assignment, which is treated only as a security for such consideration money (*Re Unsworth*, 2 Dr. & Sm. 337; where 5 per cent. was allowed). Interest at the rate of 4 per cent. was allowed on a simple contract debt secured by deposit of deeds, where there had been no stipulation as to interest (*Re Kerr*, 8 Eq. 331). As to interest on charges, see *Lippard* v. *Ricketts* (14 Eq. 291); on mortgages, *Thompson* v. *Drew* (20 Beav. 49); *Ashwell* v. *Staunton* (30 Beav. 52); *Re Roberts* (14 Ch. Div. 49); and on mortgagee's costs, *Eardley* v. *Knight* (41 Ch. D. 537). Where an annuity is in arrear "the established rule of the court (which, however, is only general and not inflexible) is, that interest cannot be recovered on the arrears" (*Martyn* v. *Blake*, 3 Dru. & War. 125; *Mansfield* v. *Ogle*, 4 De G. & J. 41; *Blogg* v. *Johnson*, 2 Ch. 228; *Wheatley* v. *Davies*, 24 W. R. 818; *Re Hiscoe*, *Hiscoe* v. *Waite*, 1902, W. N. 49). As to the cases in which it has been given, see Seton, 6th ed. 1637. As to interest on arrears of salary, see *Rishton* v. *Grissell* (10 Eq. 393). Interest was allowed at 5 per cent. where default had been made in the performance of a covenant to pay money (*Knapp* v. *Burnaby*, 9 W. R. 765; *Re Horner*, *Fooks* v. *Horner*, 1896, 2 Ch. 188; see *Re Roberts*, *Goodchap* v. *Roberts*, 14 Ch. D. 49; *Mellersh* v. *Brown*, 45 Ch. D. 228). Where a bond does not specify a day for payment, it is payable on the day of date, and interest runs from that day (*Farquhar* v. *Morris*, 7 T. R. 124). Where a date is specified, see as to interest after that date, *Cook* v. *Fowler* (L. R. 7 H. L. 27); *Re Dixon*, *Heynes* v. *Dixon* (1900, 2 Ch. 561). It is the general rule both at law (*Brangwin* v. *Parrot*, 2 W. Bl. 1190; *White* v. *Sealey*, 1 Dougl. 49), and in equity, to consider the penalty of the bond as the Interest between banker and customer; principal and agent. On securities. Arrears of annuity. On money due under covenant. Bonds.

3 & 4 Will. 4, c. 27, s. 42.

limit of the debt or damages which can be recovered. But there are exceptions to this rule (see the earlier cases collected in C. P. Coop. 209—230; and see *Clarke* v. *Abingdon*, 17 Ves. 106; *Hughes* v. *Wynne*, 1 M. & K. 20; *Walter* v. *Meredith*, 3 Y. & Coll. 264; *Knipe* v. *Blair*, 1900, 1 Ir. R. 372; and *Mathews* v. *Keble*, 3 Ch. 691, where the interest allowed, together with the principal, exceeded the penalty).

As to deducting income tax on payments in respect of interest, see *Crane* v. *Kilpin* (6 Eq. 334). And as to calculation of interest and apportionment in questions between a tenant for life and remainderman, see *Re Grabowski* (6 Eq. 12); *Cox* v. *Cox* (8 Eq. 343); *Maclaren* v. *Stainton* (11 Eq. 382); *Re Moore* (54 L. J. Ch. 432); *Re Foster, Lloyd* v. *Carr* (45 Ch. D. 629); *Re Hubbuck, Hart* v. *Stone* (1896, 1 Ch. 754); *Re Bird* (1901, 1 Ch. 916); *Re Alston, Alston* v. *Houston* (1901, 2 Ch. 584). The rate allowed would probably now be 3 per cent. (see *Re Goodenough, Marland* v. *Williams*, 1895, 2 Ch. 537; *Re Cleveland, Hay* v. *Wolmer*, *ib.* 542).

Interest in liquidation of a company.

The Civil Procedure Act, 1833, s. 28, applies to calls made in winding up a company where the notice of call states that interest will be charged (*Barrow's case*, 3 Ch. 784). But provisions in articles as to interest on calls do not apply to calls made by liquidators (*Re Welsh Flannel, &c. Co.*, 20 Eq. 360). As regards debts due from a company where under the act interest would be payable, it may be claimed in a winding-up (*Times Assurance Co.'s case*, 2 H. & M. 722). The rule in winding up an insolvent company is that creditors whose debts carry interest get dividends on what was due for principal and interest at the winding-up, but no subsequent interest except there be a surplus (*Warrant Finance Co.'s case*, 4 Ch. 643). As to the application of the rule where a creditor has security or a right of proof against another company, see *Warrant Finance Co.'s case* (No. 2) (5 Ch. 86); *Quartermaine's case*, 1892, 1 Ch. 639; and compare *Ex p. Findlay* (17 Ch. Div. 334). Creditors whose debts do not carry interest are not allowed interest in a winding-up (*Re Hatfield Co.*, 11 W. R. 971). But a demand in writing for payment may be made under the act so as to entitle the creditor to interest (*Re East of England Co.*, 4 Ch. 14; but see *Re Herefordshire Co.*, 4 Eq. 250). As to the interest now allowed in the case of a company wound up by the court, see the general rules made pursuant to sect. 26 of the Companies Act, 1890, r. 104.

Computation of interest in administration actions.

In administration, where a debt of the deceased carries interest, interest is paid accordingly, and where it does not carry interest, interest is paid at the rate of 4*l.* per cent. from the date of judgment out of assets remaining after satisfaction of the costs, debts, and interest in respect of debts carrying interest (R. S. C., Ord. 55, rr. 62, 63). Where the estate is insolvent, interest on a debt carrying interest is calculated up to judgment, and a dividend paid on that amount (*Re Summers, Boswell* v. *Gurney*, 13 Ch. D. 136; see *Re London, &c. Hotels Co.*, 1892, 1 Ch. 639; *Re Henley*, 75 L. T. 307).

Specially indorsed writ.

As to what interest can be claimed on a writ specially indorsed under R. S. C., Ord. 3, r. 6, see *Wilks* v. *Wood*, 1892, 1 Q. B. 684; *London Bank* v. *Clancarty*, *ib.* 689; *Lawrence* v. *Willcocks*, *ib.* 696; *Gold Ores Co.* v. *Parr*, 1892, 2 Q. B. 14; *Hamilton* v. *Brogden*, 60 L. J. Ch. 88; see R. S. C., Ord. 14, r. 1 (b).

Interest in the case of appeals.

Where execution has been delayed by appeal, interest will be allowed (R. S. C., Ord. 58, r. 19; see Civil Proc. Act, 1833, s. 30; *Garland* v. *Carlisle*, 5 Cl. & F. 355; *Langridge* v. *Levy*, 4 M. & W. 337; *Hooper* v. *Lane*, 6 H. L. C. 443; *Tyne Commissioners* v. *General Steam Co.*, 15 W. R. 875). Where money is paid under an order which is subsequently reversed on appeal, it must be repaid with interest at 4*l.* per cent. (*Rodgers* v. *Comptoir D'Escompte*, L. R. 3 P. C. 465; *Merchant Banking Co.* v. *Maude*, 18 Eq. 659).

Costs.

As to interest on costs, see note to Judgments Act, 1838, s. 17, *post*.

On the subject of interest generally, see Fisher's Digest, tit. Interest of Money; 2 Stark. on Ev. 575—579, 3rd ed.

37 & 38 Vict. c. 57, s. 8.

THE REAL PROPERTY LIMITATION ACT, 1874.

37 & 38 VICT. c. 57, ss. 8 AND 10 (for the other sects. see *ante*, p. 184).

§ 8. *Limitation of Actions for recovering Money charged on Land or Legacies*...211.

§ 10. *Time not enlarged by Express Trusts*...213.

Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime.

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

By sect. 9 (*ante*, p. 189) the above section has been substituted for R. P. Lim. Act, 1833, s. 40, as to which see *ante*, p. 191 *et seq.*

The present section is entirely prohibitory, and does not remove any bar which previously to its passing existed to the bringing of an action within twelve years (*Firth* v. *Slingsby*, 58 L. T. 483). Accordingly, an action to recover a simple contract debt from the debtor personally was barred by the Limitation Act, 1623, even where the debt was charged on land (*Barnes* v. *Glenton*, 1899, 1 Q. B. 885).

Mortgages.

The present section barred after twelve years the personal remedy of a mortgagee to obtain payment of his debt from his mortgagor, whether on a collateral bond given by him (*Fearnside* v. *Flint*, 22 Ch. D. 579), or on his covenant in the mortgage deed (*Sutton* v. *Sutton*, 22 Ch. D. 511). In the last-mentioned case *Cotton*, L.J., referred to *Hunter* v. *Nockolds* (1 Mac. & G. 640, *ante*, p. 202), in which Lord *Cottenham* had held that in actions on covenant or specialty, sect. 42 of R. P. Lim. Act, 1833, was controlled by sect. 3 of Civil Proc. Act, 1833 (*post*, p. 215). It might be right in the case of an act passed in 1833, to read it as explained by an act passed only three weeks later; but in the case of an act passed in 1874, there was no such necessity to explain it by an act passed in 1833 (22 Ch. Div. 519; see *Re Frisby*, 43 Ch. D. 110). The section, however, did not bar an action which was brought, not against the mortgagor himself, but against a surety who had covenanted for payment by the mortgage deed (*Re Frisby*, *Alison* v. *Frisby*, *per Kay*, J., and *Bowen*, L.J., *Cotton*, L.J., differing, 43 Ch. D. 106); or who had given a promissory note (*Re Wolmershausen*, 62 L. T. 541). And it has been held that an action on a bond given by a surety for a mortgagor to recover from the surety an indemnity against the non-payment by the mortgagor of the mortgage debt, is not within this section (*Re Powers*, *Lindsell* v. *Phillips*, 30 Ch. Div. 291). As to the application of the present section to the mortgage of a reversionary interest in personalty, see *Re Lake* (63 L. T. 416).

Judgments.

The present section applies to judgments generally, not merely judgments which operate as a charge on land (*Hebblethwaite* v. *Peever*, 1892, 1 Q. B. 124; *Jay* v. *Johnstone*, 1893, 1 Q. B. 189; *Taylor* v. *Hollard*,

37 & 38 Vict. c. 57, s. 8.

1902, 1 K. B. 676). It barred after twelve years the right of a judgment creditor to obtain an adjudication in bankruptcy against the judgment debtor (*Ex p. Tynte*, 15 Ch. D. 125).

Liens.

As regards liens, in the case of a contract to sell a reversionary interest in stock, the purchaser was held entitled to enforce a lien for his deposit after a long lapse of time, no Statute of Limitations directly applying (*Levy* v. *Stogdon*, 1898, 1 Ch. 487; 1899, 1 Ch. 5). As to a vendor's lien, see *ante*, p. 192.

Other charges.

The present section did not apply to an action on the personal covenant of a lessee in respect of a royalty (*Darley* v. *Tennant*, 53 L. T. 257). It barred, however, after twelve years the right to recover paving expenses made a charge on land by statute (*Hornsey Board* v. *Monarch Society*, 24 Q. B. Div. 1); and also an action to recover interest on money paid for redeeming land tax, which by statute was charged on the land (*Skene* v. *Cook*, 1902, 1 K. B. 682). The section applies where money is charged on land, even where there is no personal liability on the part of the owner of the land to pay the money (*Ib.* 689).

In the case of simple contract debts charged on land, the remedy against the land is not barred for twelve years (*Re Stephens, Warburton* v. *Stephens*, 43 Ch. D. 39; see *Barnes* v. *Glenton*, 1899, 1 Q. B. 891), although the personal remedy by action is barred in six (*Barnes* v. *Glenton*, 1899, 1 Q. B. 885; compare *Hugill* v. *Wilkinson*, 38 Ch. D. 480; *Powell* v. *Brodhurst*, 1901, 2 Ch. 167).

Legacies.

The present section barred after twelve years the right to recover legacies or shares in residue which were not held by executors on express trusts (*Re Rowe, Jacobs* v. *Hind*, 61 L. T. 581; *Re Davis, Evans* v. *Moore*, 1891, 3 Ch. 119; *Re Barker, Buxton* v. *Campbell*, 1892, 2 Ch. 491; see *Rudd* v. *Rudd*, 1895, 1 Ir. R. 15; *Re Timmis, Nixon* v. *Smith*, 1902, 1 Ch. 176). An action by a residuary legatee to recover loss which has arisen from the non-realization of such residue is not an action to recover a legacy within this section (*Swain* v. *Bringeman*, 1891, 3 Ch. 233; see Trustee Act, 1888, s. 8, *post*, p. 248).

"Present right to receive."

As to the words, "present right to receive," see *Re Owen*, 1894, 3 Ch. 220; and the cases collected under R. P. Lim. Act, 1833, s. 40, *ante*, p. 196.

Part payment.

With regard to payments within this section, it has been said that a payment is made whenever there is a render of money to a person entitled to receive it by a person liable to pay it (*Re Frisby, Alison* v. *Frisby*, 43 Ch. D. 107). In the case of mortgages there must be a payment by the mortgagor, or by somebody bound to pay on his behalf, *i.e.*, bound as between himself and the mortgagor (*Bradshaw* v. *Widdrington*, 1902, W. N. 107; see *Harlock* v. *Ashberry*, 19 Ch. Div. 539). Where a mortgagee received from an insurance company the surrender value of a policy on the mortgagor's life which had been included in a mortgage of reversionary interests in land, this was not a payment within the section so as to entitle the mortgagee to sue on the covenant (*Re Clifden, Annaly* v. *Agar-Ellis*, 1900, 1 Ch. 774). In cases within the section, payment of interest by one co-contractor or co-debtor will preserve the remedy against the other, sect. 14 of 19 & 20 Vict. c. 97, not applying (*Re Frisby, Alison* v. *Frisby*, 43 Ch. D. 111; see *Re Powers*, 30 Ch. Div. 291; *Baillie* v. *Irwin*, 1897, 2 Ir. R. 614. See, further, the cases quoted under 3 & 4 Will. 4, c. 27, s. 40, *ante*, p. 197; and under R. P. Lim. Act, 1837, *ante*, p. 174).

Same hand to pay and receive.

Where the hand to pay and to receive was the same, payment of interest on a charge has been presumed (see the cases under R. P. Lim. Act, 1837, *ante*, p. 174; under R. P. Lim. Act, 1833, s. 40, *ante*, p. 194, and under Civil Proc. Act, 1833, s. 5, *post*, p. 220); as where the person entitled to interest on the charge was also tenant for life of the charged land, and owed a duty to the remainderman (*Burrell* v. *Egremont*, 7 Beav. 236); *secus* where payment of the money charged was claimed out of the chargor's personal estate under his covenant, and the devisee of the land was absolute owner, and owed no such duty (*Re England, Steward* v. *England*, 1895, 2 Ch. 107). The last decision was affirmed by the C. A.,

on the principle that the landowner was not personally liable to the chargee to pay the interest (1895, 2 Ch. 825). And this principle appears to have been applied to the case of a tenant for life by *North*, J., in refusing to presume a payment of interest (*Re Allen, Bassett* v. *Allen*, 1898, 2 Ch. 499). 37 & 38 Vict. c. 57, s. 10.

10. After the commencement of this act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.

By sect. 9 of this act (*ante*, p. 189) the provisions of R. P. Lim. Act, 1833 (except the repealed sections but including the provisions substituted for such repealed sections), are to be construed together with this act. The present section must accordingly be construed with especial reference to R. P. Lim. Act, 1874, s. 8 (substituted for R. P. Lim. Act, 1833, s. 40), and R. P. Lim. Act, 1833, s. 42.

Under R. P. Lim. Act, 1833, s. 40, it was held that in a number of cases (*ante*, p. 195) an express trust prevented the section from operating as a bar. By the present section an express trust will make no difference in this respect. A conveyance of a term on trust for raising money was held to be such an express trust (*Williams* v. *Williams*, 1900, 1 Ch. 152). See further the cases as to express trusts quoted *ante*, pp. 162, 195, 204. It has been said that simple contract debts, secured by a trust in a will to pay the same out of real estate, may be barred in twelve years (*Re Stephens, Warburton* v. *Stephens*, 43 Ch. D. 39). This section prevented a trust to pay debts in a will from keeping alive a claim on a bond (*Fearnside* v. *Flint*, 22 Ch. D. 579).

Legacies not charged upon or payable out of land or rent, which were within R. P. Lim. Act, 1833, s. 40, and are within R. P. Lim. Act, 1871, s. 8, are not within the present section. In the case of such legacies, accordingly, an express trust would seem to prevent time running (see *Playfair* v. *Cooper*, 17 Beav. 187; see further the notes *ante*, pp. 195, 204, and *post*, p. 254). The ordinary implied trust which affects personal estate held by an executor for the benefit of legatees, does not prevent time running (*Re Davis, Evans* v. *Moore*, 1891, 3 Ch. 124; see *Re Barker, Buxton* v. *Campbell*, 1892, 2 Ch. 491). As to arrears of interest on a legacy, see *Blachford* v. *Worsley* (27 Ch. D. 676).

Again, under R. P. Lim. Act, 1833, s. 42, it was held, that in a number of cases (*ante*, p. 204) an express trust prevented the section from operating as a bar. By the present section an express trust will make no difference as regards arrears. Where land was conveyed to trustees upon trust to pay an annuity to A., his heirs and assigns, and no claim was made by A. for twenty-seven years after the annuity first became payable, A. could not recover any arrears by reason of this section, but was held entitled to the future payments of the annuity, the right to which had been preserved by the express trust (*Hughes* v. *Coles*, 27 Ch. D. 231, doubted in *Dower* v. *Dower*, 15 L. R. Ir. 275). In *Hughes* v. *Coles* (*sup.*) the words "any sum of money" were held applicable to each instalment of the annuity as it became due; see *Edwards* v. *Warden*, 9 Ch. 595.

As regards the matters especially mentioned in it, this section appears to control Jud. Act, 1873, s. 25, sub-s. 2, which provided generally that no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, should be barred by any Statute of Limitations. Jud. Act, 1875, s. 25.

In the case of proceedings against trustees and persons claiming through them commenced after 1st January, 1890, regard must be had to the Trustee Act, 1888, *post*, p. 247. Trustee Act, 1888.

3 & 4 Will. 4, c. 42, s. 2.

III. Of the Limitation of Actions by or against Executors in respect of Injuries to Property.

THE CIVIL PROCEDURE ACT, 1833.

3 & 4 Will. IV. c. 42, s. 2.

Executors may bring actions for injuries to the real estate of the deceased, and actions may be brought against executors for injuries to property, real or personal, by their testator.

2. And whereas there is no remedy provided by law for injuries to the real estate (*a*) of any person deceased committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal; for remedy, therefore, be it enacted, that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person (*b*); and an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person (*c*).

(*a*) It was doubted whether this includes leasehold interests (*Adam* v. *Bristol*, 2 Ad. & Ell. 389).

(*b*) An executor was held entitled to recover damages for an obstruction to the light of a house of his testatrix (*Jones* v. *Simes*, 43 Ch. D. 607).

(*c*) According to the rule of common law, executors could not be sued for a wrong committed by their testator for which only unliquidated damages could be recovered (*Kirk* v. *Todd*, 21 Ch. D. 489; see *Phillips* v. *Homfray*, 24 Ch. D. 439; *Twycross* v. *Grant*, 4 C. P. D. 45; *Re Duncan, Terry* v. *Sweeting*, 1899, 1 Ch. 387, and the notes to *Wheatley* v. *Lane*, 1 Wms. Saund. 239).

As an exception to the above rule, this section permits executors to be sued for wrongs committed by their testator in respect of property, provided the injury has been committed not more than six months before his death (*Kirk* v. *Todd*, *sup.*). Trespass was maintained against an administrator for coal wrongfully taken from the plaintiff's land by the intestate within six months before his death (*Powell* v. *Rees*, 7 Ad. & Ell. 426). And the section has been applied in the case of continuing wrongs, *e.g.*, wrongs arising from obstruction of light (*Jenks* v. *Clifden*, 1897, 1 Ch. 694, where the obstructing building was completed more than six months before the death); or from not repairing (*Woodhouse* v. *Walker*, 5 Q. B. D. 408).

3 & 4 Will. 4, c. 42, s. 3.

It seems that a claim under the section may be made more than six months after the death, but within six months from probate (*Re Williames, Andrew* v. *Williames*, 52 L. T. 41). Under this section an action of tort was maintained against the executors of an innkeeper within six months after his death for the property of a traveller lost in his house (*Morgan* v. *Ravey*, 30 L. J. Ex. 131). But a claim for negligence brought against the executors of a deceased landlord more than six months after the death was too late (*Erskine* v. *Adeane*, 8 Ch. 760).

Law independently of the act.

The rule *actio personalis moritur cum personâ* was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant or any other duty to be performed (*Wheatley* v. *Lane*, 1 Wms. Saund. 240; *Finlay* v. *Chirney*, 20 Q. B. Div. 502). And damages for non-repair are, independently of this section, recoverable from the estate of a former possessor of land, where the obligation to repair arises either from the terms of the instrument under which possession was taken (*Re Williames, Andrew* v. *Williames*, 52 L. T. 41; 54 L. T. 405; compare *Dingle* v. *Coppen*, 1899, 1 Ch. 726), or from the local law (*Batthyany* v. *Walford*, 33 Ch. D. 624; 36 Ch. Div. 269), or from the custom of the manor (*Blackmore* v. *White*, 1899, 1 Q. B. 293). In the last-mentioned cases the nature of the obligation to repair was said to be contractual. In the earlier case, however, of *Woodhouse* v. *Walker* (*sup.*), the neglect to repair was held to amount to a tort.

IV.—Of the Limitation of Actions on Specialties, etc.

The Civil Procedure Act, 1833.

3 & 4 Will. IV. c. 42, ss. 3—7.

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§ 6. *Limitation after Judgment reversed, &c.*...221.
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Limitation of action of debt on specialties, &c.

3. That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon any indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions

3 & 4 Will. 4, c. 42, s. 3.

or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited. (As to Ireland, see 16 & 17 Vict. c. 113, s. 20.)

The reasons which led to this enactment are discussed by *Lindley*, M.R. (*Thomson* v. *Clanmorris*, 1900, 1 Ch. 725).

Covenants or bonds.

To an action of covenant six years is not a good plea of limitation (*Hartshorn* v. *Watson*, 4 Bing. N. C. 178). Where a purchaser covenanted to pay his purchase-money by promissory notes of even date, it was held that an action could be brought on the covenant after six years (*Dixon* v. *Holroyd*, 7 Ell. & Bl. 703). The section applies even where the bond on which action is brought was executed in India, where the period of limitation for specialties is three years (*Alliance Bank* v. *Carey*, 5 C. P. D. 429).

As regards rent reserved, an action on a covenant under seal for payment of such rent may be brought within the twenty years limited by Civil Proc. Act, 1833, s. 3, and is not limited to six years by the 42nd section of R. P. Lim. Act, 1833 (see *ante*, p. 201). In *Paget* v. *Foley* (2 Bing. N. C. 679), *Tindal*, C.J., said, "If the 42nd section of R. P. Lim. Act, 1833, is a general enactment the subsequent declaration that an action of covenant may be commenced during a longer period is virtually an exception out of the former: we are to reconcile the two enactments if it be possible, but if it be not, the affirmative and negative cannot co-exist, and the action of covenant must be taken as an exception; therefore, without affecting the clause in the first statute further than is necessary to give effect to the second, we decide that the plea of six years' limitation of the cause of action is bad" (see *Paddon* v. *Bartlett*, 3 Ad. & Ell. 895; *Wilson* v. *Jackson*, 2 Ir. L. R. 1; *Strachan* v. *Thomas*, 12 Ad. & Ell. 558). The R. P. Lim. Act, 1874, has made no difference in this respect (*Darley* v. *Tennant*, 53 L. T. 257). As regards a rent-charge, it was held under R. P. Lim. Act, 1833, that such statute did not apply to an action on a collateral covenant for payment of such rent-charge; and that the covenantee might recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge out of the land was barred (*Manning* v. *Phelps*, 10 Exch. 59; see now R. P. Lim. Act, 1874, s. 8, *ante*, p. 211). As regards mortgage debts, the personal remedy of a mortgagee to obtain payment from the mortgagor, is now, by R. P. Lim. Act, 1874, s. 8, barred after twelve years, whether the action be on a collateral bond (*Fearnside* v. *Flint*, 22 Ch. D. 579), or on the mortgagor's covenant in the mortgage deed (*Sutton* v. *Sutton*, 22 Ch. D. 511). As regards arrears of interest recoverable in an action on covenant, see *Mellersh* v. *Brown* (45 Ch. D. 228).

Old rule as to the presumption of payment of bonds.

Before this Act it had been long held that satisfaction of money secured on bonds would be presumed after twenty years (3 P. Wms. 396; 2 Atk. 144; *Morley* v. *Morley*, 5 D. M. & G. 610). But such presumption of payment might have been encountered by evidence to repel it, as if the interest were proved to have been paid within the time conceived to furnish the presumption (8 Mod. 278; 2 Ld. Raym. 1370; 3 Br. P. C. 535; 2 Str. 827; 2 Cox, 118); or if the obligor had had no opportunity or means of paying (*Fladong* v. *Winter*, 19 Ves. 196); or had been abroad ever since he acknowledged by letter the debt to be due (*Newman* v. *Newman*, 1 Stark. N. P. C. 101). See further as to the presumption of payment of bonds, and the grounds upon which the presumption could be

3 & 4 Will. 4, c. 42, s. 3.

rebutted, *Barrington* v. *Searle*, (3 Br. P. C. 535); *Glyn* v. *Bank of England* (2 Ves. sen. 43); *Oswald* v. *Legh* (1 T. R. 271); *Colsell* v. *Budd* (1 Camp. 27); *Middleton* v. *Melton* (10 B. & C. 317); *Gleadow* v. *Atkin* (1 C. & M. 410); *Sanders* v. *Meredith* (3 M. & R. 116; 1 Phil. Ev. 7th ed. 255). No presumption of the discharge of a bond arose from the fact of its being in the obligor's possession at his death (*Re Dixon, Heynes* v. *Dixon*, 1900, 2 Ch. 561).

Specialty liabilities of shareholders and contributories.

In the winding up of a company established by a deed of settlement, the liability of a shareholder was a liability by way of specialty within this section (*Re Portsmouth Banking Co.*, 2 Eq. 167). By the Companies Act, 1862, s. 75, the liability to contribute under a winding-up order creates a specialty debt, even though the company was not registered under that act (*Muggeridge* v. *Sharp*, 10 Eq. 443); and the specialty is one which binds the heirs of the contributory (*Buck* v. *Robson*, 10 Eq. 629). In the case of companies formed and registered under that act, the liability of a member in a winding-up is a specialty (Companies Act, 1862, sects. 75, 90, 134). So also is the liability of a member under the articles (sect. 16). A specialty debt was not created by a call made by a company established under the old Joint Stock Companies Winding-up Acts (*Robinson's Executors' case*, 6 D. M. & G. 572), or under a colonial statute (*Welland R. Co.* v. *Blake*, 30 L. J. Ex. 161).

Debt upon statute.

An action upon statute is an action upon a specialty (*Cork and Bandon R. Co.* v. *Goode*, 13 C. B. 826). So the following were within the section, viz., an action by a company for calls under 8 & 9 Vict. c. 16 (*Ib.*); an action for shipping duties (*Shepperd* v. *Hills*, 11 Exch. 55); an action by solicitors for expenses (*Nichols* v. *Regent's Canal Co.*, 63 L. J. Q. B. 641); a claim under warrants for interest on debenture stock issued under the Companies Clauses Act, 1863 (*Re Cornwall R. Co.*, 1897, 2 Ch. 74); an action to recover the price of seed from an occupier of land in Ireland (*Magherafelt* v. *Gribben*, 24 L. R. Ir. 520). But not a claim by a borough authority against a county authority for expenses which would be payable out of a particular fund and recoverable by action on the case (*Salford* v. *Lancashire*, 25 Q. B. D. 384). The liability of a lunatic to repay to guardians the cost of his maintenance (treated as a statutory liability) was held to fall within Lim. Act, 1623, and not within this section (*Re Newbegin, Eggleton* v. *Newbegin*, 36 Ch. D. 477; *Re Watson, Stamford Union* v. *Bartlett*, 1899, 1 Ch. 72; *Re Taylor, Edmonton Union* v. *Deeley*, 1901, 1 Ch. 480).

Judgments.

Judgments, although specialties, are not within this section (*Jay* v. *Johnstone*, 1893, 1 Q. B. 30, 190).

Awards.

Under this section an action for debt on an award, where the submission is not by specialty, must be brought within six years. An action of debt on an award under seal was held not to fall within Lim. Act, 1623, (*Hodsden* v. *Harridge*, 2 Wms. Saund. 150).

Fines.

A lord's right to a fine on admittance was barred by this section, time running from the admittance (*Monckton* v. *Payne*, 1899, 2 Q. B. 603).

Penalties.

The words "actions for penalties, damages, or sums of money given to the party grieved by any statute," do not include an action for penalties by an officer of the Goldsmiths' Company, mentioned in 7 & 8 Vict. c. 22 (*Robinson* v. *Currey*, 7 Q. B. Div. 465); or an action by a shareholder against directors for misrepresentation under the Directors' Liability Act, 1890 (*Thomson* v. *Clanmorris*, 1900, 1 Ch. 718).

When time begins to run under this section.

In the case of *post obit* bonds, time does not begin to run until the death (*Tuckey* v. *Hawkins*, 4 C. B. 655; see *Barber* v. *Shore*, 1 Jebb & S. 610). On a bond conditioned to pay an annuity, the non-payment of each instalment is a distinct breach, and the statute begins to run against each as it becomes due (*Amott* v. *Holden*, 18 Q. B. 593); where Lord *Campbell*, C. J., said (p. 603): "It is admitted that, since *Sanders* v. *Coward* (15 M. & W. 48), and *Blair* v. *Ormond* (17 Q. B. 423), where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture, by reason of the non-performance of the first act in that series, yet if default be made in the performance of subsequent acts, a new

3 & 4 Will. 4, c. 42, s. 3.

cause of action arises upon each default, and the statute runs from that. The obligee, therefore, is not prevented by the statute from suing in respect of breaches committed more than twenty years after the first breach, if he has chosen to waive the previous breaches" (see *Higgs* v. *Mortimer*, 1 Exch. 711). If a bond with a penalty were given to secure a duty which is to be performed during a period of twelve years, the bond would be forfeited by a delinquency in the first year, but the obligee might elect not to act on it until the delinquency in the twelfth year (*per Bramwell*, B., 7 L. T. 792). Where the breach is a continuing breach, a fresh cause of action arises at every moment of the time during which the breach continues (*Maddock* v. *Mallet*, 12 Ir. Ch. R. 193).

The breach of a covenant for good right to convey, occasioned by the existence of a right of way, is not a continuing breach. Time ran from the delivery of the deed (*Turner* v. *Moon*, 1901, 2 Ch. 828; *Spoor* v. *Green*, L. R. 9 Ex. 110. See, however, the judgment of *Kelly*, C. B., L. R. 9 Ex. 116).

In the case of a present debt and covenant to pay on demand, a demand is not a condition precedent to an action; *secus*, in the case of a covenant to pay a collateral sum on demand; and time runs accordingly (*Re Brown*, 1893, 2 Ch. 300).

A deed of settlement of a company exonerated the transferor of shares from all liabilities subsequently to transfer. In winding-up time ran from the date of the transfer (*Re Portsmouth Banking Co.*, 2 Eq. 167).

Courts of equity and the statute.

Courts of equity adopted many of the provisions of this statute (*Hyde* v. *Price*, 8 Sim. 578). In administration suits specialty debts were held barred under it (*Spickernell* v. *Hotham*, Kay, 669). But where a settlor had constituted himself a trustee of a covenant, time was no bar (*Stone* v. *Stone*, 5 Ch. 74). A covenant to pay a mortgage debt was held to remain in force for more than twenty years by reason of the pendency of a trust (*Bennett* v. *Cooper*, 9 Beav. 252). See, further, the note as to courts of equity and the statutes of limitation, p. 251, *post*.

Remedy for infants, *femes coverts*, &c.

4. That if any person or persons that is, or are, or shall be entitled to any such action or suit, or to such *scire facias*, is, are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action, is, or are, or shall be at the time such cause of

Absence of defendants beyond seas provided for.

action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas.

Disabilities.

This provision as to disabilities has been altered by Merc. Law Amdt. Act, 1856, s. 10 (p. 244, *post*), which enacts that the absence beyond seas of the person entitled to the action shall be no disability. As to the meaning of "beyond seas," see sect. 7 of this statute (p. 221, *post*). See further the cases quoted under Limitation Act, 1623, s. 7 (p. 232, *post*), the law as to disabilities under both these sections being now the same. In cases within M. W. P. Act, 1882, s. 1, sub-s. 2, coverture has ceased

to be a disability (*Lowe* v. *Fox*, 15 Q. B. Div. 676; *Weldon* v. *Neal*, 51 L. T. 289). 3 & 4 Will. 4, c. 42, s. 5.

5. That if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid; or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute (see 16 & 17 Vict. c. 113, s. 23, as to Ireland). Proviso in case of acknowledgment in writing, or by part payment.

(1.) *Acknowledgment by Writing*...219.
(2.) *Acknowledgment by Payment*...219.

(1) Acknowledgment by writing.

The acknowledgment under this section need not be made to the person entitled, or amount to a promise to pay; and, therefore, the admission of a bond debt, contained in an answer of the executors of the obligor in a suit to which the obligee was not a party, was held sufficient (*Moodie* v. *Bannister*, 4 Drew. 433; 28 L. J. Ch. 881). A conveyance on trust to sell and pay off mortgages was held not an acknowledgment within this section of a particular mortgage (*Howcutt* v. *Bonner*, 3 Exch. 491; see *Forsyth* v. *Bristowe*, 8 Exch. 716). As to pleading acknowledgments under this section, see *Kempe* v. *Gibbon* (9 Q. B. 609; 12 Q. B. 662). See further the cases as to acknowledgments by payment under this section.

The case of disability at the time of the acknowledgment existing on the part of the person entitled to the action, or on the part of the person making the acknowledgment, is provided for at the end of this section. See the joint effect of this provision and Merc. Law Amdt. Act, 1856, s. 11, explained Darb. & Bos. Stat. Lim. 161.

(2) Acknowledgment by payment.

The 5th section does not specify by whom the part payment is to be made; but Lord *Cranworth*, C., thought it must be made by a party interested, for the legislature could not mean to give any right against the debtors by the mere act of a stranger (*Roddam* v. *Morley*, 1 De G. & J. 18). The payment of interest to a mortgagee by the assignee of the equity of redemption was payment by the agent of the mortgagor within the section (*Forsyth* v. *Bristowe*, 8 Exch. 716; compare *Newbould* v. *Smith*, 33 Ch. Div. 127, quoted *ante*, p. 197); so payment by the tenant for life of an equity of redemption (*Dibb* v. *Walker*, 1893, 2 Ch. 429). Payments made by a receiver in a suit, but which were not authorized by the order appointing him, were held not to take the case out of this

3 & 4 Will. 4, c. 42, s. 5.

statute (*Whitley* v. *Lowe*, 25 Beav. 421; 2 De G. & J. 704; see *Re Hale, Lilley* v. *Foad*, 1899, 2 Ch. 107). Where the same bond secured payment of different sums to different persons, payment of one sum was held no acknowledgment in respect of the other sum (*Ashlin* v. *Lee*, 23 W. R. 458).

Where several liable.

Where a devisee for life paid interest on a specialty of his testator's, in which the heirs were bound, this was sufficient to preserve the right of action not only against the payor, but also against all remaindermen (*Roddam* v. *Morley*, 1 De G. & J. 1). "If the payment is made by one only of several persons liable, as, for instance, by a person having only a life interest as devisee, who is affected by the payment? Does it operate against the party only by whom the payment is made, or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other persons liable on the specialty" (*per* Lord *Cranworth*, *Ib.* 18). Payment of interest on a simple contract debt by a devisee for life of the debtor's real estate binds the remaindermen (*Hollingshead* v. *Webster*, 37 Ch. D. 660). See also as to a tenant for life's payment, *Barclay* v. *Owen* (60 L. T. 222); and *Dibb* v. *Walker* (1893, 2 Ch. 429).

Where a person indebted on a specialty dies having left personal estate, and real estate devised for payment of debts, and also real estate devised beneficially, it was said by *Kindersley*, V.-C., "There are three parties, each of whom is liable to the claims of a specialty creditor—the executor in respect of the personalty, the trustees in respect of the real estate devised for payment of debts, and the beneficial devisee in respect of the real estate beneficially devised. . . . . If any one of these parties makes the payment or gives the acknowledgment, it is a payment or acknowledgment by the party liable by virtue of the specialty" (*Coope* v. *Cresswell*, 2 Eq. 117, in which case the V.-C. held, that payment of interest on a specialty debt of a testator by his personal representatives who were also trustees of real estate devised for payment of debts, took the debt out of the statute as against a beneficial devisee). This decision was reversed by Lord *Chelmsford* (2 Ch. 112), as to which decision, see *Re England, Steward* v. *England* (1895, 2 Ch. 109, 110; and *Astbury* v. *Astbury* (1898, 2 Ch. 119), where *Stirling*, J., held that an acknowledgment which might have bound the debtor's personal estate, did not bind his real estate.

In *Coope* v. *Cresswell* (2 Ch. 126), Lord *Chelmsford* said he was unable to concur in the reasoning in *Roddam* v. *Morley*. *Roddam* v. *Morley* was subsequently followed by *Bacon*, V.-C., in *Pears* v. *Laing* (12 Eq. 41; see *Barclay* v. *Owen*, 60 L. T. 222), and by *Chitty*, J., in *Hollingshead* v. *Webster* (37 Ch. D. 651), and *Dibb* v. *Walker* (1893, 2 Ch. 429), where payment of interest by tenant for life under a settlement of an equity of redemption kept alive the remedy on the original mortgagor's covenant. A similar effect was given to payment by a devisee of the mortgaged land (*Leahy* v. *De Moleyns*, 1896, 1 I. R. 206).

As regards acknowledgments by payment of principal or interest in the case of several parties being liable, it has now been provided by Merc. Law Amdt. Act, 1856, s. 14, that payments by one co-debtor shall not prevent time running under this statute in favour of another co-debtor (see *post*, p. 246).

What amounts to payment.

Where a settlement (under which the husband took the first life interest) comprised stock covenanted to be transferred by him, and the stock was not transferred, time ran in favour of the husband from the execution of the settlement. It could not be assumed that a person had been paying himself the interest of a non-existing fund (*Spickernell* v. *Hotham*, Kay, 669; see also *Stone* v. *Stone*, 5 Ch. 74).

Same hand to pay and receive.

But where a settled fund, the income of which the settlor was entitled to receive until insolvency, was lent to him, and judgment was entered against him to secure repayment, time did not run against the judgment until the insolvency (*Re Keay*,

3 & 4 Will. 4, c. 42, s. 5.

I. R. 3 Eq. 659). And where a settlement (under which the husband took the first life interest) comprised money secured by a bond of the husband time did not run against the obligee until his death, he being the person who was both bound to pay the interest on the bond, and entitled to receive the interest under the settlement (*Mills* v. *Borthwick*, 35 L. J. Ch. 31; 13 W. R. 707). So where the wife took the first life interest, and she lived with her husband in amity (*Re Dixon, Heynes* v. *Dixon*, 1900, 2 Ch. 561). The principle was applied where the same person was entitled to receive the rents of mortgaged land and the interest on the mortgage (*Topham* v. *Booth*, 35 Ch. D. 607), and also where the husband was mortgagor and the wife mortgagee (*Re Hawes, Burchell* v. *Hawes*, 62 L. J. Ch. 463; see *Re Dixon, sup.*). Where money settled to the separate use of a wife was lent to her husband, and she, with his consent, gave formal receipts for the income, but no money passed, this was payment of interest within the section (*Amos* v. *Smith*, 1 H. & C. 238; see *Re Dixon, Heynes* v. *Dixon, sup.*). See *Re England, Steward* v. *England*, 1895, 2 Ch. 820, where the money was charged on land; and also the cases quoted *ante*, pp. 174, 194, 212.

A payment upon one of several judgments obtained upon one joint and several bond will prevent recovery upon another of such judgments from being barred (*Re Kingston*, I. R. 3 Eq. 485).

A bond conditioned for the replacing of stock in specie is not such an instrument as comes within the 5th section of Civil Proc. Act, 1833. The payment of sums of money in lieu of dividends which would have been payable if the stock had remained in the name of the obligee, is not payment of interest, neither is any sum of money thereby acknowledged to be due (*Blair* v. *Ormond*, 17 Q. B. 436, 437).

As to the proof of payment by indorsements on a bond, see 1 Taylor, Ev. 605, 611, 8th ed.

The limitation after judgment reversed.

6. And nevertheless be it enacted, if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after (16 & 17 Vict. c. 113, s. 21, Ireland).

See *Tynte* v. *The Queen* (7 Q. B. 216). Outlawry has been abolished in civil cases by Civil Proc. Acts Repeal Act, 1856, s. 3.

No part of the United Kingdom, &c. to be deemed beyond the seas within the meaning of this act.

7. That no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the 21st year of the reign of King James the First, intituled "An Act for Limitation of Actions, and for avoiding of Suits in Law."

The act 4 Anne, c. 16, s. 19, was omitted from this section, and the consequence was to make Ireland a place beyond the seas within the meaning of 4 Anne, c. 16, s. 19, notwithstanding the Act of Union (*Lane*

3 & 4 Will. 4, c. 42, s. 7.

v. *Bennett*, 1 M. & W. 70; *Battersby* v. *Kirk*, 2 Bing. N. C. 603). But see now Merc. Law Amdt. Act, 1856, s. 12, *post*, p. 245.

Beyond the seas within the Irish acts.

No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, are to be deemed to be beyond the seas within the meaning of the act 3 & 4 Vict. c. 105, or of the Irish Statute of Limitations, 10 Car. 1, st. 2, c. 6 (3 & 4 Vict. c. 105, s. 36, which is repealed by 16 & 17 Vict. c. 113, s. 3).

V.—Of the Limitation of Actions on simple Contract Debts, etc.

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Limitation of certain personal actions.

3. That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than for such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after, (that is to say) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after.

(1) *Statute does not extinguish the Debt*...223.
(2) *Application of the Act*...223.
(3) *When Time begins to run*...226.
(4) *Continuous running of Time and Actions by and against Executors*...230.

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(1) Statute does not extinguish debt, but merely bars remedy.

This statute does not extinguish the debt, but merely bars the remedy by action (*Courtenay* v. *Williams*, 15 L. J. Ch. 204; *Curwen* v. *Milburn*, 42 Ch. Div. 434; *Re Hancock*, *Hancock* v. *Berrey*, 59 L. T. 199; see *Re Hepburn*, 14 Q. B. D. 400, where it was said that for the purpose of proving in bankruptcy the remedy by action can alone be looked at). On the above principle, a creditor whose action is barred may avail himself of any other means of recovering his debt he may possess.

An executor may retain a barred debt (see cases quoted *post*, p. 257). If a debtor pay money to a creditor without appropriation, the creditor may apply it in payment of a barred debt (*Mills* v. *Fowke*, 5 Bing. N. C. 455; see *Friend* v. *Young*, 1897, 2 Ch. 434). A solicitor recovered by his lien barred costs (*Higgins* v. *Scott*, 2 B. & Ad. 413; *Re Murray*, 1867, W. N. 190; *Re Carter*, 1885, W. N. 184; see *Spears* v. *Hartley*, 3 Esp. 81). Statute-barred items are taxable under an order directing taxation of a trustee's costs as between him and his *cestui que trust* (*Budgett* v. *Budgett*, 1895, 1 Ch. 202), and under the common order as between a client and his solicitor (*Re Margetts*, 1896, 2 Ch. 263), and may be recovered under the submission to pay what appears due (*Ib.*). As to a client recovering from his solicitor (under the summary jurisdiction) money the claim to which is statute-barred, see *Sittingbourne Co.* v. *Lawson*, 1886, W. N. 76.

Set-off.

Set-off, however, is within sect. 3 of the Lim. Act, 1623 (Statute of Frauds Amendment Act, 1828, s. 4, *post*, p. 244); therefore, a debt barred by the statute cannot be set off (*Remington* v. *Stevens*, 2 Str. 1271; Bull, N. P. 180). The set-off must have been barred before the commencement of the suit in order to support a replication of the statute (*Walker* v. *Clement*, 15 Q. B. 1046; *Re Ballard*, *Lovell* v. *Forester*, 1890, W. N. 64). A claim to retain a barred loan was disallowed as being in the nature of set-off (*Dingle* v. *Coppen*, 1899, 1 Ch. 726). As to replying the statute to part of the claim of set-off, see *Mead* v. *Bashford*, 5 Ex. 336; see also *Fairthorne* v. *Donald*, 13 M. & W. 424; and see R. S. C., Ord. 19, r. 15.

(2) Cases within this section.

An action of debt for a penalty incurred under a bye-law, made by virtue of a royal charter under the great seal is an action of debt grounded upon a contract without specialty within this section (*Tobacco-pipe Makers* v. *Loder*, 16 Q. B. 765). The liability of an equitable assignee of leaseholds in respect of the covenants in the lease is that of simple contract within the statute (*Saunders* v. *Benson*, 4 Beav. 351; see *Moore* v. *Greg*, 2 Phil. 717). So an action in an English court to recover a simple contract debt for which judgment had been recovered in a foreign court was barred in six years (*Dupleix* v. *De Roven*, 2 Vern. 540; compare *Wilson* v. *Dunsany*, 18 Beav. 293). When by an instrument not under seal, A. agrees to repay an advance and execute a mortgage, this statute would at the end of six years bar an action to recover the advance or for breach of the contract to execute the mortgage (*Firth* v. *Slingsby*, 58 L. T. 483). The section applies to the personal remedy, even where the simple contract debt is charged on land (*Barnes* v. *Glenton*, 1899, 1 Q. B. 885). An action *in rem* in the Admiralty Court to recover damages for collision is not within this act (*Kong Magnus*, 1891, P. 223).

Banker and customer.

Money placed with a banker to current account in the ordinary way is *money lent* to the banker with a superadded obligation that it is to be paid when called for by cheque; and if it remain in the banker's hands for six years, without any payment by him of the principal or allowance of interest, the statute is a bar to its recovery (*Pott* v. *Clegg*, 16 M. & W. 324; distinguish money paid to a deposit account, *Re Tidd*, *Tidd* v. *Overell*, 1893, 3 Ch. 156). The relation between a banker and his customer is that of

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debtor and creditor, and not trustee and *cestui que trust* (*Foley* v. *Hill*, 1 Phil. 399; 2 H. L. Ca. 28; and see *Moxon* v. *Bright*, 4 Ch. 294). But, where a fund was standing to the account of two trustees, and the bankers, who had notice that it was a trust fund, transferred it to the account of the tenant for life, and thereby obtained payment of a debt due from him to them, the trustees had a right to compel the bankers to replace the fund, and the statute was inapplicable (*Bridgman* v. *Gill*, 24 Beav. 302; see *Foxton* v. *Manchester Banking Co.*, 44 L. T. 406; *Coleman* v. *Bucks Bank*, 1897, 2 Ch. 243). As to the parties to actions against bankers, and the practice of the common law courts in allowing amendments to avoid the effect of the statute, see *Crawford* v. *Cocks* (20 L. J. Ex. 169); *Corne* v. *Malins* (*Ib.* 434).

Solicitor and client.

The statute bars a solicitor's action for costs (*Coburn* v. *Colledge*, 1897, 1 Q. B. 702). As to the effect of a solicitor's lien, see cases quoted *supra*, p. 223; and as to the running of time in the case of actions for costs, see p. 230, *post*. In the absence of fraud, the statute bars a client's action to recover money received by a solicitor as his client's agent (*Re Hindmarsh*, 1 Dr. & Sm. 129; *Crawford* v. *Crawford*, 16 W. R. 411; *Watson* v. *Woodman*, 20 Eq. 721). But the statute did not apply where a solicitor received money of which he knew his client was an express trustee (*Re Bell, Lake* v. *Bell*, 34 Ch. D. 462; see *Blyth* v. *Fladgate*, 1891, 1 Ch. 337; *Soar* v. *Ashwell*, 1893, 2 Q. B. 390); nor where a solicitor received his client's money under a special power of attorney, which was held to create a trust (*Burdick* v. *Garrick*, 5 Ch. 233; *Gray* v. *Bateman*, 21 W. R. 137). See now Trustee Act, 1888, s. 8, *post*. No trust, however, is created where a solicitor is employed to invest in a particular mortgage, or to find securities to be approved by the client and then invest, and the client does approve the security; in such a case the statute will bar an action for negligence (*Dooby* v. *Watson*, 39 Ch. D. 178; see *Hughes* v. *Twisden*, 54 L. T. 570; *Mara* v. *Browne*, 1896, 1 Ch. 199). See also *Smith* v. *Pococke*, 2 Drew. 197.

Master and steward.

Where during his life a master had permitted his steward to retain his salary out of moneys in his hands, the steward, in accounting after the master's death, was allowed his salary for twenty years, the statute not applying (*Hawkins* v. *Hawkins*, 28 W. R. 240).

Principal and agent.

An action by a principal for an account against his agent is, generally speaking, within the statute, time not commencing to run until the agency is terminated (*Re Sharpe, Masonic Co.* v. *Sharpe*, 1892, 1 Ch. 166; see *Burdick* v. *Garrick*, 5 Ch. 233; *Friend* v. *Young*, 1897, 2 Ch. 421).

Account.

Before the Stat. Frauds Amdt. Act, 1828, it was held, that in the case of open accounts between persons other than merchants, the statute did not begin to run so long as the account was continued (see *Foster* v. *Hodgson*, 19 Ves. 185). The effect, however, of that act in the case of actions of debt or assumpsit was, that although there might be a mutual open running account, the existence of items not barred was not sufficient to take items which were barred out of the statute (*Williams* v. *Griffiths*, 2 C. M. & R. 45; *Cottam* v. *Partridge*, 4 M. & G. 271; see *Jackson* v. *Ogg*, Johns. 397).

Merchants' accounts.

Merchants' accounts were excepted from the Lim. Act, 1623 (see as to the exception, *Robinson* v. *Alexander*, 2 Cl. & Fin. 717); but this exception has been repealed by the Merc. Law Amdt. Act, 1856, s. 9 (*post*, p. 244), and merchants' accounts now stand upon the same footing as other accounts. The statute bars an action by a merchant against his factor (*Friend* v. *Young*, 1897, 2 Ch. 431).

Partnership accounts.

In the case of partnership accounts it is settled that, after a partnership has ceased, any claim on simple contract by one partner against the others in respect thereof is *primâ facie* subject to be barred after six years (*Knox* v. *Gye*, L. R. 5 H. L. 656); in which case a suit for an account by the executors of a deceased partner instituted against the surviving partner more than six years from the death, was barred, although the business had been carried on and assets got in by the defendant during the six years (see *Chan Kit San* v. *Ho Fung Hang*, 1902, A. C. 257, where time ran against the estate of the deceased partner from the grant of administration). In another case an action for an account brought more than six

years after a dissolution was barred (*Noyes* v. *Crawley*, 10 Ch. D. 31, where *Miller* v. *Miller*, 8 Eq. 499, was treated as overruled). On the other hand, "while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of *Lindley*, L. J. (Partnership, 5th ed. p. 510), is to the contrary" (*Barton* v. *N. Stafford. Co.*, 38 Ch. D. 463). The statute was no bar where the accounts of an old partnership had been carried on into a new partnership without interruption or settlement (*Betjemann* v. *Betjemann*, 1895, 2 Ch. 474). A partner is entitled to rely on the good faith of his co-partner, and concealed fraud (even where due caution would have discovered it) will prevent the statute applying (*Ib.*).

Companies.

An action by a shareholder against a company for unpaid dividends appears to be within the section (*Re Severn R. Co.*, 1896, 1 Ch. 559). Where an action was brought to compel a company to replace stock transferred on a forgery, time ran from the refusal of the company after notice of the forgery to treat the plaintiff as owner (*Barton* v. *N. Stafford. Co.*, 38 Ch. D. 458).

Fraud, breach of duty.

A shareholder's action against directors under sect. 3 of the Directors' Liability Act, 1890, is within the section (*Thomson* v. *Clanmorris*, 1900, 1 Ch. 718); so an action based on concealed fraud (*e.g.*, to recover a bribe secretly received by a director) is within the section, time running from the discovery of the fraud (*Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319; *Re Fitzroy Bessemer Co.*, 50 L. T. 144; see *Re Cape Breton Co.*, 29 Ch. Div. 810). Compare the case of a claim against directors for improperly paying dividends, which was a claim for a breach of trust, and was not then capable of being barred, *Flitcroft's case* (21 Ch. D. 519); and see the principle stated by *Cotton*, L. J. (5 Ex. D. 325). Where an auditor was guilty of a breach of duty to the company, the plea of the statute was admitted without argument (*Leeds Co.* v. *Shepherd*, 36 Ch. D. 809). In an action for damages arising from fraudulent misrepresentation, time ran from the discovery of the fraud (*Gibbs* v. *Guild*, 9 Q. B. Div. 59; compare *Moore* v. *Knight*, 1891, 1 Ch. 547; *Rawlins* v. *Wickham*, 3 D. G. & J. 304, and the other cases cited *post*, p. 253). As to an action to rescind a contract on the ground of fraud, see *Redgrave* v. *Hurd* (20 Ch. D. 13). And as to an injunction in aid of an action of deceit, see *Fullwood* v. *Fullwood* (9 Ch. D. 176).

Fraudulent trespass.

The statute applies to Chancery proceedings in respect of trespass unless some equitable grounds repel it (*Trotter* v. *Maclean*, 13 Ch. D. 584). Where for years coal was furtively taken from a mine by a wilful and secret underground trespass, the statute did not apply (*Bulli Co.* v. *Osborne*, 1899, A. C. 351). To avoid the defence of the statute in such a case it is not necessary to show active concealment (*Ib.* 363). But breaking bounds into a neighbouring colliery is not *per se* fraudulent (*Bulli Co.* v. *Osborne*, *sup.*; disapproving *Ecc. Commrs.* v. *N. E. R.*, 4 Ch. D. 845); and the fact that the defendants kept a map, in which they omitted to mark their workings into the plaintiff's mine, was not sufficient to establish fraud (*Daws* v. *Bagnall*, 23 W. R. 690). Where the wrongful working of the defendant was with the knowledge of the plaintiff, it was treated as inadvertent, and an account was only directed for six years (*Trotter* v. *Maclean*, 13 Ch. D. 574; see the cases classified, *ib.* 586; and see *Dean* v. *Thwaite*, 21 Beav. 61).

As to waste, see *post*, p. 254.

Devastavit.

A person injured by a devastavit is but a simple contract creditor of the executor (*Charlton* v. *Low*, 3 P. W. 331), and in general his claim is barred by this statute after six years (*Thorne* v. *Kerr*, 2 K. & J. 54; *Re Gale, Blake* v. *Gale*, 22 Ch. D. 820; *Re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 618). See further as to enforcing debts against executors, p. 256, *post*.

Arrears of pauper lunatic's maintenance.

Where a pauper lunatic becomes entitled to property, the guardians can only recover six years' arrears in respect of his maintenance either from himself (*Re Newbegin, Eggleton* v. *Newbegin*, 36 Ch. D. 477; see *Re Weaver*, 21 Ch. Div. 615) or from his representatives (*Re Watson, Stamford*

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Union v. *Bartlett*, 1899, 1 Ch. 72; *Re Taylor, Edmonton Union* v. *Deeley*, 1901, 1 Ch. 480).

India. Foreign contracts.

Prior to 1859 this statute extended to India (*Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. 4; but see now *Re Peat*, 7 Eq. 302). In the construction of a contract, the question whether there has been a contract made at all is to be governed by the law where the contract was made, but the remedy is to be according to the law where the contract is sought to be enforced (*Ex p. Melbourn*, 6 Ch. 69). Therefore a debt contracted abroad can only be enforced in England within the time limited by the English statutes (*Huber* v. *Steiner*, 2 Bing. N. C. 202; see *Harris* v. *Quine*, L. R. 4 Q. B. 653; *Pardo* v. *Bingham*, 4 Ch. 738; *Finch* v. *Finch*, 35 L. T. 235; *Alliance Bank* v. *Carey*, 5 C. P. D. 429). But where a debt was disallowed as barred in an English administration action, and the creditor afterwards obtained in Scotland a judgment which he registered in England under 31 & 32 Vict. c. 54, he was restrained from enforcing his judgment only on the terms of being admitted to prove (*Re Low, Bland* v. *Low*, 1894, 1 Ch. 147).

(3) When time begins to run. Cause of action from which time runs.

There cannot be a cause of action within the meaning of the statute from which time will run unless there be not only a person in existence capable of suing (*Murray* v. *East India Co.*, 5 B. & Ald. 214; *Chan Kit San* v. *Ho Fung Hang*, 1902, A. C. 257), but also a person who can be sued (*Douglas* v. *Forrest*, 4 Bing. 704; see *Musurus Bey* v. *Gadban*, 1894, 2 Q. B. 358). An ambassador cannot be sued either while he is accredited, or during such reasonable period afterwards as he requires for preparing to return home; and time does not run against his creditors until the expiration of such period (*Musurus Bey* v. *Gadban*, *sup.*), and see the cases as to executors and administrators, *post*, p. 231.

(a) *Actions* ex Delicto...226.
(b) *Actions* ex Contractu...227.
(c) *Effect of Fraud*...229.
(d) *Costs*...230.

(a) Running of time in actions *ex delicto*. Case.

In an action on the case for negligence (*e.g.*, against a solicitor), where the plaintiff alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty and not the consequential damage; and the statute runs from the time when the breach of duty is committed, and not from the time when the negligence was discovered, or when the consequential damage accrued (*Howell* v. *Young*, 5 B. & C. 259; *Smith* v. *Fox*, 6 Hare, 386; *Hughes* v. *Twisden*, 54 L. T. 570. Compare the rule in assumpsit, *Short* v. *M'Carthy*, 5 B. & Ald. 626, *post*, p. 227). Concealment of the negligence without fraud would make no difference (*Armstrong* v. *Milburn*, 54 L. T. 247, 723). There is no duty on the part of the solicitor to disclose his negligence (*Wood* v. *Jones*, 61 L. T. 551). Time runs against a shareholder's right to sue directors for compensation under sect. 3 of the Directors' Liability Act, 1890, from the subscription for the shares (*Thomson* v. *Clanmorris*, 1900, 1 Ch. 718). In actions on the case for injury to real property, where the ground of the action is the consequential damage, time runs from the actual damage, and not from the wrongful act (*Bonomi* v. *Backhouse*, 9 H. L. C. 503; an action for negligently working mines, where the working which caused the thrust was more than six years before action brought, but the actual damage did not commence till within six years). In the case of a further subsidence, time commences to run from such subsidence (*Darley Main Co.* v. *Mitchell*, 11 App. Cas. 127, overruling *Lamb* v. *Walker*, 3 Q. B. D. 389; see *Crumbie* v. *Wallsend Board*, 1891, 1 Q. B. 503).

Trover.

In trover, time runs from the conversion (*Denys* v. *Shuckburgh*, 4 Y. & C. 42). A.'s furniture having been seized under an execution, and then purchased by his friends, was left in A.'s possession for more than six years. After A.'s death the furniture was claimed by his friends, and

Detinue.

adversely by his administratrix: it was held that the rights of the former were not barred by the statute, which could only apply from six years from a conversion (*Edwards* v. *Clay*, 28 Beav. 145). Where once there has been a complete cause of action arising out of contract or tort, the statute begins to run, and subsequent circumstances, which would but for the prior wrongful act or default have constituted a cause of action, are disregarded (*Wilkinson* v. *Verity*, L. R. 6 C. P 209). In the case of tort this principle only applies where the defendant is the sole wrongdoer (*Miller* v. *Dell*, 1891, 1 Q. B. 470). Goods having been bailed by the plaintiffs to the defendant for safe custody, the defendant wrongfully sold them, and the plaintiffs, more than six years after the sale, of which they were ignorant, demanded the goods, which the defendant refused. Held, in detinue, that time ran from the refusal, and not from the sale; inasmuch as the plaintiffs, although if they had discovered the sale they would have been entitled to sue immediately for conversion, were also entitled to elect to sue upon the breach of the bailee's duty by the refusal to deliver up on request. But where an action of detinue is founded upon a bare taking and withholding of the property of another, without any circumstances to show a trust for the owner, or to found an option to sue, either for the wrong or for the breach of the original terms of deposit, time will run from the period at which the property was first wrongfully dealt with (*Wilkinson* v. *Verity*, L. R. 6 C. P. 206). Where A.'s lease was, without his knowledge, deposited fraudulently with B. to secure a loan, and the mortgage debt and lease were afterwards transferred to C., both B. and C. being ignorant of the fraud, and C. having refused to return the lease, A. brought an action of detinue against him, the statute ran from the time when A. first had a complete cause of action against C. by reason of his refusal, irrespective of the existence of any previous cause of action against B. (*Miller* v. *Dell*, 1891, 1 Q. B. 468; *Spackman* v. *Foster*, 11 Q. B. D. 99). It was doubted whether the statute would prevent a person rightfully in possession of land from recovering title deeds more than six years after their conversion (1891, 1 Q. B. 472). In an action for detention of title deeds, it was laid down that time does not begin to run so long as the deeds are in the possession of the person enjoying the land, although such enjoyment be wrongful (*Plunt* v. *Cotterell*, 5 H. & N. 430).

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As to the running of time in the cases of concealed fraud, see the cases on p. 229.

Fraud.

As to when time runs in the case of an action for false imprisonment, see *Violett* v. *Simpson* (8 El. & Bl. 344; 6 W. R. 12).

False imprisonment.

(b)

The time limited by the statute does not begin to run until there be a full and complete cause of action (see *Musurus Bey* v. *Gadban*, 1894, 2 Q. B. 358). Where the cause of action does not arise until after request made, the statute will only run from the time of such request (*Gould* v. *Johnson*, 2 Salk. 422; 2 Saund. 63 b, n.). If the contract be to pay money at a future period, or upon the happening of a certain event, the statute does not begin to run until that specified period or that event (*Fenton* v. *Imbers*, 1 W. Bl. 354; 3 Burr. 1278). If goods be consigned to a factor for sale, an action does not lie against him for not accounting for them, until after a demand made of an account; and the statute, therefore, in such case runs only from the time of such demand (*Topham* v. *Braddick*, 1 Taunt. 572). On a sale of goods on credit, the statute begins to run from the time when credit has expired (*Helps* v. *Winterbottom*, 2 B. & Ad. 431). In general, the day on which the cause of action accrued is to be included (Hob. 109; 4 Moore, 465).

In actions *ex contractu* time only runs from complete cause of action,

The statute runs from the earliest time at which an action can be brought (*Reeves* v. *Butcher*, 1891, 2 Q. B. 511). In assumpsit the statute begins to run from the breach of the promise, and not from the consequential damage. In an action against an attorney for an omission to make a search, which took place upwards of six years before, the statute was a bar, though the omission was not discovered till within the six

but runs from earliest time.

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years (*Short* v. *M'Carthy*, 3 B. & Ald. 626; *Brown* v. *Howard*, 2 Brod. & B. 73; *Battley* v. *Faulkner*, 3 B. & Ald. 288). Compare the rule in an action on the case (*Howell* v. *Young*, 5 B. & C. 259, *ante*, p. 226). As regards the liability of a husband for his wife's ante-nuptial debts under sects. 14, 15 of M. W. P. Act, 1882, time runs in favour of the husband from the date of the cause of action against the wife, not from marriage (*Beck* v. *Pierce*, 23 Q. B. Div. 323). The defendant gave a warrant of attorney to secure a debt payable by instalments, the plaintiff to be at liberty, in case of any default, to have judgment and execution for the whole. The fact that the first default was made more than six years before action was a complete defence, not only as to instalments due more than six years ago, but also as to those due within that period (*Hemp* v. *Garland*, 4 Q. B. 519). If any one of the securities for an annuity are set aside, the grantee may recover back the purchase-money on the ground of failure of consideration, and the statute runs from the time when the security is set aside (*Huggins* v. *Coutes*, 5 Q. B. 432; *Cowper* v. *Godmond*, 9 Bing. 748; see *Churchill* v. *Bertrand*, 3 Q. B. 568).

Debt payable on demand.

In the case of a present debt and promise to pay on demand, the demand is not a condition precedent to an action: *secus*, in the case of a promise to pay on demand a collateral sum—*e.g.*, by a surety (*Re Brown*, 1893, 2 Ch. 300; see *Birks* v. *Trippet*, 1 Wms. Saund. 38). Where money was advanced to a firm to be repaid on demand, with compound interest: the statute ran from the date of the advance (*Jackson* v. *Ogg*, Johns. 397); in which case it was also held that entries in the books of the firm, crediting the lender with interest, did not affect the operation of the statute. Compare the cases as to a mortgagee's accounts, *ante*, p. 172. Where the plaintiff advanced 5,000*l.* to assist an undertaking, and the defendant was not to be personally liable, but the plaintiff was to be paid out of the profits, the statute did not run until after the plaintiff's first demand. A distinction was drawn between debts payable on demand, and debts recoverable on demand (*Knox* v. *Gye*, 15 W. R. 628). The defendant, drawer of two bills of exchange of which the plaintiff was holder, gave him a written promise to pay the bills, "whenever my circumstances may enable me to do so, and I may be called upon for that purpose." The statute ran from the time of the defendant becoming able to pay, though the plaintiff had made no demand, and had no knowledge of such ability (*Waters* v. *Thanet*, 2 Q. B. 757; see *Hammond* v. *Smith*, 33 Beav. 452; *Bethell* v. *Bethell*, 34 Ch. D. 561). A promissory note being given to a banker by A. and a surety, and a contemporaneous agreement being executed showing the note to be given as a security for A.'s banking account, the statute did not run from the time when A. became indebted to the bank, but from the time when the balance was struck (*Hartland* v. *Jukes*, 32 L. J. Exch. 162). Time runs without demand in the case of money paid into a bank on current account (*Pott* v. *Clegg*, 16 M. & W. 32, see *ante*, p. 223); but a demand is necessary in the case of an ordinary deposit account (*Re Tidd, Tidd* v. *Overell*, 1893, 3 Ch. 154); also in the case of money entrusted to another for safe custody (*Ib.*); also in the case of a loan to a building society on the terms that the same should be repayable on notice (*Atkinson* v. *Bradford Society*, 25 Q. B. D. 377). But time ran from the date of an advance, notwithstanding that the lender was authorised to sell bonds deposited as security, and the borrower undertook to pay the difference (*Re McHenry, McDermott* v. *Boyd*, 1894, 3 Ch. 290).

Guarantees.

On the construction of a guarantee for a current account given to a bank, time ran against the bank's right to sue on the guarantee as regards each item of the account as it became due. The bank, however, recovered interest which had accrued within six years, although the principal was barred (*Parr's Bank* v. *Yates*, 1898, 2 Q. B. 460). An action on a guarantee was held barred (*Henton* v. *Paddison*, 68 L. T. 405).

Bills and notes.

In the case of a note, payable on demand, the statute runs from the date of the note (*Christie* v. *Fonsick*, 1 Selw. N. P. 301, 13th ed.; *Re George, Francis* v. *Bruce*, 44 Ch. D. 627). So in the case of a cheque given for a pre-existing debt (*Bethell* v. *Bethell*, 34 Ch. D. 566). It makes

21 Jac. 1, c. 16, s. 3.

no difference that the note is payable with interest (*Norton* v. *Ellam*, 2 M. & W. 461). Where, upon a loan, the borrower, before the advance was made, gave to the lender a promissory note payable on demand, it was said that time ran from the giving of the note, not from the date of the advance (*Buccleugh* v. *Eden*, 61 L. T. 360). Where in form a note is payable twenty-four months after demand, the cause of action on the note does not accrue, and the statute does not begin to run until twenty-four months after demand made (*Thorpe* v. *Boothe*, 1 Ry. & Moo. 388). Payment of interest upon a promissory note payable on demand, although there be no independent evidence that any demand of payment of the note has been made, is of itself evidence of a demand (*Bamfield* v. *Tupper*, 7 Exch. 27; *Re Rutherford, Brown* v. *Rutherford*, 14 Ch. Div. 687). Where a note is payable after sight, the statute runs only from the time of presentment (*Holmes* v. *Kerrison*, 2 Taunt. 323; and see *Savage* v. *Aldred*, 2 Stark. 232). As to when bills and notes are to be deemed payable on demand, see Bills of Exchange Act, 1882, ss. 10, 11, 88.

Where the statutory period for suing on a note expired on a Sunday, and a writ was issued on Monday, the action was held barred, R. S. C. Ord. 64, r. 3, not applying (*Morris* v. *Richards*, 45 L. T. 210). Where a debtor draws a bill to be applied in part payment of the debt, and the bill is paid when due by the drawee to the creditor, it operates as a part payment to defeat the statute only from the time of the delivery of the bill by the debtor, not from the time of its payment (*Irving* v. *Veitch*, 3 M. & W. 90). The defendant gave S. his acceptance in blank on a *5s.* stamp. S. (not within a reasonable time) filled in his own name as drawer for 200*l.* at five months. The defendant being sued on the bill, and having pleaded the statute, the statute ran from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank (*Montague* v. *Perkins*, 22 L. J. C. P. 187). In the case of a bill of exchange drawn on a bank, time did not commence to run against the holder's right to sue the drawer until presentation to the bank for payment (*Re Boyse, Crofton* v. *Crofton*, 33 Ch. D. 612). In the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete, and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment (*Wilkinson* v. *Verity*, L. R. 6 C. P. 209; see *Whitehead* v. *Walker*, 9 M. & W. 506). K. being indebted to the plaintiffs and to the defendant, and also to a banking company, it was agreed between all the parties that to secure K.'s debt to the company the defendant should draw upon K. three bills of exchange, payable to the plaintiffs, and that the plaintiffs should indorse them to the company. The bills became due in 1843, and were dishonoured. In 1847 the company sued the plaintiffs on the bills, and the plaintiffs, in 1851, paid the amount: it was held, in 1852, that the plaintiffs were barred by the statute from suing the defendant as drawer of the bills (*Webster* v. *Kirk*, 17 Q. B. 944).

Where a bill is drawn payable at a future period for a sum lent by payee to drawer at the time of drawing the bill, the payee may recover in an action for money lent at any time within six years from the time when the bill became due (*Wintersheim* v. *Carlisle*, 1 H. Bl. 631). Where an advance was made by the lender giving to the borrower a cheque which was subsequently paid, time ran against the lender, in an action for money lent, from the payment not the giving of the cheque (*Garden* v. *Bruce*, L. R. 3 C. P. 300).

Contribution.

As to actions for contribution, see *post*, p. 254.

(c) Effect of fraud.

Before the Jud. Acts it was held that it was no answer at law to a plea of the statute that the plaintiff was prevented by the defendant's fraud from knowing of the cause of action until after the time of limitation had expired (*Imperial Gas Co.* v. *London Gas Co.*, 10 Exch. 39; *Hunter* v. *Gibbons*, 1 H. & N. 459). The rule was different in equity where time ran from the discovery of the fraud (*Blair* v. *Bromley*, 2 Phil. 354). The

21 Jac. 1, c. 16, s. 3.

rule in equity now prevails, at least in cases where before the Jud. Acts there was a concurrent remedy both in law and equity (*Gibbs* v. *Guild*, 9 Q. B. Div. 59; *Re Crosley, Munns* v. *Burn*, 35 Ch. Div. 266). As to purely common law actions, where there was no such concurrent remedy, see *Armstrong* v. *Milburn*, 54 L. T. 247, 723; *Barber* v. *Houston*, 18 L. R. Ir. 475. In cases falling within the Trustee Act, 1888, s. 8, the rule is not affected by that section (*Moore* v. *Knight*, 1891, 1 Ch. 547). But concealment of a cause of action without fraud makes no difference (*Armstrong* v. *Milburn*, 54 L. T. 723). Where fraud or non-discovery of fraud is relied on as taking a case out of the statute, it must be the fraud of the person who invokes the statute (*Thorne* v. *Heard*, 1895, A. C. 495).

(d)
Actions for costs.

The cause of action in respect of a solicitor's costs arises when the work is completed, from which time the statute runs, and not from a month after delivery of bill (*Coburn* v. *Colledge*, 1897, 1 Q. B. 702). In the case of bills of costs items dated more than six years before action will be barred, where the work was miscellaneous (*Beck* v. *Pierce*, 23 Q. B. Div. 323), or the employment not continuous (*Phillips* v. *Broadley*, 9 Q. B. 744). Where, however, the employment was continuous and lasted till within the six years, such items will not be barred (*Harris* v. *Quine*, L. R. 4 Q. B. 653). As where a solicitor is retained to conduct an action; in which case he cannot, as a rule, sue for his costs until the termination of the action or of his retainer (*Harris* v. *Osbourn*, 2 C. & M. 629; *Nicholls* v. *Wilson*, 11 M. & W. 106; see *Underwood* v. *Lewis*, 1894, 2 Q. B. 306; *Court* v. *Berlin*, 1897, 2 Q. B. 396). So costs incurred in conducting a suit in which no final decree had been made were held not to be barred, though no steps had been taken in the suit for ten years prior to action brought (*Whitehead* v. *Lord*, 7 Exch. 691; see *Stokes* v. *Trumper*, 2 K. & J. 232; *Baile* v. *Baile*, 13 Eq. 497). The statute will, as a rule, run from the date of the judgment in the action for which the retainer was given (*Rothery* v. *Munnings*, 1 B. & Ad. 15); but when an appeal is brought, the employment will be considered continuous as from the commencement of the action (*Harris* v. *Quine*, L. R. 4 Q. B. 657). During the course of the action the solicitor may give reasonable notice to the client to supply him with funds, and on refusal sue for costs. The retainer will also be determined by the death of the client (*Whitehead* v. *Lord*, 7 Exch. 691). As to part payment in the case of bills of costs, see *Morley* v. *Finney* (1870, W. N. 82). And as to taxation where some of the items of a bill are barred, see *Curwen* v. *Milburn* (42 Ch. D. 424); *Budgett* v. *Budgett* (1895, 1 Ch. 202); *Re Margetts* (1896, 2 Ch. 263).

Costs in lunacy.

Costs incurred by solicitors in prosecuting a commission in lunacy, and subsequently acting on behalf of the committee, were held (at the lunatic's death) not barred by the lapse of six years during his life; for any action for the recovery of the claim would have been restrained (*Stedman* v. *Hart*, Kay, 607). See the cases as to a lunatic's maintenance, *post*, p. 260.

When costs were incurred in obtaining an act for a railway, subsequently abandoned, time did not commence to run until the company had assets (*Re Kensington Station*, 20 Eq. 197).

Costs incurred by a company which is afterwards wound up.

Where solicitors delivered to a liquidator papers, on which they had a lien upon his undertaking in writing to pay out of the first funds available, the statute had no application (*Re Gloucester R. Co.*, 2 Giff. 47). A solicitor's right to have a call made for his payment may be lost by laches (*Ex p. A'Beckett*, 2 Jur. N. S. 684; see *Re Gloucester R. Co.*, *sup.*).

(4)
Continuous running of time.

Under the Winding-up Acts of 1848-49, an order to wind up a company did not stop time from running against a right of action accrued previously to the order (*Ex p. Forest*, 2 Giff. 42). But the carrying in a claim under the winding-up did so (*Wryghte's Case*, 5 De G. & Sm. 244).

Effect of winding-up order.

Under the Companies Act, 1862, a winding-up order stops the running of time (*Re General Rolling Stock Co.*, 7 Ch. 646). Compare the similar effect of judgment in an administration action, *post*, p. 258.

Inability to sue, &c.

It was formerly laid down that when once time had begun to run, no

subsequent disability or inability to sue would stop it (*Rhodes* v. *Smethurst*, 4 M. & W. 42). But it has since been held, that where a debtor takes out administration to his creditor, the running of time will be suspended during the administration (*Seagram* v. *Knight*, 2 Ch. 628). 21 Jac. 1, c. 16, s. 3.

A mere letter of licence by a creditor to his debtor does not suspend the operation of the statute (*Fuller* v. *Redman*, 26 Beav. 614). But a covenant not to sue for a certain period will prevent time running until the expiration of that period (*Iven* v. *Elwes*, 3 Drew. 25; see *O'Brien* v. *Osborne*, 10 Hare, 92). Where under a composition deed a debtor makes default in payment of a composition, a fresh promise to pay at that time the original debt is implied, and time begins to run accordingly (*Irving* v. *Veitch*, 3 M. & W. 107; *Re Stock*, 66 L. J. Q. B. 146).

Bankruptcy or death of creditor.

Where the creditor becomes bankrupt, time runs against the bankruptcy trustee as against the bankrupt (*Ex p. Norton*, 1892, W. N. 32). Where the creditor dies, the cause of action having accrued to him in his lifetime, his executor cannot sue after the time limited by the statute has expired (*Penny* v. *Brice*, 18 C. B. N. S. 393; 13 W. R. 342). But if the statute has not begun to run during the lifetime of an intestate, it does not run against the administrator until administration has been taken out (*Burdick* v. *Garrick*, 5 Ch. 241; *Chan Kit San* v. *Ho Fung Hang*, 1902, A. C. 257). Where a creditor dies intestate on the day on which the debt becomes due, in the absence of evidence time does not run against the administrator until administration is taken out (*Atkinson* v. *Bradford Society*, 25 Q. B. Div. 377). In an action by an administrator against the acceptor of a bill payable to the testator, *but accepted* after his death, time ran from the grant of administration, there being no cause of action until there was a party capable of suing (*Murray* v. *The East India Co.*, 5 B. & Ald. 204; and see *Pratt* v. *Swaine*, 8 B. & C. 285; *Perry* v. *Jenkins*, 1 M. & C. 118; *Hyde* v. *Price*, 1 C. P. Coop. 196; *Freake* v. *Cranefeldt*, 3 M. & C. 499; *Howlitt* v. *Lambert*, 1 Ir. Eq. R. 263; *Fergusson* v. *Fyffe*, 8 Cl. & Fin. 121; *Musurus Bey* v. *Gadban*, 1894, 2 Q. B. 358).

Bankruptcy of debtor.

When the debtor becomes bankrupt before the right of action is complete, it would seem that time does not commence to run until the close of the bankruptcy (see *Re Crossley*, *Munns* v. *Burn*, 35 Ch. Div. 266).

Death of debtor.

Where the debtor dies, and time has once begun to run against the debt in the debtor's life, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted (*Freake* v. *Cranefeldt*, 3 M. & C. 499; *Boatwright* v. *Boatwright*, 17 Eq. 71; see *Martin* v. *Beauchamp*, 1888, W. N. 247). But where an action was brought in time and the defendant died, the plaintiff had a right to bring a new action against the executor or administrator within a reasonable time (*Sturgis* v. *Darell*, 6 H. & N. 120; see sect. 4, *post*). This rule was applied where the second action was commenced within a year from the proof of the will by the executor (*Swindell* v. *Bulkeley*, 18 Q. B. Div. 250).

Where time had not commenced to run against a debt during the debtor's life, it was held that the statute was not a good plea where an executor had not proved, because no laches could be imputed to a plaintiff for not suing whilst there was no executor against whom he could bring his action (*Jolliffe* v. *Pitt*, 2 Vern. 694; Coop. Eq. Pl. 233; 1 Eq. Cas. Abr. 305; see *Douglas* v. *Forrest*, 4 Bing. 686; *Musurus Bey* v. *Gadban*, 1894, 2 Q. B. 532). But where the defendant acts, and might be sued, as executor *de son tort*, time runs from his so acting, and not from the date of probate (*Flood* v. *Patterson*, 29 Beav. 299; *Webster* v. *Webster*, 10 Ves. 93).

As to actions by or against executors for injuries to property, see *ante*, p. 214.

Limitation after judgment or outlawry reversed.

By sect. 4, if judgment is given for the plaintiff and reversed by error or arrested, or if the defendant is outlawed and the outlawry reversed, a new action may from time to time be

21 Jac. 1, c. 16, s. 4.

commenced within a year afterwards by the plaintiff, his heirs, executors or administrators.

Within the equity of this section the courts permitted an executor or administrator, within a year, or within a reasonable time after the death of the testator or intestate, to renew a suit commenced by the testator or intestate, and *vice versâ* (*Curlewis* v. *Mornington*, 7 E. & B. 283; see 15 & 16 Vict. c. 76, ss. 135 *et seq.*; *Swindell* v. *Bulkeley*, 18 Q. B. Div. 250).

Infants, femes coverts, &c. excepted.

7. Provided nevertheless, and be it further enacted, that if any person or persons that is, or shall be, entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action, given or accrued, fallen or come, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done.

Infancy.

A case of infancy occurred in *Dashwood* v. *Magniac*, 1891, 3 Ch. 387.

Coverture.

From the time when the M. W. P. Act, 1882, enabled a married woman to sue, she became discovert within the above section; so held in the case of an action for slander (*Weldon* v. *Neal*, 51 L. T. 289; 32 W. R. 828), and for assault (*Lowe* v. *Fox*, 15 Q. B. Div. 676). Neither the imprisonment of the plaintiff nor his absence beyond the seas now constitute a disability (Merc. Law Amdt. Act, 1856, s. 10, *post*). During the absence of a defendant beyond the seas the running of time is suspended by 4 Anne, c. 16, s. 19 (see *Forbes* v. *Smith*, 11 Ex. 161); and the right of the plaintiff to sue after the defendant's return is not affected by R. S. C. Ord. 11, giving leave to serve out of the jurisdiction (*Musurus Bey* v. *Gadban*, 1894, 2 Q. B. 352). As to the meaning of "beyond seas" in these acts, see Civil Proc. Act, 1833, s. 7 (p. 221, *ante*); and Merc. Law Amdt. Act, 1856, s. 12 (*post*, p. 245); and see, as to the effect of the proviso relating to plaintiffs beyond the seas, *Perry* v. *Jackson* (4 T. R. 516); *Lafond* v. *Ruddock* (13 C. B. 813; 2 Atk. 610—614); *Strithorst* v. *Græme* (3 Wils. 145); *Le Veux* v. *Berkeley* (5 Q. B. 836); *Townsend* v. *Deacon* (3 Exch. R. 706); *Smith* v. *Hill* (1 Wils. 134; 4 T. R. 311); *Denys* v. *Shuckburgh* (4 Y. & Coll. 47).

Imprisonment and beyond the seas.

One of several under disability.

Under the statute 4 Anne, c. 16, s. 19, if a right of action accrued against several persons, one of whom was beyond seas, the statute did not run until his return, though the others had never been absent from the kingdom (*Fannin* v. *Anderson*, 7 Q. B. 811; *Towns* v. *Mead*, 16 C. B. 123; see Merc. Law Amdt. Act, 1856, ss. 10, 11, *post*, pp. 244, 245).

Representatives of persons dying under disability.

Where a person died abroad, to whom a right of action had accrued during his residence there, and he never returned to this country, his executors could sue for it, although more than six years had elapsed since it accrued. It was unnecessary to consider the question whether the executor could maintain the action after the expiration of six years; *Parke*, B., inclining to the opinion that the executor was under no restraint; but *Rolfe*, B., thinking it would be more reasonable to consider the right of action as accruing to the executor at the death

of the testator, and to limit the right of action to six years (*Townsend* v. *Deacon*, 3 Exch. R. 706). A person gave his creditor a bill, and, before the bill arrived at maturity, went to India, whence he never returned. As soon as circumstances would permit after his death in India, his will was proved in England. A creditor's bill filed within six years after his death was held not barred (*Story* v. *Fry*, 1 Y. & Coll. C. C. 603; see *Williams* v. *Jones*, 13 East, 439; and *Flood* v. *Patterson*, 29 Beav. 295). 21 Jac. 1, c. 16, s. 7.

Express Acknowledgments.

THE STATUTE OF FRAUDS AMENDMENT ACT, 1828, ss. 1, 3, 4.

9 Geo. 4, c. 14.

An Act for rendering a Written Memorandum necessary to the Validity of certain Promises and Engagements.

[19th May, 1828.]

§ 1. *No Acknowledgment sufficient unless in Writing or by Payment*...233.

§ 3. *Indorsements by Payee not sufficient*...243.

§ 4. *Limitation Act*, 1623, *applied to Set-off* ..244.

The stat. 9 Geo. 4, c. 14, recites the stat. 21 Jac. 1, c. 16, s. 3, and the Irish stat. 10 Car. 1, sess. 2, c. 6, and that various questions had arisen in actions founded on simple contracts, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactments; and that it was expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof; and enacts (sect. 1), That in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint con- 9 Geo. 4, c. 14. In actions of debt or upon the case no acknowledgment shall be deemed sufficient, unless it be in writing or by part payment. Proviso for case of joint contractors.

9 Geo. 4, c. 14, s. 1.

tractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

See as to Ireland, 16 & 17 Vict. c. 113, ss. 24, 25, and 26.

Old law.

From an early period, although the time limited by the Lim. Act, 1623, had elapsed, the plaintiff was permitted to prove an acknowledgment of, or promise to pay, the debt within six years, which was sufficient to entitle him to recover (3 Y. & Jerv. 522). To provide a remedy against the vague and loose verbal promises which had been allowed to take cases out of the last-mentioned Act, the Statute of Frauds Amdt. Act, 1828, was passed (6 Bing. 264).

(1) *Acknowledgments in Writing*...234.
(2) *Acknowledgments by Payment*...240.

(1) Acknowledgments in writing.

The intention of the stat. 9 Geo. 4, c. 14, was not to make any alteration in the legal construction to be put upon acknowledgments or promises made by debtors, but merely to require a different mode of proof, substituting the certain evidence of writing, signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses. The inquiry, therefore, in a given case whether the written document amounts to an acknowledgment or a promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar effect (*Haydon* v. *Williams*, 7 Bing. 163; see *Courtenay* v. *Williams*, 3 Ha. 549; and *Moodie* v. *Bannister*, 4 Drew. 440). Since the statute a verbal order by the trustees of a turnpike act to pay a debt was held insufficient (*Emery* v. *Day*, 1 C. M. & R. 245).

Acknowledgments by agent.

Previously to the Merc. Law Amendment Act, 1856, it was held, under 9 Geo. 4, c. 14, that an acknowledgment signed by an agent of the debtor would not revive a debt barred by the Lim. Act, 1623, but that it must have been signed by the debtor himself (*Hyde* v. *Johnson*, 2 Bing. N. C. 776; *Clark* v. *Alexander*, 8 Scott, N. R. 165; see *Swift* v. *Winterbotham*, L. R. 8 Q. B. 249; and *Williams* v. *Mason*, 21 W. R. 386). An acknowledgment signed by an agent is now sufficient (see Merc. Law Amendment Act, 1856, s. 13, *post*, p. 246). Thus an acknowledgment by a solicitor bound his client (*Curwen* v. *Milburn*, 42 Ch. D. 432). And an acknowledgment by one partner would probably be regarded as an acknowledgment by the firm (Lindley, Partnership, 263, 5th ed.). Compare the case of payments by one partner (*Watson* v. *Woodman*, 20 Eq. 730; *Re Tucker, Tucker* v. *Tucker*, 1894, 3 Ch. 429). Where a debt due from a company to L. was barred, and the board of directors, of whom L. was one, passed a resolution in reference to the debt, it was said, that even if the resolution had been a sufficient acknowledgment, it would not have bound the company (*Lowndes* v. *The Garnett, &c. Co.*, 33 L. J. Ch. 418; 12 W. R. 573).

By one of several executors.

Since 9 Geo. 4, c. 14, one of several executors can bind the estate by an acknowledgment or promise (*Re Macdonald, Dick* v. *Fraser*, 1897, 2 Ch. 187), and after the death of the promisor payment of the debt may be ordered out of assets in hands of the surviving executors (*Ib.*). See before 9 Geo. 4, c. 14, *Tulloch* v. *Dunn*, 1 Ry. & M. 416; *Scholey* v. *Walton*, 12 M. & W. 514.

9 Geo. 4, c. 14.

A written acknowledgment of a debt is an answer to a plea of the statute, though made by an infant, if the debt was for necessaries supplied to him (*Willins* v. *Smith*, 4 Ell. & Bl. 180). With regard to acknowledgments of debts and contracts of infants generally, it is provided by Infants Relief Act, 1874, s. 2, that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

By infants.

Acknowledgment to a third party: to an agent.

An acknowledgment made to a third party will not take the case out of the statute (*Moodie* v. *Bannister*, 4 Drew. 439; *Fuller* v. *Redman*, 26 Beav. 619; *Grenfell* v. *Girdlestone*, 2 Y. & Coll. Exch. 676; *Tanner* v. *Smart*, 6 B. & C. 603; *Stamford Banking Co.* v. *Smith*, 1892, 1 Q. B. 765). But an acknowledgment to the agent of the creditor will be sufficient (*Edmonds* v. *Goater*, 15 Beav. 415).

When acknowledgment must be made.

An acknowledgment made within six years before action brought is sufficient, although it be made more than six years after the original cause of action (*Spickernell* v. *Hotham*, Kay, 669; see *Re Lane*, 23 Q. B. D. 74). Compare the rule on this point as to land, *ante*, p. 179, and as to money charged on land, *ante*, p. 200. An acknowledgment made after action brought cannot be used to take a case out of the statute (*Bateman* v. *Pinder*, 3 Q. B. 574).

Effect of an acknowledgment.

The legal effect of an acknowledgment of a debt, barred by the Statute of Limitations, is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the whole debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him (*Philips* v. *Philips*, 3 Hare, 299; since adopted, *Buckmaster* v. *Russell*, 10 C. B. N. S. 749; *Chasemore* v. *Turner*, L. R. 10 Q. B. 505). On this principle a mere acknowledgment of a debt, accompanied with a proposal to pay part, which has not been acceded to, is not sufficient to take the case out of this statute (*Francis* v. *Hawkesley*, 1 Ell. & Ell. 1052; 28 L. J. Q. B. 370).

Construction of an acknowledgment.

The construction of an acknowledgment is a question for the court, not the jury, except where the document is connected with other evidence affecting the construction (*Morrell* v. *Frith*, 3 M. & W. 402; *Bird* v. *Gammon*, 3 Bing. N. C. 883; *Power* v. *Barham*, 4 Ad. & Ell. 473). The later cases have decided that the effect of a document set up as an acknowledgment is entirely a question for the court, unless extrinsic evidence is necessary to qualify or explain it (*Smith* v. *Thorne*, 18 Q. B. 140).

Acknowledgment of pending account.

To prevent the right to have an account from being barred by the statute, it is not necessary to have an acknowledgment that a debt is actually due, but it is sufficient that there should be an acknowledgment that the account is pending, and a promise to pay the balance if it should be found to be against the accounting party (*Prance* v. *Sympson*, Kay, 678).

Amount need not be stated.

If, since the stat. 9 Geo. 4, c. 14, a defendant, by letter, admits a *balance to be due*, without stating the amount, this will take the case out of the statute, but the damages will be nominal unless the amount be proved at the trial (*Dickenson* v. *Hatfield*, 5 C. & P. 46; *Bird* v. *Gammon*, 3 Bing. N. C. 833; *Archer* v. *Leonard*, 15 Ir. Ch. Rep. 67, a promise to pay a solicitor an amount to be ascertained by taxation; *Cheslyn* v. *Dalby*, 4 Y. & C. 238, where the recitals of a deed amounted to a promise to pay an amount to be ascertained as mentioned in the deed; *Dodson* v. *Mackey*, 8 Ad. & El. 225, n.; *Dabbs* v. *Humphries*, 10 Bing. 446; *Lechmere* v. *Fletcher*, 1 C. & M. 623; *Waller* v. *Lacy*, 1 Scott, N. R. 186).

Bankrupt's balance sheet.

An admission by a bankrupt in his balance-sheet will not, as between the creditor and the bankrupt's assignees, take a debt out of the statute

9 Geo. 4, c. 14.

(*Pott* v. *Clegg*, 16 M. & W. 321); where it was also held that an admission in an unsigned letter, written and sent by direction of the assignees of a bankrupt, by an accountant employed by them to wind up the affairs of the bankrupt estate, would not take a debt of the bankrupt out of the statute (see *Everett* v. *Robertson*, 1 Ell. & Ell. 16, and *Ex p. Topping*, 34 L. J. Bk. 44).

Advertisement.

An advertisement under Law of Prop. Amendment Act, 1859, s. 29, to creditors to bring in their claims will not take a debt out of the statute (*Re Stephens, Warburton* v. *Stephens*, 43 Ch. D. 43). So in the case of advertisements before that act (*Scott* v. *Jones*, 4 Cl. & Fin. 382).

Deposition.

An admission in cross-examination, and appearing in a signed deposition, may amount to an acknowledgment (*Re Beynon*, 1873, W. N. 186).

Parol evidence.

Where a written promise to pay a debt barred by the statute has been lost, parol evidence of the contents of the writing is admissible (*Haydon* v. *Williams*, 7 Bing. 163) But it is doubtful whether the date of the written acknowledgment can be supplied by oral evidence (*Edmunds* v. *Downes*, 2 C. & M. 459).

Acknowledgment exempted from stamp duty. 9 Geo. 4, c. 14, s. 8.

No memorandum or other writing made necessary by 9 Geo. 4, c. 14, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps (9 Geo. 4, c. 14, s. 8; 16 & 17 Vict. c. 113, s. 27, Ir.). Under this section the following memorandum:—"I acknowledge to owe to M. 36*l.*, which I agree to pay him as soon as circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the statute, the debt itself being proved by other evidence (*Morris* v. *Dixon*, 4 Ad. & Ell. 845). When the parties mean to make an instrument solely to prevent the operation of 9 Geo. 4, c. 14, they must take care not to import into it terms which will make it liable to stamp duty as a promissory note. A promissory note, improperly stamped, is not admissible as a memorandum to take a case out of the statute under the 9 Geo. 4, c. 14, s. 8; that section applies only to instruments which might be stamped with an agreement stamp (*Jones* v. *Ryder*, 4 M. & W. 32; see also *Parmiter* v. *Parmiter*, 3 D. F. & J. 461).

What a sufficient acknowledgment. There must be—(a) acknowledgment, or (b) unconditional promise, or (c) conditional promise and evidence of condition performed.

A mere acknowledgment is not sufficient to take a case out of the statute, unless there be a promise to pay; upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, an implication will not arise (*Tanner* v. *Smart*, 6 B. & C. 602). A statement of inability to pay does not *per se* exclude the implication of a promise (*Firth* v. *Slingsby*, 58 L. T. 485). In *Smith* v. *Thorne* (18 Q. B. 134, 139), *Parke*, B., said, "the acknowledgment must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on some condition which has been fulfilled" (cited by *Hill*, J., *Everett* v. *Robertson*, 1 Ell. & Ell. 20). "There must be, in order to take the case out of the statute, one of the three following things: either there must be an acknowledgment of the debt from which a promise to pay it must be implied: or secondly, there must be an unconditional promise to pay the debt: or thirdly, there must be a conditional promise to pay the debt in writing, and evidence that that condition has been performed" (*Mitchell's Claim*, 6 Ch. 828).

Instances of sufficient acknowledgments.

The following letters written by debtors have been held to be sufficient acknowledgments of debts from which a promise to pay must be implied:—"In regard to your statement of account received, I am ashamed the account has stood so long, I must beg to trespass on your kindness a short time longer" (*Cornforth* v. *Smithard*, 1 H. & N. 13). "I have received your bill, it does not, I think, specify sufficiently to which cottages the work is done. I shall feel obliged if you will more particularly explain, and take your agreements to Mrs. H. (the defendant's agent). It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked Mrs. H. to mark the agreements, and send them to me, and I will return

them by first post, with instructions to pay, if correct" (*Sidwell* v. *Mason*, 2 H. & N. 306). "When the policy is paid on the 29th October, I hope that you will have whole of your account ready for me as I hope to be with you on that day": followed by a second letter, "Oct. 25, Mr. V., when here on Saturday, stated that the amount due against me was about 280*l.*; of course this includes the 100*l.* and interest that I had some years since, and the 40*l.* promissory note that I jointly signed with the late Mr. B." (*Godwin* v. *Culley*, 4 H. & N. 373). "I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week" (*Lee* v. *Wilmot*, L. R. 1 Ex. 364). "I shall be obliged to you to send in your account made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done": followed by another letter, "I again beg of you to send in your account" (*Quincey* v. *Sharpe*, 1 Ex. D. 72). A request for the delivery of "any unsettled bill" (*Curwen* v. *Milburn*, 42 Ch. D. 424). The usual submission, in a petition for taxation, to pay what shall be found due (*Re Margetts*, 1896, 2 Ch. 263). An indorsement by the maker of a promissory note, with his name, together with the date, upon the note (*Bourdin* v. *Greenwood*, 13 Eq. 281). So where a first mortgagee who had sold the property, wrote to the second mortgagee enclosing account showing balance after payment of first mortgage, and offered explanation (*Banner* v. *Berridge*, 18 Ch. D. 254, see 274).

S. borrowed of J. 200*l.* upon promissory notes, and a year afterwards remitted to J. 10*l.* on account of the interest due, and sent him a bill of 17*l.* for goods. J., by note, acknowledged the 10*l.* and the bill and stated that he placed both sums to the credit of S., and requested S. to receipt the bill and return. In an action for the 17*l.*, it was held, that the above letter took the case out of the statute (*Evans* v. *Simon*, 9 Exch. 282).

Unconditional promises.

The following were held to be unconditional promises to pay:—"I hope to be in H. very soon, when I trust everything will be arranged with Mrs. W. agreeable to her wishes" (*Edmonds* v. *Goater*, 15 Beav. 415; see *Fuller* v. *Redman*, 26 Beav. 620). "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are a short time and all will be right" (*Collis* v. *Stack*, 1 H. & N. 605, in which case it was said that the question in these cases is, whether the statement as to the time of payment is merely an excuse, or the condition on which payment is to be made). "Show this letter to Mrs. W., and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity" (*Wilby* v. *Elgee*, L. R. 10 C. P. 497). "The old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged, we will see you are paid" (*Chasemore* v. *Turner*, L. R. 10 Q. B. 500). "If you send me the particulars of your account with vouchers, I shall have it examined, and cheque sent you for the amount due, but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim" (*Skeet* v. *Lindsay*, 2 Ex. D. 314).

In 1834, A. gave B. a promissory note payable on demand. Demand having been made, but neither principal nor interest having been paid, in 1848 A. wrote to B. a letter referring to a promissory note for a debt which he acknowledged and promised thereby to pay. It was held, that in the absence of proof of the existence of any other promissory note to which it could relate, the letter of 1848 must be taken to refer to the promissory note, and thus to take it out of the statute (*Spickernell* v. *Hotham*, Kay, 699).

Conditional promises.

Condition performed.

The following is an instance of a conditional promise to pay, the condition having been performed. A debtor wrote to his creditor, "I will pay you as soon as I get it in my power: before I cannot." Held, that time commenced to run when the debtor became of ability to pay, and not before (*Hammond* v. *Smith*, 33 Beav. 452; see *Waters* v. *Thanet*, 2 Q. B. 757, *ante*, p. 228; *Buccleugh* v. *Eden*, 61 L. T. 360).

See also *Archer* v. *Leonard* (15 Ir. Ch. R. 267); *Leland* v. *Murphy* (16

9 Geo. 4, c. 14.

Ir. Ch. R. 500); *Burrows* v. *Baker* (I. R. 3 Eq. 596); *Fiske* v. *Mitchell* (19 W. R. 798).

Instances of insufficient acknowledgments.

An acknowledgment, accompanied with what is a contradiction of any promise to pay, is not sufficient (*Linsell* v. *Bonsor*, 2 Bing. N. C. 241). A mere acknowledgment, though it may, under circumstances, amount to a new promise, yet if it does not it is not a sufficient answer to the statute (*Fearn* v. *Lewis*, 6 Bing. 349; *Scales* v. *Jacob*, 3 Bing. 638; *Ayton* v. *Bolt*, 4 Bing. 105). And therefore a letter acknowledging that the plaintiff made a demand, but not acknowledging the propriety of the demand, and denying all liability on the defendant's part to make the payment, was held not to raise an implication of a promise to pay (*Brigstock* v. *Smith*, 1 C. & M. 483). The following letters written by debtors have been held not to be sufficient acknowledgments of debts from which a promise to pay could be implied:—"I am happy to say that by that time both the principal and interest will have been paid in full" (*Green* v. *Humphreys*, 26 Ch. Div. 474). "A paper has been received purporting to be a memorandum of account between you and this company, which is altogether incorrect, omitting all deductions and credits, which would leave a balance considerably in their favour. The company are still willing to have all accounts decided by arbitration" (*Mitchell's Claim*, 6 Ch. 822). "I am in hopes that I shall be able to transfer the mortgage to enable me to clear off the whole that may be standing against me" (*Smith* v. *Thorne*, 18 Q. B. 134). "I give the above accounts to you, so you must collect them and pay yourself, and I will then be clear" (*Routledge* v. *Ramsey*, 8 Ad. & Ell. 221). "I have been in almost daily expectation of being enabled to give a satisfactory reply to your application. I will call upon you (the plaintiff's solicitor) to-morrow on the matter" (*Morrell* v. *Frith*, 8 C. & P. 246). "I am not conscious of ever having had this bill put before me till now, nor did I know it was owing. I am much annoyed that it should have been so long unsettled" (*Collinson* v. *Margetson*, 27 L. J. Ex. 305). "I must candidly tell you once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the pantechnicon by paying the expenses incurred thereon, as before agreed when Mr. F. (one of the plaintiffs) was in town" (*Cawley* v. *Furnell*, 12 C. B. 291). "I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. In time an augmentation of salary may enable me to propose some satisfactory arrangement" (*Rackham* v. *Marriott*, 2 H. & N. 196). "It is agreed that Mr. H. in his general account shall give credit to Dr. H. for 174*l.*, being for bricks delivered to the trustees of Y. P. chapel in 1834" (*Hughes* v. *Paramore*, 7 D. M. & G. 229). "I have no wish to have anything to do with the lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army. But as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated" (*Buckmaster* v. *Russell*, 10 C. B. N. S. 745). "I will not fail to meet the plaintiff on fair terms, and have now a hope, before perhaps a week from this date, I shall have it in my power to pay him at all events a portion of the debts, when we shall settle about the liquidation of the balance" (*Hart* v. *Prendergast*, 14 M. & W. 745; see *Gardner* v. *M'Mahon*, 3 Q. B. 561; *Fuller* v. *Redman*, 26 Beav. 620). A letter in which the defendant stated "that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; and that some time must elapse before payment, but that the defendant is authorized by A. to refer the plaintiff to him for any further information" (*Whippy* v. *Hillary*, 3 B. & Ad. 399).

The renewal of mere former promissory notes by a debtor cannot be considered as a promise rendering a party liable to pay original debts; all that can be inferred is that the party intended to give a fresh security limited to the liability on the new notes (*Foster* v. *Dawber*, 6 Exch. 839).

9 Geo. 4, c. 14.

Instances of insufficient acknowledgments.

A deed of composition by which, after reciting that the defendant was indebted to the plaintiff and others, the former assigned his property to the plaintiff, in trust to sell and to pay all such creditors as should sign the schedule of debts annexed, but which was neither signed by the plaintiff nor specified the amount of his debt, and had become void under a proviso, was held not to be evidence of a promise nor an acknowledgment in writing within the stat. 9 Geo. 4, c. 14, for the acknowledgment was only of some debt, but what, remained to be made out by parol evidence (*Kennett* v. *Milbank*, 8 Bing. 38).

Commissioners under a town improvement act appointed a committee, who made a report with a schedule of liabilities, including arrears of salary due to a clerk more than six years. The commissioners made an entry in their minute book that they accepted the report. Held, no sufficient acknowledgment of the debt (*Bush* v. *Martin*, 2 H. & C. 311; 11 W. R. 1078; see *Re Severn R. Co.*, 1896, 1 Ch. 559; see also *Emery* v. *Day*, 1 C. M. & R. 245; *Lowndes* v. *The Garnett, &c. Co.*, 33 L. J. Ch. 418; 12 W. R. 573; *ante*, p. 234). In *Williams* v. *Griffith* (3 Exch. 335), letters were not sufficient to take the plaintiff's claim, nor an account and affidavit sufficient to take the defendant's set-off, out of the statute. P., being indebted to the executors of C. in 1,100*l.* to which A. was beneficially entitled, sent a letter to A., as follows:—"I have sent you a note for the money due to you, which your mother left for you." Inclosed in this letter was a promissory note on receipt stamp for 1,100*l.*, and 4*l.* per cent. interest. At the time of this letter and note being sent the debt was barred by the statute: it was held, that there was no sufficient acknowledgment by P. without referring to the note to see what was the promise made, and that this could not be done for want of a proper stamp (*Parmiter* v. *Parmiter*, 3 D. F. & J. 461). An admission of a debt made to a person, who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgment though the discharge was inoperative in itself, and was given upon a consideration which the debtor failed to observe (*Goate* v. *Goate*, 1 H. & N. 29). A debtor presented a petition for arrangement with his creditors under 7 & 8 Vict. c. 70, and inserted the debt in the account of his debts, and his proposal was, that "for the future payment or compromise of such debts and engagements," he proposed to assign all his estate and effects to trustees: held, not to be sufficient acknowledgment (*Everett* v. *Robertson*, 1 Ell. & Ell. 16). An account stated between the defendant, a part owner and ship's husband, and his co-owners, in which the items of the plaintiff's account for work done and money advanced are included, is not a sufficient acknowledgment (*Nash* v. *Hill*, 1 F. & F. 198). The drawer of a bill wrote to the holder, "If in funds I would immediately pay the money and take the bill out of your hands." Held an insufficient acknowledgment (*Richardson* v. *Barry*, 29 Beav. 22). In 1853, H. as principal and the defendant as surety gave to the plaintiff their joint and several note for payment of 200*l.* on demand. In 1861, H. assigned all his property for the benefit of his creditors, and the defendant signed and gave to the plaintiff the following letter: "I hereby consent to your receiving the dividend under H.'s assignment, and agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff received the dividend, and in 1862 sued the defendant for the balance of the note. Held not a sufficient acknowledgment (*Cockrill* v. *Sparke*, 1 H. & C. 699; 11 W. R. 428). In *Cassidy* v. *Firman* (I. R. 1 C. L. 8), and *Crawford* v. *Crawford* (I. R. 2 Eq. 166) acknowledgments were held to be insufficient. See further Darb. & Bos. Stat. Lim. 2nd ed. 81—91.

Conditional promises.

Condition not performed.

The following have been held to be conditional promises, the conditions of which were not shown to have been performed:—"I will send it as soon as possible, send your account next week" (*Bethell* v. *Bethell*, 34 Ch. D. 561); "I shall be glad as soon as my position becomes somewhat better to begin again my instalments" (*Meyerhoff* v. *Froehlick*, 4 C. P. Div. 63); "I cannot pay the debt at present, but I will pay it as soon as I can" (*Tanner* v. *Smart*, 6 B. & C. 602); "I shall be happy to pay you both

9 Geo. 4, c. 14.

principal and interest as soon as convenient, I shall pay no more interest till we have a fair settling" (*Edmunds* v. *Downes*, 2 C. & M. 459).

(2) ACKNOWLEDGMENT BY PAYMENT.

In addition to written acknowledgments, a creditor may, for the purpose of taking a case out of the statute, rely on the act of part payment. No other act will suffice (*Emery* v. *Day*, 1 C. M. & R. 249). The payment is sufficient even though at the time the debt is barred (*Re Lane*, 23 Q. B. D. 74); and even if the payment could be recovered back as *pro tanto* a fraudulent preference (*Ib.*).

Part payment of principal.

In order to take a case out of the statute by a part payment it must appear, in the first place, that the payment was made on account of a debt; secondly, that the payment was made on account of the debt for which the action is brought; and thirdly, that the payment was made as part of a greater debt; because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at time of the payment (*Tippets* v. *Heane*, 1 C. M. & R. 252; see *Wainman* v. *Kynman*, 1 Exch. R. 118; *Waugh* v. *Cope*, 6 M. & W. 829). Part payment to come within the statute must be a payment from which a promise may be inferred to pay the remainder (*Stamford Banking Co.* v. *Smith*, 1892, 1 Q. B. 769; *Foster* v. *Dawber*, 6 Exch. 839. See *Sims* v. *Brutton*, 5 Exch. 802; *Re Somerset, Somerset* v. *Poulett*, 1894, 1 Ch. 268; *Friend* v. *Young*, 1897, 2 Ch. 421). The reason why the effect of such a payment is not lessened by the act 9 Geo. 4, c. 14, is, that it is not a mere acknowledgment *by words*, but it is coupled with a fact (*Waters* v. *Tompkins*, 2 C. M. & R. 726; see *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493).

Payment of interest.

Payment of interest upon a promissory note payable on demand will take the principal sum secured by the note out of the statute, although there be no independent evidence of any demand having been made (*Bamfield* v. *Tupper*, 7 Exch. 27; *Beally* v. *Greenslade*, 2 C. & J. 61; *Wyatt* v. *Hodson*, 8 Bing. 309). But the payment of interest must be such that a promise to pay the principal can be inferred (*Morgan* v. *Rowlands*, L. R. 7 Q. B. 498). Accordingly, payment under compulsion of law is not enough (*Ib.*). And payment by trustees to a tenant for life of interest on a mortgage debt was not an acknowledgment of their liability to pay the principal in respect of which a breach of trust had been committed (*Re Somerset, Somerset* v. *Poulett*, 1894, 1 Ch. 231). As to whether a part payment of principal will take a claim for interest out of the statute, see *Collyer* v. *Willcock*, 4 Bing. 313; Darb. & Bos. Stat. Lim. 108.

Insufficient payments.

Payment into court will not keep a debt alive (*Long* v. *Greville*, 3 B. & C. 10; distinguish *Re Dennis*, 1895, 2 Q. B. 630). Nor will the payment of a dividend under an insolvency (*Davies* v. *Edwards*, 7 Exch. 22; *Taylor* v. *Hollard*, 1902, 1 K. B. 676), or under an inspectorship deed (*Ex p. Topping*, 34 L. J. Bank. 44). The effect of a payment may be qualified by words used at the time, but the jury must judge the truth of statements accompanying the admission of a previous payment (*Baildon* v. *Walton*, 1 Exch. 617; see *Trentham* v. *Deverill*, 3 Bing. N. C. 397). Where payment was relied upon as taking a debt out of the statute, it was for the jury to judge whether such payments were made in respect of interest or in respect of an annuity (*Baildon* v. *Walton*, *sup.*). As to the effect of payments by guardians of one union to those of another, see *Wycombe Union* v. *Eton Union* (1 H. & N. 687).

Appropriation.

Where, several debts being due of which some are barred and some not barred, the debtor pays a sum without appropriating it to any debt, such payment will not, in the absence of evidence, be appropriated so as to revive the debts barred (*Mills* v. *Fowkes*, 5 Bing. N. C. 455). *Semble*, the creditor cannot, without the consent of the debtor, appropriate the payment, so as to entitle himself to sue for the balance of a barred debt (*Nash* v. *Hodgson*, 6 D. M. & G. 490; see, however, the judgment of *Knight-Bruce*, L. J., *S. C.*). And such consent will not be inferred from the debtor omitting to question an account sent to him which shows the appropriation (*Re McHenry, McDermott* v. *Boyd*, 71 L. T. 146). The

creditor, however, may apply the payment towards satisfaction of such debt (*Mills* v. *Fowkes*, *sup.*; distinguish *Friend* v. *Young*, 1897, 2 Ch. 421). It may, of course, be shown that the debtor has himself appropriated the payment to any particular debt (*Gwynn* v. *Gwynn*, 41 L. T. 610).

Payment by an agent to a principal of 300*l.* "on account" was an acknowledgment that there was an account between them on which more than 300*l.* would be payable, from which a promise to pay that balance must be inferred (*Friend* v. *Young*, 1897, 2 Ch. 436; see *Walker* v. *Butler*, 6 E. & B. 506).

Proof of payment —by parol evidence;

Part payment of principal or payment of interest on account of a debt is not affected by the 9 Geo. 4, c. 14, and therefore a *parol acknowledgment* of payment within six years before the action brought will take the case out of the statute (*Cleave* v. *Jones*, 6 Exch. 573; 20 L. J. Exch. 238; *Edwards* v. *Janes*, 1 K. & J. 534; *Bevan* v. *Gething*, 3 Q. B. 740). A witness, who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment was in his own handwriting, but could not recollect the fact of payment: held, sufficient evidence to go to the jury, as to the fact of payment (*Trentham* v. *Deverill*, 3 Bing. N. C. 397; see further, as to parol evidence of part payment, *Morley* v. *Finney*, 1870, W. N. 82). A letter not in itself sufficient as a written acknowledgment to bar the statute, may be left, with other evidence, to the jury upon the question whether there have been payments or deliveries of goods in part satisfaction of the debt within the six years. It will be a question for the jury whether the payments or deliveries of goods were made and received on account of the particular debt sued for (*Collinson* v. *Margesson*, 27 L. J. Ex. 305).

—by indorsements on bills and notes. 9 Geo. 4, c. 14, s. 3.

It was enacted by sect. 3 (*post*, p. 243) that no indorsement or memorandum of any payment written or made after the 1st Jan. 1829, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the statute. As to the law before this act, see *Briggs* v. *Wilson* (5 D. M. & G. 12). The section only applies to the case when there is nothing more than an indorsement or memorandum on the note or bill or other writing which constitutes the contract, and does not prevent payment being proved by an entry in an independent account book (*Bradley* v. *James*, 13 C. B. 822).

Entries in debtor's books.

See as to admitting in evidence entries in a deceased's books, on the ground that they were against interest, *Taylor* v. *Witham* (3 Ch. D. 605); *Newbould* v. *Smith* (29 Ch. D. 882).

Modes in which payment can be made.

To constitute a payment sufficient to take a debt out of the statute it is not essential that money should pass between the parties. Thus there was a sufficient payment where the creditor gave a receipt (*Maber* v. *Maber*, L. R. 2 Ex. 153); and where a debtor supported a creditor's child (*Bodger* v. *Arch*, 10 Exch. 333). The dictum in *Brocklehurst* v. *Jessop* (7 Sim. 438), as to an equitable mortgagee's receipt of rents being a payment within the proviso in 9 Geo. 4, c. 14, s. 1, has been overruled (*Cockburn* v. *Edwards*, 18 Ch. Div. 449). Anything received upon an agreement, in reduction of a debt, is a payment within 9 Geo. 4, c. 14, s. 1, sufficient to take the debt out of the statute (*Hooper* v. *Stephens*, 4 Ad. & Ell. 71). If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is sufficient part payment (*Hart* v. *Nash*, 2 C. M. & R. 337); but in order to make a delivery of goods operative, there must be some evidence of an agreement that such delivery shall be deemed equivalent to payment (*Cottam* v. *Partridge*, 4 Scott, N. R. 819).

Payment —by delivery of goods;

—by settlement of accounts.

The stat. 9 Geo. 4, c. 14, does not apply to the fact of an account stated, where there are items on both sides; but the going through an account with items on both sides and striking a balance converts the *set-off* into *payments* (*Ashby* v. *James*, 11 M. & W. 342; *Worthington* v. *Grimsditch*, 7 Q. B. 484; *Clark* v. *Alexander*, 8 Scott, N. R. 165; *Amos* v. *Smith*, 1 H. & Colt. 238). See *Williams* v. *Griffiths* (2 C. M. & R. 45); *Hughes*

9 Geo. 4, c. 14.

v. *Paramore* (7 D. M. & G. 229), and also *Scholey* v. *Walton* (12 M. & W. 510), where the setting-off a sum of money in an account stated and settled was held to be a payment within the statute (see *Stewart* v. *Connick*, I. R. 5 C. L. 562). The going through an account where there are items on one side only does not alter the situation of the parties at all or constitute a new consideration (*Smith* v. *Forty*, 4 C. & P. 126; *Jones* v. *Ryder*, 4 M. & W. 32; *Mills* v. *Fowkes*, 5 Bing. N. C. 455).

Payment —by giving note or bill.

Where a bill is given in payment on account of a debt in such a manner as to raise an implication of a promise to pay the balance, this is sufficient part payment (*Turney* v. *Dodwell*, 3 Ell. & Bl. 136; 23 L. J. Q. B. 137; see *Irving* v. *Veitch*, 3 M. & W. 90). A testator died in 1829, part of his assets consisted of a promissory note for 100*l.* of five persons. All interest on it was paid down to 1837, but by whom did not appear. In 1837, the executor took the note of one of the five for the 100*l.*, and interest was paid until 1842. Subsequently nothing was done, and the debt became barred by the statute: it was held, that the second note must be treated as a new security given for payment of the old debt, and the executor was charged with the 100*l.* (*Sparkes* v. *Restall*, 22 Beav. 587).

Payment to an agent;

Payment may be made to an agent of the creditor (*Evans* v. *Davies*, 4 Ad. & El. 840). The payment of interest to a *cestui que trust* was held to keep alive the right of the trustee to maintain an action on a promissory note (*Megginson* v. *Harper*, 2 C. & M. 322). Payment to a husband of interest on a promissory note given to his wife before marriage, was held sufficient payment (*Hart* v. *Stephens*, 6 Q. B. 937).

—to a stranger.

Payment to a stranger is not sufficient (*Stamford Banking Co.* v. *Smith*, 1892, 1 Q. B. 765). Unless possibly where the payment is made to a person filling a representative capacity, or who was believed to fill that capacity, when the payment might enure for the benefit of the persons for whom it was believed to be made (*Ib.* 769; *Clark* v. *Hooper*, 10 Bing. 480).

Payment by a wife;

Before M. W. P. Act, 1882, it was held that an acknowledgment or part payment by a woman before marriage kept her debt alive, both as against herself and her after-taken husband. But similar acts by her after marriage were of no avail either against herself or as against her husband (*Pittam* v. *Foster*, 1 B. & C. 248; *Neve* v. *Hollands*, 18 Q. B. 262). The M. W. P. Act, 1882, enables a wife to keep alive her liabilities in respect of her separate estate by an acknowledgment or part payment, or by suffering judgment to be obtained against her. But such acts do not affect her husband (*Beck* v. *Pierce*, 23 Q. B. Div. 322).

—by an agent;

The words of the act, that "nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever," can never mean a payment made by a stranger, and without authority, but payment made by the principal debtor or someone acting by his authority (*Linsell* v. *Bonsor*, 2 Bing. N. C. 245; *Homan* v. *Andrews*, 1 Ir. Ch. R. 106). In *Jones* v. *Hughes* (5 Exch. 104), where money was advanced on a promissory note signed by the defendant thus: "I. H., churchwarden, J. E., overseer, or *others for the time being*," it was a question for the jury, whether the defendant had not constituted the parish officers for the time being his agents for payment of interest (see *Rew* v. *Pettet*, 1 Ad. & E. 196). As to whether payments by a company affect a director who has guaranteed the company's debt, see *Re Wolmershausen* (62 L. T. 541). In paying interest on a second mortgage a solicitor was held not to be the agent of the first mortgagee for whom he had previously acted on a sale (*Thorne* v. *Heard*, 1893, 3 Ch. 530). Payment of

—by receiver;

part of a debt by a receiver of a business (appointed under a power in a mortgage) kept alive the debt against the estate of the owner of the business (*Re Hale, Lilley* v. *Foad*, 1899, 2 Ch. 107; compare *Whitley* v. *Lowe*, 2 De G. & J. 704).

—by one of a number of joint contractors, &c.;

As to payments by one of a number of joint contractors, executors, or partners, see Merc. Law Amdt. Act, 1856, s. 14, *post*, p. 246. The case of payments by one of a number of persons bound by several promises is dealt with in *Re Wolmershausen* (62 L. T. 541).

9 Geo. 4, c. 14.

—of interest on simple contract debt by devisee for life of debtor's real estate;

—by executor, effect as against beneficial devisee.

Payment of interest on a simple contract debt by a devisee for life of the debtor's real estate will keep the creditor's right of action alive against all parties interested in such real estate in remainder (*Hollingshead* v. *Webster*, 37 Ch. D. 651). It was said in one case that such a payment would operate to prevent time running as regards the testator's real estate only (*Boatwright* v. *Boatwright*, 17 Eq. 74).

It was held under 47 Geo. 3, c. 74, that a payment by the executrix of a trader would not take a debt out of the statute, so as to enable the creditor to claim payment out of the real estate in the hands of a devisee (*Putnam* v. *Bates*, 3 Russ. 188; *cmf. Wilson* v. *Leonard*, 3 Beav. 373, where a devisee was held not bound by the amount of a claim substantiated against the executor in an action at law to which he was not a party). And it has since been held under Administration of Estates Act, 1833 (*post*), that the payment of interest on a debt of the testator by his executors, they being also trustees of his real estate not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate; for although the executors and trustees were the same persons, they filled different characters, and where the payments were made by them in the character of executors only, the real estate was not affected by it (*Fordham* v. *Wallis*, 10 Hare, 217; compare *Astbury* v. *Astbury*, 1898, 2 Ch. 119, where *Stirling*, J., held that an acknowledgment which might have bound personal estate did not bind real estate; and see *Re England, Steward* v. *England*, 1895, 2 Ch. 109). The demand of a simple contract creditor as against the real estate of the testator, which would otherwise be barred by the statute, is not kept alive by the effect of any right to have the assets marshalled (*Fordham* v. *Wallis, sup.*; see, however, Darb. & Bos. Stat. Lim. 2nd ed. 130).

Where executor is beneficial devisee.

Payment of interest on a testator's simple contract debt made by a party filling the two characters of beneficial devisee and executor, will be attributed to both characters, and not to one only, for the moral obligation does not attach more to one character than to the other.

Where executor is trustee.

But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, and is answerable also in the character of trustee of another; for he then represents two persons, and the question in such a case is by whom the promise is made and not what is its extent or effect (*Fordham* v. *Wallis*, 10 Hare, 217; compare *Brown* v. *Gordon*, 16 Beav. 302; and as to payments keeping alive a mortgagee's twofold remedies against the person and the land, see *Pears* v. *Laing*, 12 Eq. 41; *Dibb* v. *Walker*, 1893, 2 Ch. 429; *Leahy* v. *De Moleyns*, 1896, 1 I. R. 206).

Effect in keeping alive right to make legatees refund.

Payments having been made to some residuary legatees by the executors, it was held that such payments whilst the debts of the testator remained unpaid were a breach of trust, and that the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor as against the residuary legatees to the extent of their interest in the residue, and they must therefore refund the moneys they had received on account of the estate (*Fordham* v. *Wallis*, 10 Hare, 217). A claim by a creditor to make legatees refund was held barred by lapse of time and acquiescence (*Blake* v. *Gale*, 32 Ch. Div. 571).

See further as to the acknowledgment of a simple contract debt by payment, *Whitcomb* v. *Whiting* (1 Smith, L. C.); and see the cases quoted under R. P. Lim. Act, 1833, s. 40 (*ante*, p. 197), and Civil Proc. Act, 1833, s. 5 (*ante*, p. 219).

Indorsements of payments.

3. That no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such pay-

9 Geo. 4, c. 14, s. 3.

ment, so as to take the case out of the operation of either of the said statutes.

As to this section, see *ante*, p. 241.

Simple contract debts alleged by way of set-off.

4. That the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

See *ante*, p. 223.

VI.—The Mercantile Law Amendment Act, 1856.

19 & 20 Vict. c. 97, ss. 9—14.

An Act to amend the Laws of England and Ireland affecting Commerce. [29th July, 1856.]

§ 9. *Actions on Merchants' Accounts to be commenced within six years*...244.
§ 10. *Absence beyond seas and imprisonment of creditor not to be disability*...244.
§ 11. *Joint Debtors beyond seas*...245.
§ 12. *Definition of "beyond seas"*...245.
§ 13. *Acknowledyments by agents*...246.
§ 14. *Part payment by one co-contractor*...246.

19 & 20 Vict. c. 97, s. 9.

Limitation of actions for "merchants' accounts."

9. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandize between merchant and merchant (*a*), their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

(*a*) *Ante*, pp. 222, 224.

Absence beyond seas or imprisonment of a creditor not to be a disability.

10. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of the twenty-first year of the reign of King James the First, chapter sixteen, section three (*b*), or by the act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the act of the fifty-third year of the reign of King George the

Third, chapter one hundred and twenty-seven, section five (*c*), or by the acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one and forty-two (*d*), and chapter forty-two, section three (*e*), or by the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*f*), shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons, being imprisoned at the time of such cause of action or suit accrued.

19 & 20 Vict. c. 97, s. 10.

(*b*) *Ante*, p. 222.
(*c*) *Ante*, p. 210.
(*d*) *Ante*, pp. 190, 200.
(*e*) *Ante*, p. 215.
(*f*) *Ante*, p. 215.

This section was retrospective, and included causes of action accrued before the statute was passed (*Pardo* v. *Bingham*, 4 Ch. 755; see *Cornill* v. *Hudson*, 8 El. & Bl. 429).

Period of limitation to run as to joint debtors in the kingdom, though some are beyond seas.

11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas; and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

Judgment recovered against joint debtors in the kingdom to be no bar to proceeding against others beyond seas after their return.

See *ante*, p. 232.

Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this act.

12. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this act.

See R. P. Lim. Act, 1833, s. 19, *ante*, p. 196; Civil Proc. Act, 1833, s. 7, *ante*, p. 221. This section of the act is not retrospective (*Flood* v. *Patter-*

19 & 20 Vict. c. 97, s. 12.

son, 29 Beav. 295). A testator residing in Jersey appointed his widow, who also lived there, his executrix. She proved his will in Jersey, but not in England, and, though she had been three weeks in England shortly after his death, she did not act as executrix in England: held, that she could not be sued in this country, and that time did not therefore run in favour of her testator's estate (*Ib.*).

Provisions of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

13. In reference to the provisions of the acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight (*i*), and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven (*k*), an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

(*i*) *Ante*, pp. 233, 236. (*k*) *Ante*, pp. 234, 236.

Part payment by one contractor, &c. not to prevent bar by certain Statutes of Limitations in favour of another contractor, &c.

14. In reference to the provisions of the acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three (*l*), and of the act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three (*m*), and of the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*n*), when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors, or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

(*l*) *Ante*, p. 222. (*m*) *Ante*, p. 215. (*n*) *Ante*, p. 216.

Old law as to payments by one of several joint contractors.

Before this act, it was held that payment of interest by one of the makers of a joint and several promissory note was sufficient to take the case out of the Statute of Limitations as against the other maker (*Whitcomb* v. *Whiting*, 2 Doug. 652), although such payment was made after the statute had run (*Channell* v. *Ditchburn*, 5 M. & W. 494; *Goddard* v. *Ingram*, 3 Q. B. 839; see *Atkins* v. *Tredgold*, 2 B. & C. 23; *Slater* v. *Lawson*, 1 B. & Ad. 396; *Burleigh* v. *Stott*, 8 B. & C. 36; *Munderston* v. *Robertson*, 4 M. & R. 140. Where a debtor, A., gave as security a note of himself and another, B., a payment on behalf of B., after the statute has begun to run, was held to revive the debt as against A. (*Ex p. Woodman*, 3 Mont. & A. 613). The doctrine of *Whitcomb* v. *Whiting* was applied to the case of one of the co-contractors being a principal and the other a surety (*Perham* v. *Raynall*, 2 Bing. 306; *Wyatt* v. *Hodson*, 8 Bing. 309).

But the doctrine was limited to cases where a joint liability existed, and was never applied where the liability arose from promises which were several only (*Re Wolmershausen*, 62 L. T. 544); even where one of the promisors was a principal mortgaging real estate and another a surety for him (*Ib.*). So where a joint contract is severed by the death of one of the

Payments

contractors, nothing can be done by his personal representatives to take the debt out of the statute as against the survivor (*Slater* v. *Lawson*, 1 B. & Ad. 396), nor by the survivor so as to affect the deceased (*Atkins* v. *Tredgold*, 2 B. & C. 23). 19 & 20 Vict. c. 97, s. 14.

after death of one of several joint contractors.

So also payments of interest on a partnership debt by surviving partners have not the effect of taking the debt out of the statute as against the real or personal estate of a deceased partner (*Way* v. *Bassett*, 5 Hare, 55; *Brown* v. *Gordon*, 16 Beav. 302). See the doubts previously expressed as to this, *Winter* v. *Innes* (4 M. & Cr. 111); *Braithwaite* v. *Britain* (1 Keen, 221). Even where payments are made by a surviving partner, who is also executor of the deceased partner, the presumption seems to be that the payments are made in the character of surviving partner, and not as executor (*Thompson* v. *Waithman*, 3 Drew. 628). Partners: payments after death of one of several;

payments after dissolution.

Where a partnership continues, and all the partners are living, it has been decided, since 19 & 20 Vict. c. 97, that the above section does not apply to a payment made by one partner on account of a debt due by the firm, such a payment being considered as a payment of the firm itself (*Goodwin* v. *Parton*, 42 L. T. 91; see *Watson* v. *Woodman*, 20 Eq. 730). But where a partner retires, and the retirement is publicly announced, part payment by a continuing partner cannot be set up against the retiring partner as an answer to the statute (*Watson* v. *Woodman*, 20 Eq. 721). *Secus* where the retirement is secret (*Re Tucker*, 1894, 3 Ch. 429).

Executors.

For the effect before the Merc. Law Amdt. Act, 1856, of a payment by one of several executors as regards his co-executors, see *Atkins* v. *Tredgold* (2 B. & C. 23); *Scholey* v. *Walton* (12 M. & W. 512). The effect since the act of one of several executors paying interest on a simple contract debt of his testator is discussed, *Hollinshed* v. *Webster* (37 Ch. D. 658). See *Re Macdonald, Dick* v. *Fraser*, 1897, 2 Ch. 181.

Cases on the section.

Under the above section (which was held not retrospective as regards the date of the payment, *Jackson* v. *Woolley*, 8 E. & B. 784), part payment by one of two makers of a joint and several promissory note did not take the case out of the statute as against the other (*Cockrill* v. *Sparkes*, 1 H. & C. 699). The section does not apply in the case of payments under R. P. Lim. Act, 1874, s. 8, *ante*, p. 211 (*Re Frisby, Allison* v. *Frisby*, 43 Ch. Div. 106). As to the effect of a mortgagor's payment of interest where by a separate instrument a surety had guaranteed the mortgage debt, see *Re Powers, Lindsell* v. *Phillips* (30 Ch. Div. 291, a separate bond); *Re Wolmershausen* (62 L. T. 541, a separate promissory note).

16. In citing this act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856." Short title.

17. Nothing in this act shall extend to Scotland. Extent of act.

VII.—The Trustee Act, 1888.

51 & 52 Vict. c. 59, ss. 1, 8, 12.

An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees. [24th December, 1888.]

Short title, extent, and definition.

1.—(1.) This act may be cited as the Trustee Act, 1888.
(2.) This act shall not extend to Scotland.

51 & 52 Vict. c. 59, s. 1.

(3.) For the purposes of this act, the expression "trustee" shall be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law, as well as an express trustee, but not the official trustee of charitable funds.

(4.) The provisions of this act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

As regards moneys of a company under their control, directors are trustees within this section (*Re Lands Allotment Co.*, 1894, 1 Ch. 616; *National Bank of Wales*, 1899, 2 Ch. 629, 663; see *Re Kingston Cotton Co.*, 1896, 1 Ch. 347; *Whitwam* v. *Watkin*, 78 L. T. 188); but not a trustee in bankruptcy (*Re Cornish*, 1896, 1 Q. B. 99; see *Re Gallard*, 1897, 2 Q. B. 8). A husband who had seized his wife's separate estate was a trustee (*Wassell* v. *Leggatt*, 1896, 1 Ch. 554).

As to the cases of constructive trust in which independently of this act lapse of time would be a defence, see the note *post*, p. 255.

Statute of Limitations may be pleaded by trustees.

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(a.) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(b.) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3.) This section shall apply only to actions or other pro-

ceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations. 51 & 52 Vict. c. 59, s. 8.

As to the application (independently of the present act) of the Statutes of Limitation to proceedings against trustees, see in the case of land sect. 25 of the R. P. Lim. Act, 1833, *ante*, p. 160; in the case of money charged on land, the notes to sects. 40 and 42 of the R. P. Lim. Act, 1833, *ante*, pp. 195, 204, and sect. 10 of the R. P. Lim. Act, 1874, *ante*, p. 213; and in the case of money not charged on land, the note to sect. 40 of the R. P. Lim. Act, 1833, *ante*, p. 195, and the note *post*, p. 254 *et seq.*

(1) *Effect of the Section*...249.
(2) *Point from which Time Runs*...250.
(3) *Exceptions from the Section*...250.
(4) *Proceedings and Persons within the Section*...251.

(1) Effect of section.

The short effect of sect. 8 is that, except in three specific cases—viz., fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use—a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them (*How* v. *Winterton*, 1896, 2 Ch. 640). In cases where it applies the section appears to control sect. 25 (2) of the Jud. Act, 1873.

Clause (a).

As to clause (a) of sub-sect. (1), *Fry*, L. J., pointed out that there was no right or privilege conferred by any Statute of Limitations in respect of a breach of trust (*Re Bowden*, 45 Ch. D. 450). But this seems to deprive clause (a) of meaning (*How* v. *Winterton*, 1896, 2 Ch. 639). *Rigby*, L. J., said that the clause dealt with remedies, not with causes of action. The clause supposed the trustee to be guilty of a breach of duty, and provided that he was to be treated as though the breach of trust were nothing more or less than a breach of duty by reason of some act or omission (*Ib.* 642). Where, accordingly, an annuitant sued a trustee of a will for breaches of trust consisting of omission to accumulate, clause (a) protected the defendant from demands more than six years before writ (*How* v. *Winterton*, *sup.*). The same clause barred a second mortgagee's action for an account against a first mortgagee who had sold and received the proceeds (*Thorne* v. *Heard*, 1894, 1 Ch. 603; 1895, A. C. 495).

In discussing the period prescribed by clause (a) *Rigby*, L. J., said that a duty might be thrown on a trustee by virtue of his simple contract to undertake the trust, or by reason of a covenant to undertake it, and that you must look to the appropriate Statutes of Limitation under which the periods might be different (*How* v. *Winterton*, 1896, 2 Ch. 642; see as to this, *Holland* v. *Holland*, 4 Ch. 449). *Lindley*, L. J., said that if clause (a) applies to the trustee's accounts at all, it puts them on the same footing as other accounts; as to which (see *ante*, p. 224) the period is six years (1896, 2 Ch. 639). The form of an order for account by trustees protected by the section is given, *Re Davies*, *Ellis* v. *Roberts*, 1898, 2 Ch. 142.

Clause (b).

As to clause (b). The period prescribed in the case of an action of debt for money had and received is the six years mentioned in the Lim. Act, 1623 (*ante*, p. 222; see *Re Somerset*, *Somerset* v. *Poulett*, 1894, 1 Ch. 255; *Re Timmis*, *Nixon* v. *Smith*, 1902, 1 Ch. 184). Clause (b) has been held to bar an action to compel a trustee to make good loss from improper investment (*Re Bowden*, *Andrew* v. *Cooper*, 45 Ch. D. 444; *Re Gurney*, *Muson* v. *Mercer*, 1893, 1 Ch. 590; *Re Somerset*, *sup.*). Also an action by a residuary legatee to recover from a trustee loss from non-realization of residue (*Re Swain*, *Swain* v. *Bringemann*, 1891, 3 Ch. 233). The

51 & 52 Vict. c. 59, s. 8.

words of the clause are satisfied if the action be one to make the trustee pay money which does not belong to the plaintiff, but is payable into a fund as against which the plaintiff has a claim (see *How* v. *Winterton*, 1896, 2 Ch. 642).

Where a will appointed the same persons executors and trustees, and the executors completed the administration and became trustees of a fund settled by the will, and paid over such fund to the tenant for life, an action by the remaindermen brought more than six but less than twelve years after the death of the tenant for life, was barred by this section. It was held not to be an "action to recover a legacy" within sect. 8 of the R. P. Lim. Act, 1874; but an action to which no existing Statute of Limitations applied (*Re Timmis, Nixon* v. *Smith*, 1902, 1 Ch. 174).

(2) Point from which time runs.

The section has not altered the principles determining the time when a cause of action accrues (*Thorne* v. *Heard*, 1894, 1 Ch. 605). In the case of a breach of trust time runs from the date of the breach (*Ib.*; see *Re Somerset, Somerset* v. *Poulett*, 1894, 1 Ch. 231; *Re Bowden*, 45 Ch. D. 450; *Smith* v. *Fox*, 6 Hare, 386). Under the concluding words, however, of clause (b), time does not run against a beneficiary until his interest is in possession. Accordingly in an action brought more than six years after a breach of trust infant remaindermen were not barred, although the tenant for life was (*Re Somerset, sup.*; see *Collings* v. *Wade*, 1896, 1 I. R. 340). So where under a settlement of personal estate a wife took (expressly) an estate during the joint lives of herself and her husband, and (by way of resulting trust) a further estate for life after her husband's death, an action to enforce a breach of trust brought by her within six years after her husband's death was not barred (*Mara* v. *Browne*, 1895, 2 Ch. 69). In the case of an owner of a deferred annuity suing for previous breaches of trust, time ran against the annuitant from the commencement of her annuity (*How* v. *Winterton*, 1896, 2 Ch. 637). Inasmuch, however, as during a life tenancy a remainderman can sue to have trust funds properly secured, his action for a breach of trust may, even where not barred under this statute, be barred by laches (*Re Taylor, Atkinson* v. *Lord*, 81 L. T. 812).

Where fraud as regards a client's money was committed by solicitors in partnership, and was concealed by misrepresentation, time did not run against the client until the discovery of the fraud; an innocent partner being deprived of the benefit of the statute by representations which bound him as a partner (*Blair* v. *Bromley*, 2 Ph. 354). This decision rests on the law relating to representation and partnership, and not the law relating to trusts; and remains unaffected by the above section (*Moore* v. *Knight*, 1891, 1 Ch. 555). In the last-mentioned case *Stirling*, J., said that as against a trustee relying on clause (b), the *cestui que trusts* could claim the benefit of *Blair* v. *Bromley* (*Ib.* 556; see *Whitwam* v. *Watkin*, 78 L. T. 190).

(3) Exceptions from the section.

Of the exceptions from the section, the first relates to fraud to which the trustee was party or privy. This means fraud in which the trustee has personally participated. It does not include fraud committed by an agent in his own interest, of which the trustee was ignorant, from which he did not benefit, and which he did not ratify (*Thorne* v. *Heard*, 1894, 1 Ch. 606, 615; 1895, A. C. 503). As to the receipt by a promoter of a secret profit, being "fraudulent," see *Re Sale Hotel Co.*, 1897, W. N. 174; 46 W. R. 617.

Fraud.

Trust property still retained.

The second exception relates to trust property still retained by the trustee. This is confined to cases in which, at the date of the writ, the trustee has in his hands, or under his control, the property sought to be recovered. It refers to cases where the trustee, or any agent for him, has the property so that he can get it; but not cases where the property has been lost, whether by the trustee's negligence or otherwise (*Thorne* v. *Heard*, 1894, 1 Ch. 606; *Re Timmis, Nixon* v. *Smith*, 1902, 1 Ch. 185).

Accordingly a trustee cannot be treated as having trust moneys still in his hands until he can account for their proper application (*How* v. *Winterton*, 1896, 2 Ch. 634, 638). Where an executor expended the whole residue in maintaining and educating the infant residuary legatee, but rendered no account, the legatee's action for account brought more than six years after his majority was barred, the exceptions not applying (*Re Page, Jones* v. *Morgan*, 1893, 1 Ch. 301). But the second exception was held to apply in the case of a husband who had seized his wife's separate estate (*Wassell* v. *Leggatt*, 1896, 1 Ch. 554). 51 & 52 Vict. c. 59, s. 8.

The third exception relates to trust property received by the trustee and converted to his use. The exception did not include the case of trust funds advanced on mortgage, and, with the concurrence of the mortgagor, applied in payment of a debt previously charged on the mortgaged property in favour of a bank in which the trustee was partner (*Re Gurney, Mason* v. *Mercer*, 1893, 1 Ch. 590); but was thought to include the case of money deposited with solicitors for investment, and embezzled by a clerk of the firm (*Moore* v. *Knight*, 1891, 1 Ch. 553). Trust property converted.

(4) Proceedings and persons within the section.

The section only applies to "proceedings against a trustee," &c. Accordingly where the executors of a deceased trustee took out a summons to ascertain the liability, if any, of the trustees for retaining mortgages, the defence of the section was said not to be available (*Re Chapman, Cocks* v. *Chapman*, 1896, 1 Ch. 326). The words, "any person claiming through" a trustee refer not to *cestui que trusts*, but to such persons as the executors, administrators, and assigns of the trustee (*Leahy* v. *De Moleyns*, 1896, 1 I. R. 206).

Sub-sect. (2).

In connection with sub-sect. (2) compare the case of creditors claiming in administration actions, *post*, p. 258.

Application of act.

12.—(1.) This act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this act.

(2.) Provided always, that save as in this act expressly provided, nothing therein contained shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.

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(1) Lapse of time in equity generally.

In the case of suits in courts of equity (before the Judicature Acts) relating to land, rent-charges, church property, advowsons, money charged on land or rent-charges, legacies, and the estates of intestates, provisions in terms affecting such suits occurred in R. P. Lim. Act, 1833 (sects. 24—34, 40—43); R. P. Lim. Act, 1837; Law of Prop. Amendment Act, 1860 (s. 13). See these sections, *ante*. Sects. 2—5, 7—9, 14—22 of R. P. Lim. Act, 1833, applied in terms only to actions at law, although in substance these limitations, by virtue of sect. 24, governed suits in equity. All the

Land, money charged on land, &c.

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provisions, however, of R. P. Lim. Act, 1874 (*ante*, p. 184), were so framed as to apply in terms to courts of equity as well as courts of law. In the case of trusts, proceedings in all courts are also affected by Jud. Act, 1873, sect. 25 (2); Trustee Act, 1888, sect. 8.

Legal demands.

In the case of specialty and simple contract debts the statutes which prescribed the periods of limitation for the recovery of such debts did not apply in terms to courts of equity. But it was said before the Judicature Acts that in the case of legal demands those courts acted in obedience to the statutes (*Foley* v. *Hill*, 1 Ph. 399). Since the Judicature Acts, it has been said that Lim. Act, 1623, s. 3, is binding upon the High Court, and applies to every action properly described by it (*Re Greaves, Bray* v. *Tofield*, 18 Ch. D. 554; see *Gibbs* v. *Guild*, 9 Q. B. Div. 67; *Re Sharpe, Masonic Co.* v. *Sharpe*, 1892, 1 Ch. 154). Again, it has been laid down that in the case of a legal right a court of equity will not refuse relief on the ground of delay unless sufficient to create a statutory bar (*Re Maddever, Three Towns' Co.* v. *Maddever*, 27 Ch. Div. 532; *Moore* v. *Marriott*, 7 Ch. D. 546). Thus a less delay did not deprive a plaintiff of his right to an injunction in aid of an action of deceit (*Fullwood* v. *Fullwood*, 9 Ch. D. 176). So also a deed was set aside under 13 Eliz. c. 5, ten years after the death of the grantor (*Three Towns' Co.* v. *Maddever*, *sup.*). And a specialty creditor recovered his debt more than eighteen years after the debtor's death (*Re Baker, Collins* v. *Rhodes*, 20 Ch. Div. 230). Mere laches does not deprive the creditor of his right to sue an executor for devastavit (*Re Birch, Roe* v. *Birch*, 27 Ch. D. 622).

Equitable demands. Acting by analogy.

Where a remedy in equity corresponds to a remedy at law which is within the statute, the court of equity acts by analogy to the statute (*Knox* v. *Gye*, L. R. 5 H. L. 674; see *Bulli Co.* v. *Osborne*, 1899, A. C. 351). Thus an action against directors for misrepresentation in a prospectus was treated as analogous to an action for deceit, and it was said that no delay short of the statutory period would be a bar (*Peek* v. *Gurney*, L. R. 6 H. L. 377). So an action to set aside a gift on the ground of undue influence (*Allcard* v. *Skinner*, 36 Ch. Div. 186). The analogy of the Lim. Act, 1623, was held applicable to an action to set aside a forfeiture of shares (*Rule* v. *Jewell*, 18 Ch. D. 667), and to an action to recover a debt out of a married woman's separate estate (*Re Hastings, Hallett* v. *Hastings*, 35 Ch. Div. 105; *Beck* v. *Pierce*, 23 Q. B. Div. 322). Where an action for damages for breach of a contract to execute a mortgage would have been barred by Lim. Act, 1623, it was said that specific performance would not be decreed (*Firth* v. *Slingsby*, 58 L. T. 483). Courts of equity have refused by analogy to apply to personal estate a statute dealing only with real estate (*Mellersh* v. *Brown*, 45 Ch. D. 229; *Charter* v. *Watson*, 1899, 1 Ch. 175). The Court of Admiralty refused to apply the analogy of the statute in dealing with arrears of interest in an action *in rem* (*The Kong Magnus*, 1891, P. 223).

Laches and acquiescence.

Independently of the statute time in equity may bar stale equitable demands on the ground of laches (*Harcourt* v. *White*, 28 Beav. 303; *Nutt* v. *Easton*, 1900, 1 Ch. 29; *Levy* v. *Stogdon*, 1899, 1 Ch. 5; see *Re Sharpe, Masonic Co.* v. *Sharpe*, 1892, 1 Ch. 154; and cases quoted *Ib.* p. 168). In the case of legal demands, however, relief will not be refused on the ground of delay unless sufficient to create a statutory bar (see above). Acquiescence will also, independently of the statute, prevent the enforcement of demands in equity (*Blake* v. *Gale*, 32 Ch. Div. 571; *Evans* v. *Smallcombe*, L. R. 3 H. L. 249; *Allcard* v. *Skinner*, 36 Ch. D. 163; see *Archbold* v. *Scully*, 9 H. L. C. 383, where laches and acquiescence are distinguished; and see the cases quoted under R. P. Lim. Act, 1833, s. 27, *ante*, p. 167). Laches and acquiescence will prevent the enforcement of a claim, even in the case of an express trust (*Re Cross, Harston* v. *Tenison*, 20 Ch. Div. 121; *Bright* v. *Legerton*, 2 D. F. & J. 606; *M'Donnell* v. *White*, 11 H. L. C. 570).

Fraud.

In actions based on concealed fraud, time in courts of equity always ran from the discovery of the fraud (*Booth* v. *Warrington*, 4 Bro. P. C.

163; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607; *Rolfe* v. *Gregory*, 4 D. J. & S. 579; see *Gibbs* v. *Guild*, 9 Q. B. Div. 70; *Re Crossley*, *Munns* v. *Burn*, 35 Ch. D. 266). For the operation of the rule as between partners in regard to partnership accounts, see *Betjemann* v. *Betjemann*, 1895, 2 Ch. 474. The rule was applied where fraud, as regards a client's money, was committed by solicitors in partnership and concealed by misrepresentation (*Blair* v. *Bromley*, 2 Phil. 354; *Moore* v. *Knight*, 1891, 1 Ch. 547). In *Blair* v. *Bromley* (*sup.*) the defendant was not personally concerned in the fraud, and had ceased to be a partner for six years before action, but was held liable for the fraud of his co-partner, committed in the ordinary course of the partnership business. The defendants were not liable where the fraud was not in such ordinary course (*Hughes* v. *Twisden*, 54 L. T. 570; compare *Mara* v. *Browne*, 1896, 1 Ch. 199), nor where fraud was committed not by themselves, but by an agent acting in his own interest (*Thorne* v. *Heard*, 1894, 1 Ch. 599; 1895, A. C. 495; see *British Co.* v. *Charnwood Co.*, 18 Q. B. Div. 714). In actions to open accounts, where an item complained of is fraudulent, the accounts will be opened altogether; but where the item is not fraudulent, and the accounts are of some years' standing, the plaintiff will only have liberty to surcharge and falsify (*Gething* v. *Keighley*, 9 Ch. D. 550; see *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Williamson* v. *Barbour*, 9 Ch. D. 529). Delay deprives a man of his right to rescind a contract on the ground of fraud, and the delay counts from the time when by due diligence the fraud might have been discovered (*Redgrave* v. *Hurd*, 20 Ch. Div. 13).

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In the case of mistake, also, time runs from its discovery. Where trustees paid over trust money on a mistake of fact, and within six years from its discovery commenced a suit to compel refunding, they recovered (*Brooksbank* v. *Smith*, 2 Y. & C. Ex. 58; see *Durrant* v. *Ecclesiastical Commrs.*, 6 Q. B. D. 234). Where A. and B. being tenants in common of rents, A. under a mutual mistake of fact received more than his share, time would not have run against B. while the mistake remained undiscovered; but inasmuch as B. had been guilty of laches in not discovering the mistake earlier, he was entitled to an account for six years only before bill (*Denys* v. *Shuckburgh*, 4 Y. & C. Ex. 42). As regards the time at which the right to recover money paid under a mutual mistake of fact arises, it has been laid down in England that no action lies until the payor gives notice of his mistake and demands the money (*Freeman* v. *Jeffries*, L. R. 4 Ex. 200; compare *Cowper* v. *Godmond*, 9 Bing. 148. But see *Leather, &c. Bank* v. *Merchants' Bank*, 128 U. S. 26, where it was held in America that the right of action arises on the payment, and that time runs from that date; and compare *Bree* v. *Holbeck*, 2 Doug. 654). As between A. and B., *cestui que trusts*, where trustees by mistake overpaid A., the statute was no defence to a suit by B. brought more than six years after the payment to make A. refund (*Harris* v. *Harris*, 29 Beav. 110, where it does not appear when the mistake was discovered; see *Prowse* v. *Spurgin*, 5 Eq. 99). As between a trustee and a *cestui que trust* who by the trustee's mistake of law has been underpaid, the effect of time is dealt with, *Newton* v. *Ayscough*, 19 Ves. 534. And see *Hilliard* v. *Fulford*, 4 Ch. D. 389.

Mistake.

A release to trustees has been set aside after the lapse of more than twenty years, it having been executed under a mistake (*Re Garnett*, *Gaudy* v. *Macaulay*, 31 Ch. Div. 1). When property has been long enjoyed by a family in certain shares under a mistake, the court will presume a family arrangement (*Re Peat*, 7 Eq. 302).

A mortgagee of an equitable reversionary interest in personal estate can, on the interest falling into possession, recover the fund from the trustee and pay himself in full, although the debt, to secure which the mortgage was made, is barred (*Re Hancock*, *Hancock* v. *Berrey*, 59 L. T. 197; *Re Lake*, 63 L. T. 416; see *Jordan* v. *Young*, 1878, W. N. 229; and compare *Hugill* v. *Wilkinson*, 38 Ch. D. 480 as to realty). As to the arrears of interest recoverable in such case, see *Smith* v. *Hill* (9 Ch. D. 143); *Clarkson* v. *Henderson* (14 Ch. D. 348); *Mellersh* v. *Brown*

Mortgagee of interests in personalty.

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(45 Ch. D. 225). So a mortgagee of personal estate in possession may foreclose after the personal remedy to recover the debt is barred (*London and Midland Bank* v. *Mitchell*, 1899, 2 Ch. 161). As to the right of the trustees of a fund, who have notice of other claims, to refuse to pay over the whole fund to a mortgagee, see *Re Bell, Jeffery* v. *Sayles*, 1896, 1 Ch. 1; *Hockey* v. *Western*, 1898, 1 Ch. 350.

Where real and personal estate were comprised in one mortgage, and the right to redeem the land was barred, redemption of the personalty was refused (*Charter* v. *Watson*, 1899, 1 Ch. 175).

Waste. In the case of legal waste by a tenant for life, time runs against the remainderman from the cutting (*Seagram* v. *Knight*, 2 Ch. 628; *Higginbottom* v. *Hawkins*, 7 Ch. 676; see *Simpson* v. *Simpson*, 3 L. R. Ir. 314); and the period of limitation is six years (*Birch-Wolfe* v. *Birch*, 9 Eq. 692), which may be extended by infancy (*Dashwood* v. *Magniac*, 1891, 3 Ch. 386). For the case where a tenant for life has rendered accounts for a longer period, see *Hony* v. *Hony* (1 S. & S. 628). As to equitable waste, the statute runs against the remainderman from the time when his title accrues in possession (*Leeds* v. *Amherst*, 2 Phil. 117; *Morris* v. *Morris*, 6 W. R. 427; *Dashwood* v. *Magniac*, 1891, 3 Ch. 386); and the period of limitation is now twelve years (R. P. Lim. Act, 1833, ss. 2, 3, 24; R. P. Lim. Act, 1874, s. 2; *Leeds* v. *Amherst*, *sup.*).

Partners. In the case of exclusion of a partner, time runs from the act of exclusion (*Barton* v. *N. Stafford Co.*, 38 Ch. D. 463).

Contribution. The statute does not begin to run against a surety's right to sue a co-surety for contribution until the time at which the claim of the principal creditor is established against the surety. And during the statutory period computed from that time the surety can sue, although at the time of suing the statute may have run as between the principal creditor and the co-surety (*Wolmershausen* v. *Gullick*, 1893, 2 Ch. 514; see *Gardner* v. *Brooke*, 1897, 2 I. R. 6). The same principle applies to the case of a trustee claiming contribution from his co-trustee (*Robinson* v. *Harkin*, 1896, 2 Ch. 415).

(2) Trusts.

Trustee Act, 1888, s. 8. In the case of proceedings against trustees commenced after 1st January, 1890, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888 (*ante*, p. 247).

The following note as to how far the existence of a trust may prevent any Statute of Limitation being set up relates to the law apart from the last-mentioned act.

Express trusts. Express trusts affecting land or rent were dealt with by R. P. Lim. Act, 1833, s. 25 (*ante*, p. 160), and express trusts affecting money charged upon land by R. P. Lim. Act, 1874, s. 10 (*ante*, p. 213). As to express trusts in the case of legacies payable out of personalty, see *ante*, pp. 195, 213.

Jud. Act, 1873, s. 25 (2). As regards real and personal property generally, it was enacted by the Jud. Act, 1873, s. 25 (2), that no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust, should be barred by any Statute of Limitations; "a statutory declaration of a law which has always been recognized and administered in courts of equity" (*Re Cross, Harston* v. *Tenison*, 20 Ch. Div. 121). See, as to this law, *Beckford* v. *Wade* (17 Ves. 97); *Townshend* v. *Townshend* (1 Bro. C. C. 550); *Wedderburn* v. *Wedderburn* (4 M. & C. 41); *Stone* v. *Stone* (5 Ch. 74). So far as regards money charged on land, the last section appears to be subject to 37 & 38 Vict. c. 57, s. 10 (*ante*, p. 213). Compare the Irish Act, 40 & 41 Vict. c. 57, s. 28 (2).

In a case affecting personal estate decided since the Jud. Act, 1873, it was said there might be an express trust without any actual expression in words (*Banner* v. *Berridge*, 18 Ch. D. 265; but see *Sands* v. *Thompson*, 22 Ch. D. 617). The first mortgagee of a ship having sold, it was held that there was no express trust of the proceeds; that in the case of an ascertained surplus, the first mortgagee might be constructively trustee of the surplus; but that after six years, evidence could not be adduced to

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prove a surplus (*Banner* v. *Berridge*, *supra*). Where a stranger had assumed to act as a trustee, and had received trust money under a breach in which he concurred, he was treated as if he were an express trustee (*Soar* v. *Ashwell*, 1893, 2 Q. B. 390; see *Re Dixon*, *Heynes* v. *Dixon*, 1900, 2 Ch. 561). Compare the cases as to express trust within R. P. Lim. Act, 1833, s. 25 (*ante*, p. 161).

Where an express trust for the payment of a debt was for the benefit of the debtor only, it did not prevent time running against the creditor (*Henriques* v. *Bensusan*, 20 W. R. 350).

Where a breach of an express trust relating to personal estate had been committed, it was said that a *cestui que trust* might by his conduct raise a presumption of abandonment of his right of action which would bar subsequent proceedings (*Re Cross*, *Harston* v. *Tenison*, 20 Ch. Div. 122). So if there had been a direct and independent dealing between the trustee and *cestui que trust* after the relation had terminated (*Wedderburn* v. *Wedderburn*, 2 Keen, 749).

Constructive trusts.

As regards constructive trusts, strictly so called, in some cases the statute would be a defence (*Beckford* v. *Wade*, 17 Ves. 87; *Bonney* v. *Ridyard*, 17 Ves. 97; see *Soar* v. *Ashwell*, 1893, 2 Q. B. 395, 400; and compare *Re Davis*, 1891, 3 Ch. 124). In other cases it would not (*Soar* v. *Ashwell*, 1893, 2 Q. B. 405). Thus, solicitors receiving money were held to be trustees who could not set up the statute (*Re Bell*, *Lake* v. *Bell*, 34 Ch. D. 462; *Lee* v. *Sankey*, 15 Eq. 204; *Soar* v. *Ashwell*, 1893, 2 Q. B. 390). Distinguish the case of solicitors held not to be trustees (*Dooby* v. *Watson*, 39 Ch. D. 178; *Mara* v. *Browne*, 1896, 1 Ch. 199; and compare *Blyth* v. *Fladgate*, 1891, 1 Ch. 337; *Hughes* v. *Twisden*, 54 L. T. 570). A person purchasing land on behalf of another was held a trustee unable to set up the statute (*Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196). So a husband seizing his wife's separate estate (*Wassell* v. *Leggatt*, 1896, 1 Ch. 554); an agent receiving rents and stating the receipt to be on behalf of another (*Lyell* v. *Kennedy*, 14 App. Cas. 457). It has been held generally that no lapse of time will bar the right to an account of moneys received by a person standing in a fiduciary position (*Teed* v. *Beere*, 7 W. R. 394; *James* v. *Holmes*, 10 W. R. 634; *Burdick* v. *Garrick*, 5 Ch. 233; *Re Tidd*, *Tidd* v. *Overell*, 1893, 3 Ch. 154). Managers of an annuity fund were held trustees for the members so as to prevent time running (*Edwards* v. *Warden*, 1 App. Cas. 281). And before the Trustee Act, 1888, the defence of the statute was unsuccessfully raised by the following persons who were held to be trustees: a receiver appointed by the court (*Seagram* v. *Tuck*, 18 Ch. D. 296; see *Re Gent*, *Gent-Davis* v. *Harris*, 40 Ch. D. 190; and compare the decisions since the Trustee Act, 1888, as to a trustee in bankruptcy, *Re Cornish*, 1896, 1 Q. B. 99; *Re Gallard*, 1897, 2 Q. B. 8); a director who had paid dividends out of capital (*Flitcroft's case*, 21 Ch. Div. 519; *Re Oxford Society*, 35 Ch. D. 509; *Re Sharpe*, *Masonic Co.* v. *Sharpe*, 1892, 1 Ch. 154; see *Re Lands Allotment Co.*, 1894, 1 Ch. 616; and compare the case of an action to recover a bribe received by a director, *Metrop. Bank* v. *Heiron*, 5 Ex. Div. 319); a person who borrowed trust money with notice of the trust (*Ernest* v. *Croysdill*, 2 D. F. & J. 198; see *Butler* v. *Carter*, 5 Eq. 276; *Coxwell* v. *Franklinski*, 12 W. R. 1072; *Re Dixon*, *Heynes* v. *Dixon*, 1900, 2 Ch. 561). In other cases, however, accounting parties were held not to be trustees of money received by them (*Phillips* v. *Homfray*, 44 Ch. D. 694; see *Lister* v. *Stubbs*, 45 Ch. 1). A company was not made a trustee of a dividend for a shareholder by declarations of the dividend, or by entry thereof in its books, no notice of the entry being given and no assets set aside (*Re Severn R. Co.*, 1896, 1 Ch. 559). A secretary of a company can raise the defence of the statute to a charge of misfeasance (*Municipal Co.* v. *Pollington*, 63 L. T. 238); and an auditor (*Leeds Co.* v. *Shepherd*, 36 Ch. D. 787).

Where there was no trust, except such as was created by the decree of the court on setting aside the transaction, time ran from the discovery of circumstances which constituted the right to relief (*Clanricarde* v. *Henning*, 30 Beav. 175, a purchase by a solicitor from his client). The rules of

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equity as to such a purchase, and the operation of lapse of time upon the right to relief in such a case, were considered in *Gresley* v. *Mousley* (4 De G. & J. 78). In one case the purchase of trust property by trustees for their own benefit was set aside, after a considerable lapse of time and several assignments (*A.-G.* v. *Dudley*, Coop. C. C. 146; see *Rochefoucauld* v. *Boustead*, 1896, 1 Ch. 199; 1897, 1 Ch. 196). But in another case, a bill to set aside a purchase by a trustee for himself and his children was dismissed, merely on the ground of the lapse of eighteen years (*Gregory* v. *Gregory*, Coop. C. C. 201; see *Champion* v. *Rigby*, 1 R. & M. 539; *Postlethwaite* v. *Rickman*, 60 L. T. 514). Damages in respect of a sale at an undervalue were given against a bankruptcy trustee after long delay (*Re Gallard*, 1897, 2 Q. B. 8; compare *Re Cornish*, 1896, 1 Q. B. 99).

Compare with the above the decisions as to the effect of lapse of time in the case of constructive trusts of land, *ante*, p. 161. Constructive trusts are within the Trustee Act, 1888, s. 8 (see sect. 1 of that act).

Enforcing breach of trust against estate of deceased trustee.

A claim arising from a breach of trust is, generally speaking, considered as a simple contract debt (*Holland* v. *Holland*, 4 Ch. 449). But it was held that the analogy of the Lim. Act, 1623, could not, in answer to a claim founded on a breach of trust, be set up, either by the executor of the trustee (*Brittlebank* v. *Goodwin*, 5 Eq. 545; *Cresswell* v. *Dewell*, 4 Giff. 460; *Woodhouse* v. *Woodhouse*, 8 Eq. 514; *Smith* v. *Cork, &c. R. Co.*, I. R. 5 Eq. 65; *Carroll* v. *Hargrave*, *Ib.* 548), or by his heir (*Gillard* v. *Lawrenson*, 57 L. T. 364). See now Trustee Act, 1888, s. 8, *ante*, p. 248.

Devise in trust to pay debts.

A devise of real estate in trust for payment of debts will not revive a debt barred at the time of the testator's death (*Burke* v. *Jones*, 2 Ves. & B. 275); but as to debts not then barred, it seems that since R. P. Lim. Act, 1874, such a devise, or a charge of debts on real estate, will keep them alive for twelve years, but no longer (*Re Stephens*, *Warburton* v. *Stephens*, 43 Ch. D. 39; *Fearnside* v. *Flint*, 22 Ch. D. 582; see *Piggott* v. *Jefferson*, 12 Sim. 26). And as to the law before the last-mentioned act, see *Hughes* v. *Wynne* (T. & R. 307); *Hargreaves* v. *Michell* (6 Mad. 326); *Moore* v. *Petchell* (22 Beav. 172). See the note to R. P. Lim. Act, 1833, s. 40, *ante*, p. 195.

Where, however, a testator devised real estate on trust for payment of his debts, and had in fact no real estate at his death, the devise had no effect on the running of time (*Ex p. Hepburn*, 14 Q. B. D. 394); and the case was the same where debts were charged on property which was described in the will as real estate, but was in fact personalty (*Scott* v. *Jones*, 4 Cl. & F. 382). A trust for payment of a testator's debts out of his personal estate does not stop the running of time (*Ex p. Hepburn*, *sup.*; *Scott* v. *Jones*, *sup.*; *Freake* v. *Cranefeldt*, 3 M. & C. 499; see *Cadbury* v. *Smith*, 9 Eq. 42). For the case where real and personal estate are blended in one gift to executors, see *Re Stephens*, *Warburton* v. *Stephens* (43 Ch. D. 45). A testator may, however, by express directions in his will, revive debts which have been barred (*Williamson* v. *Nayler*, 3 Y. & C. Ex. 208; *Philips* v. *Philips*, 3 Ha. 281). When a man makes a provision for his debts, he makes a provision for those which are not barred, that is to say, for those which in law are deemed debts. But if a man chooses voluntarily to make a provision for his father's debts to which he was not liable, the statute has no operation with respect to such debts (*O'Connor* v. *Haslam*, 5 H. L. C. 181).

(3) **The statute in the administration of estates.**

Liability of executor and legatee to creditors.

In an action on a devastavit, the claim as between the creditor and the executor personally, is barred in six years (*Thorne* v. *Kerr*, 2 K. & J. 54, *ante*, p. 225). But in a creditor's administration action, it was held that an executor might (in respect of a debt not barred as between a creditor and his deceased debtor's estate) be made personally liable to the extent of personal assets which the executor had lost or parted with, even though he did so more than six years before action brought (*Re Baker*, *Collins* v. *Rhodes*, 20 Ch. Div. 230; *Re Marsden*, *Bowden* v. *Layland*, 26 Ch. D. 783; see as regards assets claimed from a devisee, *Re Hyatt*, *Bowles* v. *Hyatt*, 38 Ch. D. 609). And where the executor had parted with assets to a

legatee, the legatee might be made to refund (*Fordham* v. *Wallis*, 10 Hare, 217). But the conduct or acquiescence of the creditor might bar his right against the legatee (*Blake* v. *Gale*, 32 Ch. Div. 571); and it would seem also against the executors (*Re Birch, Roe* v. *Birch*, 27 Ch. D. 627; see *Re Marsden, sup.*). The above liability of the executor seems to have been sometimes placed on the ground of trust (*Re Marsden*, 26 Ch. D. 789; *Fordham* v. *Wallis*, 10 Hare, 226; see, however, *Re Hyatt*, 38 Ch. D. 617). As regards the position of the executor under the above decisions, consider now the effect of the Trustee Act, 1888, s. 8 (*ante*, p. 248), where the word "trustee" includes executor (sect. 1 (3)). The sending in a claim in answer to an executor's advertisement is not such a proceeding as will prevent time running against a debt (*Re Stephens, Warburton* v. *Stephens*, 43 Ch. D. 43).

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Where judgment has been recovered against executors for a debt due from their testator, which they paid, the executors are entitled to be allowed such payment, although the statute might have been set up (*Hunter* v. *Baxter*, 3 Giff. 214). An executor may pay debts due from the testator to a stranger, although barred in testator's lifetime (*Stahlschmidt* v. *Lett*, 1 Sm. & Giff. 415); but not after the defence of the statute has been decided in favour of the estate (*Midgley* v. *Midgley*, 1893, 3 Ch. 282). An executor may also retain a debt due from testator to himself, although barred (*Hill* v. *Walker*, 4 K. & J. 166; *Beswick* v. *Orpen*, 16 Ch. D. 207; see *Coombs* v. *Coombs*, L. R. 1 P. & M. 288; *Morley* v. *Saunders*, 8 Eq. 599); but the court will not pay out a fund to an executor, so that he may exercise such right of retainer (*Trevor* v. *Hutchins*, 1896, 1 Ch. 844). An executor, however, cannot either pay or retain a debt unenforceable by reason of the Statute of Frauds (*Re Rownson, Field* v. *White*, 29 Ch. Div. 358). To satisfy a debt due from legatee to testator, but statute barred at his death, an executor may retain a pecuniary legacy (*Courtenay* v. *Williams*, 3 Hare, 539; *Coates* v. *Coates*, 33 Beav. 249). An administrator may retain the share of a next of kin (*White* v. *Cordwell*, 20 Eq. 644). But there is no such retainer as against the heir out of moneys representing undisposed-of real estate (*Re Milnes, Milnes* v. *Sherwin*, 53 L. T. 534), nor as against a specific devisee of freeholds (*Re Taylor, Taylor* v. *Wade*, 1894, 1 Ch. 674; *Re Akerman*, 1891, 3 Ch. 212), or a specific legatee of leaseholds or of chattels (*Ib.*). But retainer was allowed against a specific legatee of the profits of a business (*Re Taylor, Taylor* v. *Wade, sup.*). Trustees can require a barred debt to be brought into account in the division of the proceeds of sale of real and personal residue (*Re Akerman*, 1891, 3 Ch. 212; see *Re Watson, Turner* v. *Watson*, 1896, 1 Ch. 925). Executors of a tenant for life against whom the remainderman recovered damages for waste could not retain the damages to answer a statute-barred debt (*Dingle* v. *Coppen*, 1899, 1 Ch. 726). After appropriating assets to meet a legacy, executors cannot retain or impound such assets to meet a debt due from the legatee (*Ballard* v. *Marsden*, 14 Ch. D. 374). Directions in wills that debts due from beneficiaries are to be deducted from shares bequeathed to them, have been held to include barred debts (*Rose* v. *Gould*, 15 Beav. 189; *Poole* v. *Poole*, 7 Ch. 17; see *Mathews* v. *Keble*, 3 Ch. 691), but not moneys claimed as rent for land to which as against the beneficiary the testator's title was barred (*Re Jolly, Gathercole* v. *Norfolk*, 1900, 2 Ch. 616).

Executor may pay and retain debts barred.

Where one of several executors owed the testator 300*l.*, and the other executors proved at once, but the debtor did not prove for more than six years, he could not then set up the statute, the act of proving having relation to the testator's death (*Ingle* v. *Richards*, 28 Beav. 366).

Lapse of time will not of itself bar an executor of an executor of his right to have an account of the original testator's estate taken, with a view to ascertain such executor's liabilities as an accounting party (*Smith* v. *O'Grady*, L. R. 3 P. C. 311).

In administration suits legal demands are decided by courts of equity entirely on legal grounds (*Fuller* v. *Redman*, 26 Beav. 619). An acknowledgment by an executor after an administration decree will not revive a debt already barred (*Philips* v. *Beale*, 32 Beav. 26). Executors in adminis-

Administration actions.

Courts of Equity and the Statutes of Limitation.

tration actions are not bound to plead the statute (*Ex p. Dewdney*, 15 Ves. 498; *Norton* v. *Frecker*, 1 Atk. 526; *Castleton* v. *Fanshaw*, Prec. Ch. 100; *Re Baker, Nicholls* v. *Baker*, 44 Ch. Div. 270; see *Re Wenham, Hunt* v. *Wenham*, 1892, 3 Ch. 59). Nor is the court bound to set up the statute on behalf of absent parties (*Alston* v. *Trollope*, 2 Eq. 205). But the statute may, where a decree has been obtained, be set up in the proceedings under the decree, by one creditor against another (*Fuller* v. *Redman*, 26 Beav. 614), and by a residuary legatee or other party interested in the estate against a creditor (*Moodie* v. *Bannister*, 4 Drew. 432; *Shewen* v. *Vanderhorst*, 1 Russ. & M. 347; *Beeching* v. *Morphew*, 8 Hare, 129). A residuary legatee was entitled to insist on this right where there was no administration judgment, but the executors had issued a summons to determine whether a defendant was a creditor of the estate (*Re Wenham, Hunt* v. *Wenham*, 1892, 3 Ch. 59). The statute, however, cannot be set up against the plaintiff whose debt is the foundation of the decree (*Adams* v. *Waller*, 14 W. R. 789; *Fuller* v. *Redman, sup.*; see *Re Baker, Nicholls* v. *Baker*, 44 Ch. Div. 262). As to this question in the administration of real estate, see *Briggs* v. *Wilson* (5 D. M. & G. 21). A residuary legatee has been held to be precluded by his own acts from setting up the statute as against a pecuniary legatee (*Prowse* v. *Spurgin*, 5 Eq. 99). As to proof in an English action by a creditor who had attached French assets as security for two debts, one of which was barred in England but not in France, see *Re Bowes, Strathmore* v. *Vane* (1889, W. N. 53); and by a creditor who had recovered judgment in Scotland for a debt barred in England, see *Re Low, Bland* v. *Low* (1894, 1 Ch. 147).

Who may set up statute.

Judgment in administration action.

It has been held that judgment in an administration action commenced by a legatee, and which contained the usual direction for payment of debts, operated in favour of such creditors of the testator as could then substantiate their claims, so as to prevent time running (*Finch* v. *Finch*, 35 L. T. 235, where the judgment was within the statutory period from the incurring of the debt; *Re Crossley, Munns* v. *Burn*, 35 Ch. Div. 266). Compare the effect of a winding-up order (*Re General Rolling Stock Co.*, 7 Ch. 646). An administration judgment also operates in favour of the estate in regard to a set-off against a creditor's demand (*Re Ballard, Lovell* v. *Forester*, 1890, W. N. 64).

(4) Pendency of administration action.

The existence of a creditor's administration suit was held not to prevent the barring of a debt in respect of which no claim was made under the decree (*Tatum* v. *Williams*, 3 Hare, 347). And where a judgment creditor had allowed twenty years to elapse without taking steps to recover his debt, and then ascertained that during the twenty years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in court available for payment of the remainder, he was not allowed to prove his debt (*Berrington* v. *Evans*, 1 Y. & Coll. 434; see also *O'Kelly* v. *Bodkin*, 3 Ir. Eq. R. 390; *Hutchins* v. *O'Sullivan*, 11 Ir. Eq. R. 443).

Berrington* v. *Evans.

Sterndale* v. *Hankinson.

Before R. P. Lim. Act, 1833, it was held that although a creditor's demand was in strictness barred by the rule of equity and by analogy to the old statute, yet that rule would not be applied against him if he had delayed his suit, relying on the prosecution of an existing suit by another creditor on behalf of himself and other creditors (*Sterndale* v. *Hankinson*, 1 Sim. 393; followed in *Brown* v. *Lynch*, 4 Ir. Eq. R. 316; *Carroll* v. *Darcy*, 10 Ir. Eq. R. 321; and approved by Lord *St. Leonards* in *Bermingham* v. *Burke*, 2 J. & Lat. 714; R. P. Stat. 126; see *Foster* v. *Mackenzie*, 17 Beav. 414; *Finch* v. *Finch*, 35 L. T. 235). As to the effect of a petition for sale in the Irish Landed Estates Court, see *Re Ebbs* (31 L. R. Ir. 95). Since the Judicature Acts, however, the reasons on which *Sterndale* v. *Hankinson* was founded no longer apply (*Re Greaves, Bray* v. *Tofield*, 18 Ch. D. 551, where the action was commenced within the statutory period from the incurring of the debt, but the judgment was made after the expiration of that period). Compare *Williams* v. *Williams*, 1900, 1 Ch. 152.

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Pendency of proceedings.

The institution of a suit to execute the trusts of a will did not preserve the rights of the heir who claimed adversely to the will (*Simmons* v. *Rudall*, 1 Sim. N. S. 115). The right of a vendor to enforce his lien was not preserved by the existence of a suit by the creditors of the devisor of the estate, under whose will the sale took place, to administer his estate; nor by suits by the residuary devisees and legatees of the purchaser, for the administration of his estate (*Toft* v. *Stephenson*, 7 Hare, 1). A mortgagee's suit for foreclosure and sale instituted during the debtor's life, did not prevent time running against a judgment creditor of that debtor (*Bennett* v. *Bernard*, 12 Ir. Eq. R. 229). For the case where a creditor or incumbrancer is made a defendant to the suit, see *Watson* v. *Birch* (15 Sim. 523), and *Humble* v. *Humble* (24 Beav. 535). As to relief where time has run pending improper litigation, see *Pultney* v. *Warren* (6 Ves. 73); *East India Co.* v. *Campion* (11 Bligh. 158, 186, 187); *Furnival* v. *Boyle* (4 Russ. 142); *Sirdefield* v. *Price* (2 Y. & C. 73).

Orders to carry on proceedings.

As to the application of the Statutes of Limitation to an order to carry on proceedings made before judgment, see *Perry* v. *Jenkins* (1 M. & Cr. 118, 121); *Bland* v. *Davison* (21 Beav. 312); and after judgment, see *Alsop* v. *Bell* (24 Beav. 451); *Parkinson* v. *Lucas* (28 Beav. 627, 630); see also *Bampton* v. *Birchall* (11 Beav. 38; 1 Phil. 568; 5 Beav. 67). Where a defendant was out of the jurisdiction and a bill prayed process against him when he should come within it, the operation of the statute was suspended though he had neither been served nor appeared (*Hele* v. *Bexley*, 20 Beav. 127).

Effect of appointment of a receiver.

Although the appointment of a receiver by the court does not prevent the bar under the statute *against* a stranger, yet it will prevent time running in *favour* of a stranger to the suit (*Wrixon* v. *Vize*, 3 Dr. & War. 104, see p. 123; *Parkinson* v. *Lucas*, 28 Beav. 627). But under special circumstances the possession of a receiver prevented time running against a stranger to the action (*Penney* v. *Todd*, 26 W. R. 502). The possession of the receiver in a cause in which a trustee of the legal estate is made a party as such, may fairly be treated as the possession of the trustee. For many purposes the possession of the receiver is the possession of the party entitled to the lands, and time will not run against a person in possession (*Gresley* v. *Adderley*, 1 Swans. 579; *Boehm v. Wood*, T. & R. 345; *Wrixon* v. *Vize*, 3 Dr. & War. 104; see *Groome* v. *Blake*, 8 Ir. C. L. R. 428; *Re Butler*, 13 Ir. Ch. R. 453; *Dixon* v. *Gayfere*, 17 Beav. 421). The appointment of receiver in the matter of an infant will not prevent the operation of the statute on a claim affecting the minor's estate, notwithstanding the fact that the master, in a report ascertaining the nature of the minor's property, has expressly found that the minor's estate was subject to that incumbrance (*Harrison* v. *Duignan*, 2 Dr. & War. 295; see *Greenway* v. *Bromfield*, 9 Hare, 203).

Injunction.

See as to the relief granted by courts of equity where time had run pending an injunction, *Brown* v. *Newall* (2 M. & Cr. 572); *Anon.* (2 Cas. Ch. 217); *Fyson* v. *Pole* (3 Y. & C. 273); *Morgan* v. *Morgan* (2 Dick. 643); *Grant* v. *Grant* (3 Sim. 364; 3 Russ. 607); *Duval v. Terry* (Show. P. C. 15); *O'Donel* v. *Browne* (1 Ball & B. 262).

(5) Funds in court;

The claim of an equitable incumbrancer was kept alive by the existence of a fund in court the rights in which had not been ascertained (*Lancaster* v. *Evans*, 10 Beav. 154). Where in an incumbrancer's suit against a tenant for life rents belonging to the defendant were paid into court by a receiver and so remained 1815—1870, the claim of the remainderman to be recouped out of such rents payments which had subsequently fallen upon him was not barred (*Howlin* v. *Sheppard*, 6 Ir. Eq. Rep. 38). And when lands on which an annuity was charged were sold by the court, the claim of the annuitant to resort for arrears to the corpus of the proceeds which were in court was not barred (*Re Belton*, 1894, 1 I. R. 537). So where to annul a bankruptcy money is paid into court to provide for undisputed debts, time does not run against the creditors (*Re Dennis*, 1895, 2 Q. B. 630). Compare the case of money

Courts of Equity and the Statutes of Limitation.

provided under a scheme to satisfy unascertained bondholders (*Collingham* v. *Sloper*, 1901, 1 Ch. 779). But payment into court under the Trustee Relief Act of a fund on which an annuity was charged did not make the court a trustee or prevent a bar (*Re Nugent*, 19 L. R. Ir. 140; where, however, the annuity was also charged on real estate the remedy against which was held barred).

funds paid into court under the L. C. C. Act.

Where land in the occupation of a trespasser was compulsorily taken under the Lands Clauses Act and the purchase-money paid into court, the trespasser was, after the expiration of the full statutory period (the true owner not claiming), held entitled to the money, although at the date of the purchase his adverse possession had only lasted eighteen years (*Re Evans*, 42 L. J. Ch. 357), or nineteen years and a half (*Ex p. Winder*, 6 Ch. D. 696; see *Ex p. Chamberlain*, 14 Ch. D. 323). It seems that a less period of adverse possession would be sufficient (*Gedye* v. *Commrs. of Works*, 1891, 2 Ch. 636). And where, at the purchase, land was in occupation of a person who originally entered claiming in respect of a long term of years, but had continued in occupation after the expiration of the term, the fund in court was invested and the dividends ordered to be paid to such occupant until the lapse of twelve years from the end of the term (*Re Harris*, 1901, 1 Ch. 931; see *Ex p. Chamberlain*, 14 Ch. D. 323). But where at the date of the purchase the land was in the possession of a person claiming in respect of a term of years which subsequently expired, and twelve years after the expiration of the term the termor claimed payment of a fund which had been paid into court as representing the reversion the claim was dismissed (*Gedye* v. *Commrs. of Works*, 1891, 2 Ch. 636). Where the land taken was in mortgage, the mortgagee was only allowed six years' interest out of the purchase-money in court (*Re Stead*, 2 Ch. D. 713).

(6) Lunacy.

Where a creditor cannot recover by reason of the lunacy of the debtor, time will not run (*Stedman* v. *Hart*, Kay, 607). But where an executor was found lunatic after time had commenced to run against a legatee, time ran during the lunacy (*Boldero* v. *Halpin*, 19 W. R. 320). Proceedings in lunacy were held not to exclude the operation of the statute on a promissory note (*Roch* v. *Cooke*, 1 De G. & Sm. 675). A petition in lunacy, after the death of the lunatic, by his committee, and a reference, followed by a report that a sum of money had been expended by the committee in the maintenance of the lunatic, will not take the claim of the committee out of the statute, as against the heir-at-law, who was not a party (*Wilkinson* v. *Wilkinson*, 9 Hare, 204). Where funds in the hands of a lunatic executrix were under an order transferred to the credit of the lunacy to an account in the names of herself and other persons interested, and the income was paid to her, the order preserved the right of the parties interested, but arrears of income could only be recovered for six years (*Re Walker*, 7 Ch. 120). An order for repayment to executors of advances made by their testator for maintenance of a lady found lunatic after his death was limited to six years before the death (*Re Weaver*, 21 Ch. Div. 615). Guardians could only recover six years' arrears in respect of the maintenance of a pauper lunatic (*Re Newbegin, Eggleton* v. *Newbegin*, 36 Ch. D. 477; *Re Watson, Stamford Union* v. *Bartlett*, 1899, 1 Ch. 72; *Re Taylor, Edmonton Union* v. *Deely*, 1901, 1 Ch. 480).

IX.—Miscellaneous Limitations.

Limitations in the case of actions brought for acts done in pursuance of divers local and personal acts are imposed by 5 & 6 Vict. c. 97, s. 5; and in the case of actions against persons acting in the execution of statutory and other public duties by the Public Authorities' Protection Act, 1893. See further, Darb. & Bos., 2nd ed. p. 577; and Supplement, p. 24.

X.—Pleading and Practice as to the Statutes of Limitation.

Pleading and Practice as to the Statutes of Limitation.

Raising the statute:

By R. S. C. Ord. 19, r. 15, a party must raise by his pleading all such grounds of defence or reply as, if not raised, would take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, Statute of Limitations.

by pleading.

In *Dawkins* v. *Penrhyn* (4 App. Cas. 59; an action commenced in 1877, when demurrer was permitted), Earl *Cairns* held that in personal actions the statute must be pleaded; but that in the case of real property, where it was a question of title, the statute might be raised by demurrer (see further, *Re Burge*, *Gillard* v. *Lawrenson*, 57 L. T. 364; *Noyes* v. *Crawley*, 10 Ch. D. 31; and see as to the previous rule at common law, *De Beauvoir* v. *Owen*, 5 Exch. 166; *Owen* v. *De Beauvoir*, 16 M. & W. 547). Since *Dawkins* v. *Penrhyn* demurrer has been abolished, but in lieu thereof a party can raise by his pleading a point of law (R. S. C. Ord. 25).

Where an action is brought to recover land of which the defendant is in possession, the statute is often pleaded expressly (*Lyell* v. *Kennedy*, 18 Q. B. Div. 796; *Pedder* v. *Hunt*, *ib.* 565). In *Heath* v. *Pugh* (6 Q. B. Div. 353), it was said that in such a case the defence of the statute might be raised under the plea of possession in a general form (Ord. 21, r. 21). As to the effect of such a plea, see *Danford* v. *McAnulty*, 8 App. Cas. 456. Under the old practice in equity a plea of adverse possession was overruled because it did not state the particular facts constituting the adverse possession on which the defendant relied (*Hardman* v. *Ellames*, 5 Sim. 640; 2 M. & K. 732).

Renewal of writ to save statute.

Ord. 8, r. 1, provides that no original writ of summons shall be in force for more than twelve months from the date thereof. Ord. 6, r. 1, provides for the issue of concurrent writs, such writs only to be in force for the period during which the original writ is in force. Under Ord. 8, r. 1, however, upon application before the expiration of the twelve months, the writ or concurrent writ may for good reason be renewed for six months, and so from time to time. Under Ord. 64, r. 7, times may be enlarged. Where the plaintiff's claim would, in the absence of renewal, be barred by statute, the time for renewing a writ will not usually be enlarged, but the court has a discretion (*Doyle* v. *Kaufmann*, 3 Q. B. Div. 7, 340; *Hewett* v. *Barr*, 1891, 1 Q. B. 98; see *Magee* v. *Hastings*, 28 L. R. Ir. 288). Where, however, the original writ was issued and renewed in proper time, the time for issuing a concurrent writ was enlarged, although the operation of the statute was thereby affected (*Smalpage* v. *Tonge*, 17 Q. B. Div. 644).

Where a writ was issued in due time in the Common Pleas to recover a debt, which writ was never served; and six months later (when, unless saved by the writ, the debt was barred) the plaintiff took out an administration summons in chancery; such summons was held barred, the writ not keeping the debt alive for the purpose of proceedings in another court (*Manby* v. *Manby*, 3 Ch. D. 101. Compare *Hurst* v. *Hurst*, 21 Ch. Div. 291, 295).

Amendments.

In the case of pleadings, a party cannot by amendment set up fresh claims which since the writ have become barred by statute (*Weldon* v. *Neal*, 19 Q. B. Div. 394; see *Steward* v. *North Metropolitan Co.*, 16 Q. B. Div. 556; *Hudson* v. *Fernyhough*, 61 L. T. 722). As to raising by amendment a case of concealed fraud to meet the statute, see *Lawrance* v. *Norreys* (39 Ch. Div. 235).

THE FINES AND RECOVERIES ACT, 1833.

3 & 4 WILL. IV. c. 74, ss. 1—76, 92.

*An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.**

[28th August, 1833.]

1. *Interpretation clause, s.* 1...262.
2. *Fines and recoveries abolished, ss.* 2, 3...266.
3. *The tenure of ancient demesne, ss.* 4—6.. 268.
4. *The amendment and validating of fines and recoveries, ss.* 7——12...271.
5. *The custody of the records of fines and recoveries, s.* 13...273.
6. *Estates tail not barrable by warranty, s.* 14...274.
7. *Disposition of lands entailed, ss.* 15—21...274.
8. *Definition of the protector, ss.* 22—33...283.
9. *Powers of the protector, ss.* 34—37...289.
10. *Confirmation of voidable estates created by tenant in tail, s.* 38...291.
11. *Enlargement of base fees, s.* 39...292.
12. *Modes in which dispositions of land under this act by tenants in tail are to be effected, ss.* 40—49...293.
13. *Estates tail in copyholds, ss.* 50—54...298.
14. *Bankrupts' estates tail, ss.* 55—69...302.
15. *Money to be laid out in lands to be entailed, ss.* 70—72...309.
16. *The inrolment of deeds, &c., ss.* 73—76...311.
17. *Inland, s.* 92...312.

1.—*Interpretation Clause.*

3 & 4 Will. 4, c. 74, s. 1.

Meaning of certain words and expressions. "Lands."

1. Be it enacted, that in the construction of this act the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the tenure

* This act does not extend to Ireland, but on the 15th August, 1834, the statute 4 & 5 Will. 4, c. 92, was passed, which corresponds in most particulars with the English statute, and came into operation on the 31st October, 1834, instead of 31st December, 1833.

by copy of court roll, shall extend to manors, messuages, lands, tenements and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien or incumbrance in, upon or affecting money subject to be invested in the purchase of lands (*a*); and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred (*b*); and the expression "estate tail," in addition to its usual meaning (*c*), shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right (*d*); and the expression "tenant in tail" shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court roll, and also to lands of any tenure, in Ireland or elsewhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of parliament or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any

3 & 4 Will. 4, c. 74, s. 1.

"Estate."

"Base fee."

"Estate tail."

"Actual tenant in tail."

"Tenant in tail."

"Tenant in tail entitled to a base fee."

"Money."

"Person."

Number and gender.

Settlement.

3 & 4 Will 4, c. 74, s. 1.

settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement (*e*); and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made: provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

The principal objects of this act.

The principal objects of this statute were to abolish fines and recoveries; to enable a tenant in tail to make an effectual alienation by enrolled deed; and to enable married women to dispose of land by deed acknowledged.

Estate.

(*a*) In the Irish act the word "estate" is made to extend to "any interest, charge, *right, title*, lien or incumbrance, in, upon, or affecting lands, either at law or in equity, *whether present or vested, or future or contingent.*" The word "estate" includes the reversionary life interest of a married woman in money invested on mortgage of land (*Miller* v. *Collins*, 1896, 1 Ch. 573; overruling *Re Newton*, 23 Ch. D. 187), but not a mere *spes successionis* on a possible intestacy (*Allcard* v. *Walker*, 1896, 2 Ch. 369). See further, as to the definition of "estate" in the present act, *Briggs* v. *Chamberlain* (11 Hare, 74); *Williams* v. *Cooke* (4 Giff. 343).

Base fee.

(*b*) The species of base fee here defined is thus described by Lord *Coke*:—Where tenant in tail bargains and sells the estate to another and his heirs, and afterwards levies a fine to him and his heirs with proclamations, he has an estate in fee simple as long as the tenant in tail has heirs of his body, derived out of the estate tail; this being an inferior and subordinate estate, a remainder or reversion may be expectant upon it (*Seymour's Case*, 10 Rep. 97 b, 98 a; see 2 Ld. Raym. 1148; Plowd. 557; Co. Litt. 18; Shep. T. 46, 103, 402; 3 Leon. 117; 1 Prest. on Estates, 431, 432). It was clearly settled that a release or bargain and sale by a tenant in tail gave a *base fee*, voidable by the issue in tail (*Machel* v. *Clark*, 2 Ld. Raym. 779; *S. C.*, Salk. 619; Com. 120; 7 Mod. 18; 11 Mod. 19; *Goodright* v. *Mead*, 3 Burr. 1703; *Seymour's Case*, 10 Rep. 95; *Doe* v. *Rivers*, 7 Term Rep. 276). A conveyance by a tenant in tail without a disentailing assurance will in general pass a fee determinable by the entry of the issue in tail (*Sturgis* v. *Morse*, 2 D. F. & J. 231, 232).

The origin of estates tail.

(*c*) By the common law, before the stat. Westm. 2, commonly called the statute *De Donis* (13 Edw. 1, c. 1), there were two kinds of estates of inheritance: the one a fee simple absolute, where lands were limited to a man and to his heirs generally; and the other a fee simple *conditional*, where lands were given to a man and to the heirs of his body (see *Willion* v. *Berkeley*, Plowd. 222—252; 2 Prest. on Est. 323—354).

In the case of the latter, until issue born, the grantee had not the absolute property in the estate; but the moment issue was born, the condition being performed, the estate became absolutely his property for some purposes (2 Bl. Comm. 111), and he could dispose of it in the same manner as if he had held it in fee simple. The statute *De Donis* declared that the will of the donor or grantor should be observed, and that an estate so granted to a man and the heirs of his body should descend to the issue, and that he should not have power to alienate the estate (3 Madd. 531, 532), thus creating the modern estate tail.

What may not be entailed.

Two things are essential to an entail within the statute, viz., that the subject be of a real nature, and that the estate in it be an inheritance (Harg. Co. Litt. 20 a, note (5)). Where a dignity is limited to the heirs

of the body, even though no place be named in the creation of the title, the dignity is within the statute *De Donis*, and descendible as an estate tail (*Re Rivett-Carnac*, 30 Ch. D. 136). Lands in ancient demesne are not within the statute *De Donis* (*Cresswell* v. *Hawkins*, 3 Jur. N. S. 407). As to copyholds, see note to sect. 50, *post*, p. 298. 3 & 4 Will. 4, c. 74, s. 1.

If a purely personal annuity be granted to a man and the heirs of his body, the grantee takes a fee simple conditional, which becomes absolute on the birth of issue, the case not being within the statute *De Donis* (*Re Rivett-Carnac*, 30 Ch. D. 141; see *Stafford* v. *Buckley*, 2 Ves. sen. 170; *Turner* v. *Turner*, 1 Br. C. C. 325). In the case, however, of bequests of personalty to A. and the heirs of his body, the ordinary rule is that A. takes an absolute interest (*Leventhorpe* v. *Ashbie*, Tud. L. C. Conv. 242, 4th ed.).

Neither estates *pur autre vie* in lands, nor terms of years, are entailable any more than personal chattels. They may, however, be so settled as to answer the purposes of an entailed estate and be rendered inalienable almost for as long a time as if they were entailable (Harg. Co. Litt. 20 a, note (5); see Fearne, 495—501, 7th ed.). As to chattels settled by reference to limitations of real estate in strict settlement, see *Glenorchy* v. *Bosville* (1 White & Tud. L. C. Eq. 1).

Quasi entails of estates *pur autre vie.*

A *quasi* tenant in tail in possession of an estate *pur autre vie* may by act *inter vivos* deal with the estate as if there had never been any settlement (*Allen* v. *Allen*, 2 Dru. & War. 307; *Re Barber*, 18 Ch. D. 628; see *Pickersgill* v. *Grey*, 31 L. J. Ch. 394). The *quasi* entail in such an estate may be barred by deed, surrender, or even by articles (*Guy* v. *Mannock*, 2 Eden, 339; see 16 Ves. 313; Coop. C. C. 178; 1 Mer. 665; see *Lynch* v. *Nelson*, I. R. 5 Eq. 192), but not by *will* (*Hopkins* v. *Ramadge*, Batty, 365; *Campbell* v. *Sandys*, 1 Sch. & L. 281; *Cresswell* v. *Hawkins*, 3 Jur. N. S. 408; *Re Barber*, 18 Ch. D. 628; see *Doe* v. *Luxton*, 6 T. R. 292). Where a tenant in tail in remainder after an estate *pur autre vie* by deed barred such entail, the deed was held also to bar a *quasi* estate tail taken by the same person in the estate *pur autre vie* (*Re Michell, Moore* v. *Moore*, 1892, 2 Ch. 87). A lease for lives may be barred by surrender and renewed by the first *quasi* tenant in tail of it (*Blake* v. *Blake*, 1 Cox, 266; 3 P. Wms. 10, note 1, by Cox; see Coop. C. C. 184, 185); and a renewable freehold by a grant for one hundred years by the *quasi* tenant in tail (*Walsh* v. *Studdert*, I. R. 5 C. L. 478), or a fee farm grant to the *quasi* tenant in tail (*Morris* v. *Morris*, I. R. 6 C. L. 73; see further, Tud. L. C. Conv. 102, 4th ed.). But a *quasi* tenant in tail in remainder of an estate *pur autre vie*, after an estate for life to some other person, could not by his own act, by fine or otherwise, in the lifetime of the tenant for life and without his concurrence, bar the remainders over (*Slade* v. *Pattison*, 5 L. J. Ch. 51; *Allen* v. *Allen*, *sup.*; see *Wastneys* v. *Chappell*, 3 Br. P. C. 50; *Edwards* v. *Champion*, 3 D. M. & G. 202). So where an estate *pur autre vie* is limited to one for life with remainder over in tail, there the first taker cannot bar the remainder, unless the remainderman in tail joins (*Low* v. *Barron*, 3 P. Wms. 262; *Osbrey* v. *Bury*, 1 Ball & B. 53).

Before this act estates tail were barred by means of fines or recoveries (see the note to sect. 2, *post*).

Divest.

(*d*) The word *divest* signifies nothing more than a mere deprivation of the possession (Cow. Dict.). But the words *turned to a right* have a more extensive signification; for when an estate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property, which could not be regained by a possessory, but only by a real action (see 1 Burr. 107; 1 Taunt. 578, 588; 1 T. R. 738; Butl. Co. Litt. 239 a, n. (1)).

Relation of appointment to deed creating a power.

(*e*) It has been established ever since the time of Lord *Coke* (*Sir Edward Clere's Case*, 6 Rep. 18), that where a power of appointment over real estate is executed, that the appointee takes under him who created the power, and not under him who executes it (*Marlborough* v. *Godolphin*, 2 Ves. sen. 78); the appointee, however, does not take from the time of the creation of the power, but from the time of its complete execution, *e. g.*,

3 & 4 Will. 4, c. 74, s. 1.

where the execution is by will from the testator's death (*Ib.*). The estates limited in default of and until the execution of the power are vested until an appointment is made (*Doe* v. *Martin*, 4 T. R. 39; compare *Re Ware, Cumberlege* v. *Cumberlege-Ware*, 45 Ch. D. 269), but are defeated by an appointment (compare *Lovett* v. *Lovett*, 1898, 1 Ch. 82). Thus, in the case of a power of leasing, the lessee stands in the same relation to all the persons named in the settlement as if that settlement had contained a limitation to his use antecedent to the life estate and the subsequent limitations (*Maundrell* v. *Maundrell*, 10 Ves. 255, 256; see Co. Litt. 216 a, 241 a, notes by Butl.). So a right of dower, which had attached before the execution of a power, was defeated by an appointment (*Ray* v. *Pung*, 5 B. & Ald. 561; 5 Madd. 310).

But the donee of a power cannot by an appointment defeat a lease or other interest granted by him by virtue of his estate (*Snape* v. *Turton*, Sir W. Jones, 392; *Yelland* v. *Ficlis*, Moore, 788; *Goodright* v. *Cator*, Dougl. 477; see Gilb. on Uses, 142; *Edwards* v. *Slater*, Hardr. 415; *Reg.* v. *Ellis*, 4 Exch. 652; see also the note, *post*, p. 319).

With reference to the rules against perpetuities and remoteness, where an appointment is made in exercise of a special power, the appointment must be read into the instrument creating the power, and its validity tested in that way (*Whitby* v. *Mitchell*, 42 Ch. D. 500; 44 Ch. Div. 85; *Re Brown and Sibley*, 3 Ch. D. 159). But where the appointment is made under a general power, time runs from the execution of the power, not from its creation (*Rous* v. *Jackson*, 29 Ch. D. 521, 526; *Re Devon Settled Estates*, 1896, 2 Ch. 567).

2. *Fines and Recoveries abolished.*

No fine or recovery to be levied or suffered after the 31st of December, 1833.

2. After the thirty-first day of December, one thousand eight hundred and thirty-three, no fine shall be levied or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery; and any fine or common recovery, which shall be levied or suffered contrary to this provision, shall be absolutely void.

The S. L. Rev. Act, 1888, has repealed the words, "and be it further enacted," wherever they occurred in this act, and has also repealed immaterial words in the following sections, viz., 36, 47, 79, 80, 83, 84, and 89. The repealed words have accordingly been omitted.

Report of Real Property Commissioners.

The following account of the nature and operation of fines and recoveries is abridged from the First Report of the Real Property Commissioners, 1829, pp. 20—25.

Definition of a fine and its origin.

A fine in its origin was an amicable composition, by leave of the king or his justices, of any actual suit, whereby the lands were acknowledged to be the right of one of the parties, and at common law all persons were barred by it who did not claim within a year and a day. The safe title acquired by this process led, it is supposed, to the practice of transferring lands by means of a fictitious suit of the same nature as the real suit above alluded to. This is the origin of fines, which, before this statute, subject to certain modifications made from time to time by statutes, had been in use for centuries (see 34 Edw. 3, c. 16; 1 Rich. 3, c. 7; 4 Hen. 7, c. 24; 32 Hen. 8, c. 36).

Different sorts of fines.

There were four sorts of fines, viz., 1st, a fine "*Sur conuzance de droit come ceo, &c.*"; 2ndly, a fine "*Sur conuzance de droit tantum*"; 3rdly, a

fine "*Sur concessit*"; and 4thly, a fine "*Sur done grant et render.*" The first and third were those in general use; the second was sometimes used, but the same purposes could not be attained either by the first or third; the fourth had become obsolete. 3 & 4 Will. 4, c. 74, s. 2.

The three principal uses to which fines were applied were, to bar estates tail, and enable a tenant in tail to acquire or pass a base fee (see 32 Hen. 8, c. 36); to gain a title by non-claim (see *ante*, p. 125; *Davies* v. *Lowndes*, 7 Scott, N. R. 141); and to pass the estates and bar the rights of married women (see *Life Association* v. *Siddal*, 3 D. F. & J. 74; Co. Litt. 121 a, n.; *Dickens* v. *Unthank*, 1 Jur. N. S. 916; 24 L. J. Ch. 501). For other effects of a fine, see notes to the following sections of this act, viz., sects. 20, 34, 38, 39, and the note to sect. 39 of R. P. Lim. Act, 1833 (*ante*, p. 182); *Doe* v. *Dilnot* (2 Bos. & P. N. R. 401); *Brassington* v. *Llewellyn* (1 F. & F. 27). Operation of fines.

A common recovery was a judgment in a fictitious suit brought by the demandant against the tenant of the freehold, who vouched some person to warrant the lands, and judgment was given for the demandant to recover them against the tenant, in consequence of the person vouched making default in defending the title to the lands, which title he was supposed to have warranted. In a recovery, the regular process of a real action was pursued throughout (see *Broome* v. *Swan*, 1 Bl. Rep. 496, 526), and no compromise took place as in a fine. Common recoveries were invented by ecclesiastics in order to elude the statutes of mortmain (Willes Rep. 448, 551; 5 J. B. Moore, 607; 5 T. R. 109, n.; Shelford's Mortmain, 12, 13), and were in constant use for that purpose until checked by the statute of Westminster 2, 13 Edw. 1, c. 32. In consequence of the principles laid down in the 12 Edw. 4, in *Taltarum's Case* (Hardr. 209; Willes Rep. 452; see Tudor, L. C. Conv. 695, 3rd ed.), a common recovery was afterwards applied to the purpose of evading the statute of Westminster 2, 13 Edw. 1, c. 1, commonly called the statute *De Donis Conditionalibus* (*ante*, p. 264). Definition of a common recovery and its origin.

The principal use of a recovery was to enable a tenant in tail to bar not only his estate tail, but also all remainders, reversions, conditions, collateral limitations and charges, not prior to the estate tail, and to acquire or pass a fee simple or an estate commensurate with the estate of the settlor; it was not unfrequently made use of at the same time to convey, release, bar, or extinguish the estates, rights, powers, and interests of married women and others. As to other effects of a recovery, see notes to sects. 18 and 38 of this act, and *Doe* v. *Llandaff* (2 Bos. & P. N. R. 491). Operation of a recovery.

The writ, in the case of a recovery, must have been brought by the demandant against the person who had the immediate freehold, who was called the tenant to the *præcipe*; consequently there were frequently great difficulties in barring entails, for if the tenant to the *præcipe* did not join in the conveyance, the recovery was void, and it often happened that he could not be traced or would refuse to concur (see further First Report of the Commissioners of Real Property, ordered to be printed 20th May, 1829; 5 Cru. Dig.; Prest. on Conv.; Coventry on Recoveries; Shep. Touch.; *Doe* v. *Scarborough*, 3 Ad. & Ell. 1). Necessary parties to a recovery for barring estates tail and remainders.

3. In case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into or hereafter to be entered into, before the first day of January, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to Persons liable after 31st December, 1833, to levy fines or suffer recoveries under covenants to effect the purposes intended by means of this act; but in any case where the

3 & 4 Will. 4, c. 74, s. 3.

purpose of a fine or recovery cannot be so effected, the persons liable to levy fines or suffer recoveries shall execute a deed which shall have the same operation as the fine or recovery.

levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable, under such covenant or agreement, to make, or to procure to be made, such a disposition under this act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement to make or procure to be made such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and in those cases where the purposes intended to be effected by such fine or recovery, or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable under such covenant or agreement to execute, or to procure to be executed, some deed whereby the person intended to levy such fine or suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered.

3.—*The Tenure of Ancient Demesne.*

Fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, may be

4. No fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said

manor, be reversed as to any person except the lord of the said manor; and the court shall order such fine to be vacated only as to the lord of the said manor; and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against, and as binding upon, the conusors thereof and all the persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid; and no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no common recovery hereafter to be suffered of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor, upon such writ of deceit as aforesaid, shall still remain as good and valid against, and as binding upon, the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid.

3 & 4 Will. 4, c. 74, s. 4.

reversed as to the lord by writs of deceit, the proceedings in which are now pending, or by writs of deceit hereafter to be brought, but shall be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord.

All those estates which are called in Doomsday Book *terræ regis* were manors belonging to the crown, being part of its ancient demesne; a great portion of the lands comprised within those manors was in the hands of tenants who held the same of the crown by a peculiar species of socage tenure which has long been known by the appellation of *ancient demesne* (4 Inst. 269, 270), which can only subsist in manors of that sort. Whether ancient demesne or not can only be determined by a reference to Doomsday Book (Dyer, 250; *Doe* v. *Roe*, 2 Burr. 1046; see Scriven on Cop. 36—41, 475—477, 7th ed.; Com. Dig. Ancient Demesne; and Third Real Property Report, 12, 13). The tenants in ancient demesne were subject to certain restraints, and entitled to certain immunities. They could not bring or defend any real action touching their tenements, except in the lord's court. Hence the title to lands of that tenure are frequently involved in considerable difficulties, in consequence of fines or recoveries having by mistake been levied or suffered in the Court of Common Pleas (see the First Report of the Real Property Commissioners, pp. 28, 29). See as to manors of ancient demesne, *Merttens* v. *Hill*, 1901, 1 Ch. 842.

Tenure by ancient demesne.

5. If at any time before or after the passing of this act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and subsequently to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in

Fines and recoveries of lands in ancient demesne levied or suffered in the manor court, after other fines and recoveries in a superior court, shall

3 & 4 Will. 4, c. 74, s. 5.

the lord's court, then and in every such case the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid and binding as the same would have been if the tenure had not been altered or changed; and that in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court, and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery; and in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

be as valid as if the tenure had not been changed.

Fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

Tenure of ancient demesne where suspended or destroyed by fine or recovery in a superior court, restored in cases in which the rights of the lord of the manor shall have been recognized within twenty years.

6. In every case in which at any time, either before or after the passing of this act, the tenure or * ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not by any law in force on the first day of this session of parliament be barred of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel shall in any manner have been acknowledged or recognized as to the same lands, shall, from the said first day of January, one thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents and services, as they would have been subject to if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-three.

[* *Lege* of.]

4. *The Amendment and Validating of Fines and Recoveries.*

3 & 4 Will. 4, c. 74, s. 7.

Fines made valid without amendment.

7. If it shall be apparent, from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission.

Amendment of fines.

Amendment was refused where the error in the fine was cured by this section (*Life Association* v. *Siddal*, 3 D. F. & J. 58; *Lockington* v. *Shipley*, 1 Bing. N. C. 355). Fines were amended in the following cases: *Totton* v. *Vincent* (5 Bing. N. C. 626); *Lloyd* v. *Nicholas* (4 Bing. N. C. 633); *Price* v. *Watkins* (6 Jur. 170); *Evans* v. *Davis* (5 Bing. N. C. 229).

Recoveries made valid without amendment.

8. If it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission.

Amendment of recoveries.

A recovery was amended under this section by inserting a latent fact (*Re Twisden*, 4 Bing. N. C. 253); but amendment was refused when the defect was remedied by this section (*Wickens* v. *Windus*, 9 C. B. 711; *Re Watkins*, 9 Dowl. P. C. 58; *Re Evans*, 2 Scott, N. R. 83).

A warrant of attorney cannot be amended (*Lamont*, 3 Scott, 666).

See further, as to the amendment of fines and recoveries, Cruise, Dig. tit. 35, c. 5; tit. 36, c. 6; 2 Wms. Saund. 94.

Saving jurisdiction in cases not provided for.

9. Provided always, that nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act.

Recoveries made valid in certain cases where bar-

10. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant

3 & 4 Will. 4, c. 74, s. 10.

to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly enrolled.

Bargain and sale is not duly enrolled.

Recoveries invalid in consequence of there not being proper tenants to the writs of entry made valid in certain cases.

11. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved.

Equitable fines and recoveries.

Fines and recoveries were levied or suffered of equitable estates, and had, with a few exceptions, the same operation as they would have had if the estates had been legal; but neither a fine nor a recovery of an equitable estate produced a forfeiture of a particular estate, or destroyed contingent interests, except in the instance of a recovery suffered by an equitable tenant in tail, which would bar the entail, and all interests to take effect on the determination or in derogation thereof. Fines and recoveries of equitable estates must have been levied and suffered in the same courts, and with the same formalities, as those of legal estates; but there was some difference between legal and equitable recoveries, so far as regarded the tenant to the *præcipe* (see First Real Property Report, 1829, p. 29).

Requisites to make good tenant to the *præcipe*.

In order to make a good tenant to the *præcipe* there should have been a legal estate for life, with a legal remainder in tail, or an equitable estate for life, with an equitable remainder in tail (*Shapland* v. *Smith*, 1 Br. C. C. 75; *Salvin* v. *Thornton*, *Id.* 73, n.; see *Iveson* v. *Pearman*, 3 B. & C. 811; 4 B. & Ad. 55; 1 Collect. Jurid. 214; *Doe* v. *Ewart*, 7 Ad. & Ell. 670). A recovery suffered by an equitable tenant for life with a legal remainder in tail was void (3 B. & Cr. 799). But an equitable remainder in tail might have been barred although the person making the tenant to the *præcipe* had the legal estate (3 Ves. 125). Where a legal tenant in tail conveyed his estate to a trustee or mortgagee, the concurrence of his alienee in making a tenant to the *præcipe* was necessary. But this rule was held not applicable by analogy to trust estates (*Nouaille* v. *Greenwood*, Turn. & Russ. 26; see *Casborne* v. *Scarfe*, 1 Atk. 603). In equitable recoveries the person who made the tenant to the *præcipe* was the person who had the real equitable ownership (*Re Dudson*, 8 Ch. Div. 632; see also *Penny* v. *Allen*, 7 D. M. & G. 409; *Adams* v. *Adams*, 6 Q. B. 860).

As to the necessity of possession by the tenant to the *præcipe*, see *Grenville* v. *Blyth* (16 Ves. 224); *Pigott* v. *Waller* (7 Ves. 122); *Taylor* v. *Horde* (1 Burr. 60; Cowp. 689; 6 Br. P. C. 633, Toml. ed.; see Butl. Co. Litt. 330 b, n.); *Doe* v. *Lyons* (3 B. & C. 388).

A dowress who had not entered was not a necessary party to a recovery (4 Br. C. C. 525; see Gilb. Ten. 26; 5 Cru. Dig. p. 246, pl. 18); nor a person holding a freehold lease (14 Geo. 2, c. 20). A recovery might be void in part for want of a good tenant to the *præcipe* as to that part (*Row* v. *Power*, 2 Bos. & Pull. 1; *Moody* v. *Moody*, Ambl. 649; see Co. Litt. 187; 2 Br. C. C. 180; *Winchester's case*, 3 Rep. 1; *Collyer* v. *Mason*, 2 Brod. & Bing. 685).

3 & 4 Will. 4, c. 74, s. 11.

Certain cases in which fines and recoveries shall not be made valid by this act.

12. Provided always, that where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery, if valid, shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery, on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery, and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

See as to this section, *Davies* v. *D'Arcy* (3 Ir. C. L. Rep. N. S. 617; 4 Ir. Ch. Rep. N. S. 87; Sugd. R. P. Stat. 2nd ed. 187).

5. *Custody of the Records of Fines and Recoveries.*

[*Sect.* 13 *provided for the custody of the records of fines and recoveries which are now kept at the Central Office of the Supreme Court* (*see* 5 *&* 6 *Will.* 4, *c.* 82; 42 *&* 43 *Vict. c.* 78, *s.* 5). *As to fines and recoveries in the Courts of Great Session in Wales, see* 5 *Vict. c.* 32; Doe *v.* Price, 16 *M. & W.* 603.]

3 & 4 Will. 4, c. 74, s. 14.

6. *Estates Tail not Barrable by Warranty.*

Estates tail, and estates expectant thereon, no longer barrable by warranty.

14. All warranties of lands which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

See R. P. Lim. Act, 1833, s. 39, *ante*, p. 182.

7. *Disposition of Lands Entailed.*

Power after the 31st of December, 1833, to dispose of lands entailed in fee simple, or for a less estate, saving the rights of certain persons.

15. After the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons,* including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail: saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

Corresponding clause of Irish Act.

* The remainder of the corresponding clause in the Irish Act (4 & 5 Will. 4, c. 92), s. 12, runs thus: "whose estates are to take effect after the determination or in defeasance of any such estate tail, including the King's most excellent Majesty, his heirs and successors, as regards the title to his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the Crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this act authorized to be made."

Actual tenant in tail.

The words "actual tenant in tail" are defined by sect. 1, *ante*, p. 263.

Equitable tenants in tail.

As to equitable tenants in tail, and the form of assurance made necessary in that case by this act, see 1 Hayes, Conv. 155, 5th ed. As to fines and recoveries of equitable estates, see note to sect. 11, *ante*, p. 272.

Tenant in tail in contingency.

The owner of a contingent estate tail was deemed incompetent to suffer a common recovery with effect (1 Prest. Conv. 142); but tenants in tail in contingency are expressly within the words of this section (see Sugd. R. P. Stat. 192; 1 Hayes, Conv. 194, 5th ed.). Until the contingency happens the only effect of the disposition ought to be to substitute a contingent fee for the contingent estate tail (Sugd. R. P. Stat. 192). Where

successive entails were limited subject to a proviso that in a certain event the second entail was to be postponed to the third entail, the operation of the proviso was held to be "in defeasance" of the second entail, and to be barred by a disentailment thereof (*Millbank* v. *Vane*, 1893, 3 Ch. 79). And where, after the death of A., who was tenant for life, trustees were directed to convey real estate to the use of B. in tail, but if B. should be then dead to the use of the person who should then be the first heir male of the body of B. in tail, with remainder over, it was held that, during the life of A., B. had a vested equitable estate tail in remainder expectant on the decease of A., and that the subsequent estates were barred by B.'s disentailing deed, being estates to take effect in a certain event after, if not in defeasance of, B.'s estate tail (*Cardigan* v. *Curzon Howe*, 1901, 2 Ch. 479). In both the last cases it was unsuccessfully argued that the effect of the limitations was to create alternative gifts. See, further, *Doe* v. *Scarborough*, 3 Ad. & Ell. 43, under the old law. **3 & 4 Will. 4, c. 74, s. 15.**

Where land was devised to trustees on trust for sale for certain purposes, and subject thereto to certain persons in tail, it was held not necessary to bar the entail on a sale by the trustees (*Re Skerrett*, 2 Dru. & War. 585).

Disposition —by tenant for life.

A disentailing deed executed by a tenant for life has no operation under this section (*Slater* v. *Dangerfield*, 15 M. & W. 263; as to the effect of a recovery suffered by a tenant for life, see *Smith* v. *Clifford*, 1 T. R. 738; *Meredith* v. *Leslie*, 6 Br. P. C. 388; *Doe* v. *Scarborough*, 3 Ad. & Ell. 43). But a proper disentailing deed will bar the entail, though the tenant in tail who executes it is recited in it to be tenant for life (*Evans* v. *Jones*, Kay, 29).

—by an alien, lunatic, &c.

An alien might suffer a common recovery (Leon. 404; Shep. Touch. 404), and may execute a disentailing deed (1 Jarm. Wills 44, 5th ed.). Where the tenant in tail is a lunatic, the Court of Lunacy can bar the entail, but the power will not be exercised so as to affect the remaindermen (*Re Pares, Lillingston* v. *Pares*, 12 Ch. Div. 333; see Lunacy Act, 1890, s. 123). A base fee has been enlarged where it was for the benefit of the lunatic (*Re Sefton*, 1898, 2 Ch. 378). An infant has been ordered under Debts Recovery Act, 1830, s. 11, to execute a disentailing deed (*Radcliffe* v. *Eccles*, 1 Keen, 130; see *Re Montagu, Faber* v. *Montagu*, 1896, 1 Ch. 549). A married woman is not prevented by a restraint on anticipation from barring an entail (*Cooper* v. *Macdonald*, 7 Ch. Div. 288). Where a settlor gives an estate tail, he cannot restrict the power of the tenant in tail to bar it (*Dawkins* v. *Penrhyn*, 4 App. Cas. 64).

Operation of disentailing deeds under this section.

A disentailing deed executed by a tenant in tail does not destroy the interest he possesses in the estate, but enables him, by the exercise of the power which that interest gives him, to render it perpetual (*Lilford* v. *A.-G.*, L. R. 2 H. L. 63). As to the destruction of powers by a disposition under the statute, see Sugden, Powers, 91, 8th ed.; *Hill* v. *Pritchard* (Kay, 394); *Re Wright and Marshall* (28 Ch. D. 93).

A common law grant by deed of land to a person who does not execute the deed and afterwards disclaims, is not effectual to bar an entail under this section (*Peacock* v. *Eastland*, 10 Eq. 17). But the fact that, in the case of a conveyance under the Statute of Uses, the grantee to uses does not execute the deed and afterwards disclaims, will not render the deed ineffectual to bar the entail (*Re Dudson*, 8 Ch. Div. 631).

Leases by tenant in tail.

The power of leasing conferred by this section on tenants in tail (see sect. 41, *post*) has become less material since the Settled Land Act, 1882, which last act (sect. 58, sub-sect. 1, *post*) has enabled a tenant in tail to exercise the powers under that act of a tenant for life.

Where a tenant in tail is a lunatic, the judge in lunacy may authorize the committee to grant leases binding on all reversioners (Lunacy Act, 1890, ss. 120, 122; see S. L. Act, 1882, s. 62).

Entail of rent.

"Lands" in this act includes rents (sect. 1, *ante*). As to the effect of a recovery on entailed rents, see *Smyth* v. *Farnaby*, Carter, 52; Sid. 285; 2 Keb. 29, 55, 84; *Weeks* v. *Peach*, Lutw. 1218, 1224; *S. C.*, Salk. 577; *Chaplin* v. *Chaplin*, 3 P. Wms. 229; Butl. Co. Litt. 298 a, n. 2; 1 Prest. on Conv. 3.

3 & 4 Will. 4, c. 74, s. 15.

A declaration of trust is not such a disposition as is referred to in this section (*Green* v. *Paterson*, 32 Ch. Div. 108). See further, as to the mode in which the disposition can be made, sect. 40, *post*, p. 294.

Form of disposition.

Power of disposition not to be exercised by women tenants in tail ex provisione viri, under 11 Hen. 7, c. 20, except with assent.

16. Provided always, that where under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the eleventh year of the reign of his Majesty King Henry the Seventh, intituled "Certain Alienations made by the Wife of the Lands of her deceased Husband shall be void," the power of disposition hereinbefore contained as to such lands shall not be exercised by her except with such assent as, if this act had not been passed, would, under the provisions of the said act of King Henry the Seventh, have rendered valid a fine or common recovery levied or suffered by her of such lands.

The stat. 11 Hen. 7, c. 20, and construction of it.

By stat. 11 Hen. 7, c. 20, a woman who had any estate in *dower* or for *life*, or *in tail jointly* with her husband, or *only to herself*, or to *her use*, in any lands or hereditaments of the *inheritance or purchase of her husband* (Co. Litt. 326 b), or given to the husband and wife in tail or for life, by any of the *ancestors of the husband*, or by any other person seised to the use of the husband, or of his ancestors, could not, being *sole*, or with any *after-taken husband*, except with the consent of the persons next entitled to the inheritance, or for the term of her *life only*, alien such estate (see *Foster* v. *Pitfal*, Cro. Eliz. 2, 524; *Symson* v. *Turner*, 1 Eq. Cas. Abr. 220; *Gretton* v. *Haward*, 6 Taunt. 94; *Villars* v. *Beaumont*, Dyer, 145 a; *Watkins* v. *Lewis*, 1 Russ. & M. 390; Cro. Eliz. 2; 1 Leon. 261; *Curtis* v. *Price*, 12 Ves. 97; *Rochfort* v. *Fitzmaurice*, 2 Dru. & War. 19; 1 Roper on Hus. & W. by Bright, pp. 497, 515; Cruise's Dig. tit. 36, c. 10; Prest. Conv. 19—21, 146—149).

[*Sect.* 17, *repealing* 11 *Hen.* 7, *c.* 20, *was repealed by S. L. Rev. Act*, 1874, *without reviving the former act.*]

The power of disposition not to extend to certain tenants in tail.

18. Provided always, that the power of disposition hereinbefore contained shall not extend to tenants of estates tail, who, by an act passed in the thirty-fourth and thirty-fifth years of the reign of his Majesty King Henry the Eighth, intituled, "An Act to embar feigned Recovery of Lands wherein the King is in Reversion," or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct.

Tenants in tail of the gift of the Crown. 34 & 35 Hen. 8, c. 20.

By statute 34 & 35 Hen. 8, c. 20, no feigned recovery by assent of parties against any tenant in tail of any lands *given by the Crown*, whereof the reversion shall be in the King, shall bind the heirs in tail (see *Perkins* v. *Sewell*, 1 Bl. Rep. 654; Co. Litt. 372 b, 373 a; Cruise's Dig. tit. 36, c. 10, ss. 42—51; 1 Prest. Conv. 18, 19, 144—146, 221; *Chesterfield's case*, Hardr. 409; 1 Anne, sess. 1, c. 7; 34 Geo. 3, c. 75; 39 & 40 Geo. 3, cc. 86, 88; 47 Geo. 3, c. 24; S. E. Act, 1877, sect. 55, *post*). As to the law before 34 & 35 Hen. 8, c. 20, see 2 Roll. Abr. 293, 294; Hob. R. 339; Bro. Tail. 41; Cro. Car. 430; Plowd. 555; Dyer, 32 a; *Neal* v. *Wilding*, 1 Wils. 275; *Blosse* v. *Clanmorris*, 3 Bligh, 62.

Notwithstanding 34 & 35 Hen. 8, c. 20, the entail of lands granted by letters patent to the first Duke of Grafton was held effectually barred by a bargain and sale, under sect. 15, *ante* (*Grafton* v. *London & Birmingham*

R. Co., 6 Scott, 719; see Com. Dig. Estates, B. 21; Bac. Abr. Fines and Recoveries, 2nd Div. C.). 3 & 4 Will. 4, c. 74, s. 18.

Where tenant in tail of the gift of the Crown was disseised, and the disseisor levied a fine with proclamations, and five years elapsed; it was held that the issue in tail was not barred (*Stratfield* v. *Dover*, Cro. Eliz. 595; but see 1 Sid. 166; 1 Roll. R. 171; and *Abergavenny* v. *Brace*, L. R. 7 Exch. 176). Tenant in tail of the gift of the Crown disseised; fine by disseisor.

In several acts of parliament conferring estates on eminent individuals, tenants in tail are restrained from alienating such estates, except for their own lives, as in the case of the Duke of Marlborough, by 5 Anne, cc. 3, 4 (see *Davis* v. *Marlborough*, 1 Swanst. 74; *Osborn* v. *Marlborough*, 14 W. R. 886), the Duke of Wellington (see statutes 41 Geo. 3, c. 59, s. 6; 42 Geo. 3, c. 113, s. 6; 54 Geo. 3, c. 161, s. 28), and the Earl of Abergavenny (2 & 3 Ph. & M. c. 23; see *Abergavenny* v. *Brace*, L. R. 7 Exch. 145). An attempt to bring under the parliamentary settlement estates larger than those originally settled was held void (*Howard* v. *Shrewsbury*, 2 Ch. 760). Inalienable estates tail.

By statute 14 Eliz. c. 8 (repealed by 26 & 27 Vict. c. 125), recoveries against tenant by the curtesy, tenant in tail after possibility of issue extinct, or otherwise, for term of life, or estate determinable upon life, were void against the reversioner, unless by the assent of the reversioner. See, however, *Doe* v. *Gatacre* (5 Bing. N. C. 609). A tenant in tail after possibility of issue extinct had no power of barring the estate tail or the remainders expectant thereon, but for all purposes of alienation was considered merely as tenant for life (Co. Litt. 28 a; 11 Rep. 80), although not impeachable for waste. Tenants in tail after possibility of issue extinct.

Where lands were settled to the use of the wife for life for her *jointure* and in bar of dower, remainder to the sons and daughters successively of the marriage in tail, *remainder to the heirs of the body of the husband and wife*, and there was no issue of the marriage, the widow was held tenant in tail after possibility of issue extinct (*Williams* v. *Williams*, 15 Ves. 419; see *Platt* v. *Powles*, 2 M. & S. 65).

Tenants in tail where the reversion is in the Crown, or who are restrained by act of parliament from barring the entail (with certain exceptions), and tenants in tail after possibility of issue extinct, can exercise the powers given to tenants for life by the S. L. Act, 1882 (see sect. 58, sub-sect. 1 (i), (iii), (vii), of that act, *post*). See also the powers of leasing in the case of a lunatic tenant in tail under Lunacy Act, 1890, ss. 120, 122. S. L. Act, 1882.

19. After the thirty-first day of December, one thousand eight hundred and thirty-three, in every case in which an estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute (*f*); saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made. Power after 31st December, 1833, to enlarge base fees; saving rights of certain persons.

(*f*) The remainder of the corresponding section of the Irish statute, 4 & 5 Will. 4, c. 92, s. 16, runs thus:—"including the King's most excellent Majesty, his heirs and successors, as regards the title to * his [* *Sic.*] Corresponding clause of Irish act.

3 & 4 Will. 4, c. 74, s. 19.

Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the Crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was, previously to such forfeiture, limited by any settlement or will, but not in any other case, or where the title to the Crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee and the rights of all other persons, except those against whom such disposition is by this act authorized to be made: provided always, that nothing in this act contained shall authorize any tenant in tail or other person to defeat or bar any estate or interest which may at the time of passing this act have been granted to any person or persons by his Majesty, or any of his predecessors, in any reversion or remainder which may have come to the Crown by attainder or otherwise."

Cases on sect. 19.

A tenant in tail can under this section enlarge a base fee, notwithstanding that he has parted with it to a purchaser (*Bankes* v. *Small*, 36 Ch. Div. 716). And where the tenant in tail is a woman married since 1882, she may enlarge a base fee without the concurrence or acknowledgment required by sect. 40 (*Re Drummond and Davie*, 1891, 1 Ch. 524).

Issue inheritable not to bar expectancies.

20. Provided always that nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest (*g*) which he may have as issue inheritable to any estate tail therein (*h*).

Corresponding clause of the Irish act.

(*g*) The words in the corresponding section of the Irish statute, 4 & 5 Will. 4, c. 92, s. 17, are "expectant interest or *possibility*."

By sect. 22 of the same statute it is enacted, "that from and after the 31st day of October, 1834, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of a living person, or as expectant heir of the body of a living person, to an estate in lands, not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein by any assurance, whether deed, will, or any other instrument by which he could have made such disposition if such estate were a vested estate in possession: provided nevertheless, that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled be existing and in operation at the time of the disposition." As to the nature of this provision, see 1 Hayes, Conv. 219, 5th ed., and compare the Real Prop. Act, 1845, s. 6, *post*. This provision is not in terms confined to Ireland, but from the context it would probably be held to be so confined (Sugd. R. P. Stat. 243).

Alienation of expectant interests.

(*h*) Sect. 20 and the abolition of fines put an end to some powers of alienation which previously might have been exercised by persons having only expectant interests, such as the eldest son of a tenant in tail or fee simple had during the life of his father. A fine levied by a person who afterwards became heir was an estoppel (1 Roll. Abr. 482 (S.) pl. 2; *Helps* v. *Hereford*, 2 B. & Ald. 242; *Doe* v. *Martyn*, 2 Mann. & R. 485; *Doe* v. *Oliver*, 10 B. & C. 181; *Edwards* v. *Rogers*, W. Jones, 756; *Wright* v. *Wright*, 1 Ves. sen. 412); but a grant by such a person was void (*Wivel's case*, Hob. 45; Pork. sect. 65; 1 Anst. 11; 3 Term Rep. 365); and the fine did not bind collateral heirs unless the right to the entail descended to the cognisor or his heirs (*Bradstock* v. *Scovel*, Cro. Car. 434; see 8 Rep. 88 b).

Alienation of possibilities

A mere possibility could only be bound or extinguished at law by estoppel, by a fine, or a recovery (*Weale* v. *Lower*, Pollex. 54); or in equity

by contract (*Beckley* v. *Newland*, 2 P. Wms. 182; *Hobson* v. *Trevor*, *Id.*, 191; see *Lyde* v. *Mynn*, 1 M. & K. 693). But when a possibility is coupled with an interest, as where the person is fixed and ascertained, it may be released (*Jewson* v. *Moulson*, 2 Atk. 417), or be devised, though it cannot be granted or transferred by the ordinary rules of the common law (*Lampet's case*, 10 Rep. 46). A contingent remainderman conveyed his interest to secure a debt. The remainder was afterwards destroyed by the tenant of the prior estate. The interest which the remainderman afterwards acquired under the will of such tenant was held to be available by the creditor (*Noel* v. *Bewley*, 3 Sim. 103; see *Smith* v. *Baker*, 1 Y. & C. C. C. 223). An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity (*Lyde* v. *Mynn*, 1 M. & K. 683; see *Pope* v. *Whitcombe*, 3 Russ. 124). A specific performance was decreed of an agreement between two sons to share equally whatever property they might derive from their father either in his lifetime or at his decease (*Wethered* v. *Wethered*, 2 Sim. 183; see *Harwood* v. *Tooke*, 2 Sim. 192; *Alexander* v. *Wellington*, 2 R. & M. 55; *Carleton* v. *Leighton*, 3 Mer. 667); but a voluntary agreement will not be enforced (*Meek* v. *Kettlewell*, 1 Phil. 342).

3 & 4 Will. 4, c. 74, s. 20. at law and in equity.

A *spes successionis* is not a title to property by English law. A member of a class of possible next of kin has not a "contingent title" (*Re Parsons, Stockley* v. *Parsons*, 45 Ch. D. 51); and cannot maintain an action in respect thereof (*Clowes* v. *Hilliard*, 4 Ch. D. 413; *Davis* v. *Angel*, 4 De G. F. & J. 529). See further *Allcard* v. *Walker*, 1896, 2 Ch. 369, quoted under sect. 77, *post*, p. 314.

A fine by a contingent remainderman did not operate by estoppel only, but when the contingency happened the estate which then became vested fed the estoppel, so that the fine operated upon that estate as if it had been vested in the cognisors at the time the fine was levied (*Rawlin's case*, 4 Rep. 52; *Weale* v. *Lower*, Pollex. 54; *Trevivian* v. *Lawrence*, 6 Mod. 258; Ld. Raym. 1051; *Vick* v. *Edwards*, 3 P. Wms. 372; *Doe* v. *Oliver*, 10 Barn. & Cress. 181; *Doe* v. *Howell*, *Id.* 191; *Doe* v. *Martyn*, 8 B. & C. 527; *Davies* v. *Bush*, 1 M'Clel. & Y. 58; see Fearne, 365). The estoppel raised by the fine of a contingent remainderman was available only by parties and privies (*Doe* v. *Martyn*, 8 B. & C. 527). Fines by contingent remaindermen.

A contingent interest in terms of years might be assigned in equity for valuable consideration, or for love and affection between parent and child (1 Ves. sen. 411; *Wind* v. *Jekyl*, 1 P. Wms. 572). As to the alienation of contingent interests by married women, see sect. 77, *post*; *Crofts* v. *Middleton*, 8 D. M. & G. 192; *Jones* v. *Frost*, 7 Ch. 773). Contingent interests in any tenements or hereditaments are now made alienable by deed (Real Prop. Act, 1845, s. 6, *post*). And all contingent, executory or other future interests in any real or personal estate are devisable (Wills Act, 1837, s. 3, *post*). Contingent interest now alienable and devisable.

ESTOPPEL.

An estoppel is when one is concluded and forbidden in law to speak against his own act or deed, even though it be to say the truth (Terms of the Law, 157; Litt. s. 667; Co. Litt. 352 a). There are three kinds of estoppels, (1) by matter of record, (2) by deed, whether an indenture or a deed poll (*Bonner* v. *Wilkinson*, 5 B. & Ald. 682; Co. Litt. 47 b; *Lewis* v. *Willis*, 1 Wils. 314; Litt. s. 693); and (3) by matter *in pais*. Estoppel by matter of record is discussed at length, 2 Smith, L. C. 728, 10th ed. See Co. Litt. 352.

(1) *Estoppel by Deed*...279.
(2) *Estoppel by Matter* in pais...281.

(1) Estoppel by deed.

According to the doctrine of estoppel by deed (which will not be extended, *General Finance Co.* v. *Liberator Society*, 10 Ch. D. 21), a fictitious statement is treated as true (10 Ch. D. 20). The principle is that where a man has entered into a solemn engagement under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has

3 & 4 Will. 4, c. 74, s. 20.

so asserted (*Bowman* v. *Taylor*, 2 Ad. & El. 291; see *Goodtitle* v. *Bailey*, Cowp. 600; Co. Litt. 47 b; *Gwyn* v. *Neath Canal Co.*, L. R. 3 Ex. 209). The estoppel binds persons claiming under the person estopped (*Taylor* v. *Needham*, 2 Taunt. 278; *Doe* v. *Stone*, 3 C. B. 176); but a person taking under a conveyance is not estopped by recitals in a previous deed on which the title conveyed is founded when the suit relates to land other than those comprised in the conveyance (*Doe* v. *Shelton*, 3 Ad. & El. 265; see *Melbourne Corporation* v. *Brougham*, 7 App. Cas. 307).

By recital.

In accordance with the above doctrine, the recital of a particular fact in a deed will estop the party making the statement (*Bowman* v. *Taylor*, 2 Ad. & El. 278; *Hill* v. *Manchester Waterworks Co.*, 2 B. & Ad. 544; *Pargeter* v. *Harris*, 7 Q. B. 708), *e.g.*, the recital of an ante-nuptial contract to settle property (*Re Holland*, *Gregg* v. *Holland*, 1901, 2 Ch. 158; see *Re Maddy*, *M.* v. *M.*, 1901, 2 Ch. 822). Where a lease recited a will, the lessee who executed the counterpart was estopped from denying the execution of the will (*Bringloe* v. *Goodson*, 5 Bing. N. C. 738). The recital must be precise and unambiguous, *e.g.*, that a grantor is seised of the legal estate (*Heath* v. *Crealock*, 10 Ch. 30; *Right* v. *Bucknell*, 2 B. & Ad. 278; *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1; *Re Holland*, 1901, 2 Ch. 159; *Re Horton*, *Horton* v. *Perks*, 51 L. T. 420); and since every deed must be construed according to the intention of the parties as appearing by the whole deed, when a recital is intended to be the statement of one party only, the estoppel is confined to that party (*Stroughill* v. *Buck*, 14 Q. B. 781; *S. E. R. Co.* v. *Wharton*, 6 H. & N. 526). There was no estoppel from a recital which, though accurate so far as it went, was incomplete (*Lovett* v. *Lovett*, 1898, 1 Ch. 82). As a general rule no estoppel arises by a deed upon the face of which the truth appears (*Doe* v. *Scarborough*, 3 Ad. & El. 2; *Doe* v. *Lawrence*, 4 Taunt. 23). As to the application of this rule to the case where the creation by estoppel of a tenancy between mortgagor and mortgagee was in question, see *Morton* v. *Woods* (L. R. 4 Q. B. 293, 303); *Ex p. Punnett* (16 Ch. Div. 226, 234). Where an untrue recital has been introduced into a deed by mistake and without fraud there is no estoppel (*Brooke* v. *Haymes*, 6 Eq. 25; *Empson's case*, 9 Eq. 597). Again, a recital will not estop a party in an action not founded on the deed, but wholly collateral to it (*Carpenter* v. *Buller*, 8 M. & W. 209; *Ex p. Morgan*, *Re Simpson*, 2 Ch. Div. 72). A married woman may be estopped by a recital in a deed duly executed and acknowledged by her (*Jones* v. *Frost*, 7 Ch. 773).

By other parts of a deed.

Apart from the effect of recitals, the operative words of a grant or release will not by estoppel pass a subsequently-acquired legal estate (*Heath* v. *Crealock*, 10 Ch. 30; *Right* v. *Bucknell*, 2 B. & Ad. 278; the contrary decision in *Bensley* v. *Burdon*, 2 Sim. & Stu. 519; 8 L. J. Ch. 85, being overruled; *Lloyd* v. *Lloyd*, 4 Dru. & W. 369). Nor will covenants for title have that effect (*General Finance Co.* v. *Liberator Society*, 10 Ch. D. 15). But where a person entitled only to one-ninth of a fund in court purported to assign one-sixth, and afterwards acquired a sixth, the whole interest was held bound (*Re Hoffe*, 82 L. T. 556). As to estoppel by covenant, see *Doe* v. *Ford* (3 Ad. & El. 649).

Consideration.

A nominal consideration being expressed in a deed does not prevent the admission of evidence *aliunde* of the real consideration if not inconsistent with the deed (*Re Leifchild*, 1 Eq. 231). Before the Judicature Acts the parties were bound by a receipt for the consideration money in the body of the deed (*Rowntree* v. *Jacob*, 2 Taunt. 141; *Baker* v. *Dewey*, 1 B. & C. 704); but not by an indorsed receipt, which, being no part of the deed, was not an estoppel, but only evidence (*Lampon* v. *Corke*, 5 B. & Ald. 606; *Graves* v. *Key*, 3 B. & Ad. 313). In either case it might be shown in equity that the money was not paid (*Ryle* v. *Haggie*, 1 Jac. & W. 234; *Wilson* v. *Keating*, 27 Beav. 121). The rule of equity now prevails. In favour, however, of third parties acting on the faith thereof, a receipt may be binding (*Bickerton* v. *Walker*, 31 Ch. Div. 151; see *Gordon* v. *James*, 30 Ch. Div. 249; *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192; *King* v. *Smith*, 1900, 2 Ch. 425).

Where a man executes a deed by forging the name of another, representing himself to be that other, he is bound by an estoppel, as to the nature of which see *Re Cooper*, *Cooper* v. *Vesey* (20 Ch. Div. 633). 3 & 4 Will. 4, c. 74, s. 39.

Forged deed.

The rule which requires a man to be bound by his own deliberate representations of matters of fact may be overbalanced by weightier considerations. Thus if a trustee, deriving his authority from a public act of parliament, grants by a deed unauthorized by the act, the grantor will not be estopped from insisting against the other party to the deed that he had no such power (*Fairtitle* v. *Gilbert*, 2 T. R. 169; see *Doe* v. *Hares*, 4 B. & Ad. 435, and *Webb* v. *Herne Bay Commrs.*, L. R. 5 Q. B. 642). So a party to the deed is not estopped from pleading its illegality (*Collins* v. *Blantern*, 2 Wils. 347; *Paxton* v. *Popham*, 9 East, 408); nor from showing that the consideration was immoral, or contrary to an act of parliament or public policy (*Prole* v. *Wiggins*, 3 Bing N. C. 230). So a party is not estopped from showing that a deed is void under a statute (*Doe* v. *Howells*, 2 Ad. & Ell. 744; see *Doe* v. *Ford*, 3 Ad. & El. 649). But a man cannot avoid his own deed by an allegation of his own fraud, as that the deed was executed for the purpose of giving a colourable qualification to kill game (*Doe* v. *Roberts*, 2 B. & Ald. 367). See also the cases, *Doe* v. *Skirrow*, 7 Ad. & Ell. 157; *Gaunt* v. *Wainman*, 3 Scott, 413; *Whitton* v. *Peacock*, 2 Bing. N. C. 411; *Bringloe* v. *Goodson*, 4 Bing. N. C. 726; see an article on Estoppel by Deed, 5 Jur. 858, 1170. Cases where there is no estoppel.

A surrender of copyholds does not operate by estoppel (*Taylor* v. *Phillips*, 1 Ves. sen. 230; *Goodtitle* v. *Morse*, 3 T. R. 365; *Morse* v. *Faulkner*, 3 Swanst. 429; *Doe* v. *Tomkins*, 11 East, 185; *Doe* v. *Wilson*, 4 B. & Ald. 303; see *Doe* v. *Rolfe*, 8 Ad. & El. 650). Copyholds not bound by estoppel.

(2) Estoppel by matter *in pais*.

Parties can be estopped by matters *in pais*, such as livery, entry, acceptance of an estate, and the like (Co. Litt. 352 a). Thus a tenant who accepts a lease is estopped from disputing his landlord's title (*Langford* v. *Selmes*, 3 K. & J. 220); or the title of the heir of his landlord to a part of the land demised (*Weeks* v. *Birch*, 69 L. T. 759, the case of a lease by one coparcener of the whole land belonging to several coparceners); as to how far this estoppel extends to persons other than the tenant, see *Tadman* v. *Henman*, 1893, 2 Q. B. 168, and the cases there quoted. The doctrine of the surrender of a lease by operation of law, arising out of the granting and acceptance of a new lease, is based on estoppel (*Lyon* v. *Reed*, 13 M. & W. 306). The doctrine has been extended to cases where a landlord, with the tenant's assent, grants a new lease to a third person, the tenant giving up possession (*Thomas* v. *Cook*, 2 B. & Ald. 119; *Davidson* v. *Gent*, 26 L. J. Ex. 122; see *Wallis* v. *Hands*, 1893, 2 Ch. 75, 82; *Knight* v. *Williams*, 1901, 1 Ch. 256). See as to the estoppel of the tenant in such a case, *Nickells* v. *Atherstone* (10 Q. B. 944); *Fenner* v. *Blake* (1900, 1 Q. B. 426); and of the landlord, *Oastler* v. *Henderson* (2 Q. B. Div. 575). Where a mortgagee of a lease went into possession and paid rent, a tenancy by estoppel arose (*Jump* v. *Payne*, 68 L. J. Q. B. 607). See further, Woodfall, 16th ed. 223.

As to estoppel where a person enters on land under an invalid title, see *ante*, p. 128.

In mercantile transactions an estoppel may arise by representations or conduct, as to which several propositions are given by *Brett*, J., in *Carr* v. *L. & N. W. R.*, 10 C. P. 316; as to which see *Dixon* v. *Kennaway*, 1900, 1 Ch. 837; *Whitechurch* v. *Cavanagh*, 1902, A. C. 130, 135. Estoppel in mercantile transactions.

A representation of an intention does not create an estoppel (*Chadwick* v. *Manning*, 1896, A. C. 231; *Coleman* v. *North*, 47 W. R. 57). But where one person makes to another an untrue representation of fact, upon which he knows the other intends to act, and the other does in fact act, the person who made the representation will be estopped from denying its truth (*Low* v. *Bouverie*, 1891, 3 Ch. 110; and cases there quoted). See also *Seton* v. *Lafone* (19 Q. B. Div. 575); *Seaton* v. *Seaton* (13 App. Cas. 74); *Bateman* v. *Faber* (1898, 1 Ch. 149); and compare Lord *Selborne's* statement of equitable estoppel by representation (*Citizens' Bank* v. *First* Estoppel by representation.

3 & 4 Will. 4, c. 74, s 20.

National Bank, L. R. 6 H. L. 360). The representation must be unambiguous (*Low* v. *Bouverie*, 1891, 3 Ch. 106, 113; *Whitechurch* v. *Cavanagh*, 1902, A. C. 145). On the above principle, where a company issues to A. a certificate for shares, upon which he acts, the company will be estopped from denying, either that A. is the proprietor of these shares (*Balkis Consolidated Co.* v. *Tomkinson*, 1893, A. C. 396; see *Dixon* v. *Kennaway*, 1900, 1 Ch. 833; *Foster* v. *Tyne Pontoon Co.*, 63 L. J. Q. B. 50); or (unless A. be affected with notice to the contrary) that the amount certified to have been paid on the shares has been paid (*Parbury's case*, 1896, 1 Ch. 100; *Bloomenthal* v. *Ford*, 1897, A. C. 156; see *Markham and Darter's case*, 1899, 1 Ch. 414). Even where A. is affected with such notice, the same rule applies in the case of a transferee from him for value without notice (*Burkinshaw* v. *Nicolls*, 3 A. C. 1004; see *McKay's case*, 1896, 2 Ch. 757).

Estoppel in the case of agency.

Where a person holds out another as his agent, and the agent acts in his agency, the principal may be estopped from denying the agency. Thus where a person by an agreement authorized another to apply for shares, but imposed a condition in a covering letter, he was estopped as against one who had acted on the faith of the agreement without notice of the letter (*Ex p. Harrison, Re Bentley & Co.*, 69 L. T. 204; see *Re Consort Gold Mines, Ltd.*, 1897, 1 Ch. 575, where there was no estoppel). And a person who leaves in the hands of his brokers securities and executed transfers, may be estopped from denying authority to deal with them (*Bentinck* v. *London Joint Stock Bank*, 1893, 2 Ch. 120; see *Robinson* v. *Montgomeryshire Brewery Co.*, 1896, 2 Ch. 841; *Bechuanaland Co.* v. *London Trading Bank*, 1898, 2 Q. B. 658). So also a man who leaves in the hands of his solicitor a mortgage deed executed by himself and containing a receipt for the money (*King* v. *Smith*, 1900, 2 Ch. 425; compare *Gordon* v. *James*, 30 Ch. Div. 249). But where the secretary of a company acted outside the scope of his agency, the company was not estopped (*Whitechurch* v. *Cavanagh*, 1902, A. C. 117). A person having notice of an agent's want of authority was estopped by his own negligence in dealing with him (*Jacobs* v. *Morris*, 1902, 1 Ch. 830).

Miscellaneous cases of estoppel.

A warehouseman who attorned to a purchaser was held to be estopped from denying the latter's title (*Henderson & Co.* v. *Williams*, 1895, 1 Q. B. 521; see *Ross* v. *Edwards*, 73 L. T. 100). As to estoppel in case of delivery orders, see *Union Credit Bank* v. *Mersey Board* (1899, 2 Q. B. 205); in case of bills of exchange, see *Scholfield* v. *Londesborough* (1896, A. C. 514); and in case of a customer who withholds from his bankers information about forged cheques, see *M'Kenzie* v. *British Linen Co.* (6 App. Cas. 82); *Ogilvie* v. *West Australian Corporation* (1896, A. C. 257).

The court refused to apply equitable estoppel in favour of a volunteer (*Lovett* v. *Lovett*, 1898, 1 Ch. 82); or to permit a married woman's restrained property to be bound by estoppel (*Bateman* v. *Faber*, *Ib.* 149).

Extent of the estate created by a tenant in tail by way of mortgage, or for any other limited purpose.

21. Provided always, that if a tenant in tail of lands shall make a disposition of the same under this act by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: provided always, that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien, or incumbrance shall be created without a term of years absolute or

determinable, or any greater estate for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected. 3 & 4 Will. 4. c. 74, s. 21.

Effect of this section.

This section was intended to put an end to such questions as arose in *Jackson* v. *Innes* (1 Bligh, 104), as to whether an equity of redemption was resettled by the mortgage deed (*Plomley* v. *Felton*, 14 App. Cas. 66).

By this section of the act, if a tenant in tail makes a mortgage in fee with a proviso for redemption in the usual form, he will thenceforth be entitled to the equity of redemption discharged from the entail; but if he creates an estate *pour autre vie*, or for years only, or an "*interest, charge*, or incumbrance," without a term of years, by way of mortgage, the entail will be affected only to the extent of the charge created, although there be an express declaration of intention that the deed shall operate as a complete bar of the entail (see further as to the effect of this section, 1 Hayes, Conv. 183—185, 5th ed.; and see 9 Bythewood & Jarm. Conv. 404, 405).

Where a tenant in tail subject to charges for portions was lunatic, the court directed the charges to be raised by a mortgage for a term of years without a power of sale (*Re Pares*, 2 Ch. Div. 61; and see *S. C.*, 12 Ch. Div. 333).

Mortgage of entailed copyholds.

It has been suggested, as following from a comparison of the present section with sect. 50, *post*, that if a legal tenant in tail of copyholds mortgages by conditional surrender which is not followed by admittance, but the money is paid off and the surrender vacated by the entry of satisfaction, the estate tail remains unaffected; but that the estate tail would be barred if the surrender were followed by admittance (Davidson, Mortgages, 4th ed. 39).

Interest, charge, lien or incumbrance.

Interest, charges, liens or incumbrances may be created by a tenant in tail under the act; but they must be created, and not left to vest in contract (Sugd. R. P. Stat. 197). Sect. 40 (*post*) expressly requires in every case a formal legal assurance; it would seem, therefore, that the words "interest, charge, lien or incumbrance," do not include an equitable mortgage by mere deposit of title deeds. As to such equitable mortgages, see Coote on Mortgages; Fisher on Mortgages; *Russel* v. *Russel* (1 Wh. & Tud. L. C. Eq.).

Equitable mortgages.

8. *Definition of the Protector.*

The owner of the first existing estate under a settlement, prior to the estate tail under the same settlement, to be the protector of the settlement.

22. If at the time when there shall be a tenant in tail of lands under a settlement there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then, the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for all the purposes of this act deemed the prior estate), shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this act be deemed the owner of such prior estate, although the same may have been

3 & 4 Will. 4, c. 74, s. 22.

charged or incumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause.

In cases of Lunacy the Lord Chancellor is protector (see *post*, ss. 33, 48). Where there is a tenant in tail in possession and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is the protector as to the tenant in tail in remainder (*Re Blewitt*, 6 D. M. & G. 187).

Where the owner of the only prior estate holds under a different settlement from the tnanet in tail, he is not the protector (*Berrington* v. *Scott*, 32 L. T. 125). The owner of the prior estate referred to in this section is the owner of the beneficial interest (*Re Dudson*, 8 Ch. Div. 632). Thus, where an equity of redemption was limited to trustees in trust for A. for life, with remainder to the use of B. in tail, A. was the protector, not the trustees (*Re Dudson, sup.*; compare the old law of recoveries, *ante*, pp. 267, 272). So, where lands were devised to trustee for a term on trust to pay an annuity, and manage the estate, and pay the surplus to A., who was also the joint life tenant, subject to the term, A. was the protector (*Re Ainslie, A.* v. *A.*, 51 L. T. 780; 33 W. R. 148). Where the trustees appointed protector by the settlor (see sect. 32, *post*) died, and new trustees were appointed by the court, the tenant for life became protector (*Clarke* v. *Chamberlain*, 16 Ch. D. 176). Where, however, a trustee is given an estate during the life of a person on trust to pay the rents to the settlor's creditors, it was said that the trustee would be the protector (*Re Dudson*, 8 Ch. Div. 633).

When there will be a resulting trust, see *Hill* v. *London* (1 Atk. 618); *King* v. *Denison* (1 Ves. & B. 260); *Cook* v. *Hutchinson* (1 Keen, 42); Lewin on Trusts, 155 *et seq.*, 10th ed.

Each of two or more owners of a prior estate to be the sole protector as to his share.

23. Provided always, that where two or more persons shall be owners, under a settlement, within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall for all the purposes of this act be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share.

Where A. had for life one-fifth of an estate with a remainder in tail in one-fifth, and had also one-fourth of another fifth for life, with a more remote remainder in tail in one-fourth of one-fifth, he was protector of the identical undivided share of which he was tenant in tail, and not merely protector of an equivalent aliquot share of the estate (*Tufnell* v. *Borrell*, 20 Eq. 196). See *Church* v. *Edwards*, 2 Br. C. C. 180; *Oakley* v. *Smith*, Amb. 90; 3 Prest. Conv. 90 *et seq.*

3 & 4 Will. 4, c. 74, s. 24.

Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

24. Provided always, that where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement.

See *Keer* v. *Brown* (Johns. 138). Where several persons constitute the protector, the term protector is applicable equally to the entire body and to each individual (*Re Wainwright*, 1 Phill. 258).

As to estates confirmed or restored by settlement.

25. Provided always, that, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall for the purposes of this act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement.

As to leases at rent created by settlement.

26. Provided always, that where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not in respect thereof be the protector of such settlement.

No tenant in dower, heir, executor, &c., to be protector, except in the case of a bare trustee.

27. Provided always, that no woman in respect of her dower, and (except in the case hereinafter provided for of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three), no bare trustee, heir, executor, administrator or assign, in respect to any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement.

There is a discrepancy between this date and the date given in sect. 31 (28th August, 1833). It seems doubtful which enactment must control the other (1 Hayes, Conv. 180, 5th ed.; Sugd. R. P. Stat. 203). See as to this section the argument in *Re Dudson*, 8 Ch. D. 628.

Who shall be the protector where the owner of the prior estate shall, by the two last clauses, be excluded.

28. Provided always, that where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of this act of any such prior estate, in respect of which but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then and in such case the person (if any) who, if such estate did not exist, would be the protector of the settlement, shall be such protector.

See *Re Dudson* (8 Ch. Div. 633).

3 & 4 Will. 4, c. 74, s. 29.

Where, in the disposition of an estate before the 31st December, 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

29. Provided always, that where already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

This and the following section of the act will render it necessary, where it is intended to bar an entail created on or before the 31st December, 1833, to ascertain in whom the *immediate freehold* of the lands is vested, in the same way as was required for determining who was the proper person for making a tenant to the *præcipe* in a recovery (see *ante*, p. 272). This section must be attentively considered in connection with the 27th, 30th and 31st sections. In *Corrall* v. *Cattell* (4 Mees. & W. 734; and see *Cattell* v. *Corrall*, 3 Y. & Coll. 413), a tenant in tail, in 1817, conveyed to trustees for the life of the tenant in tail upon certain trusts. The impression of the court seemed to be that the trustees were not protectors. Mr. *Hayes* (1 Conv. 177), and Lord *St. Leonards* (Sugd. R. P. Stat. 203), were of opinion that the trustees were protectors (see s. 22, *ante*).

Where in the case of the disposition of a reversion on or before the 31st of December, 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

30. Provided always, that where any person having either already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would, under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector, then and in every such case the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Where a bare trustee under a settlement made before the passing of this act shall be the protector.

31. Provided always, that where, under any settlement of lands made before the passing of this act, the person who, if this act had not been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate

conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement. 3 & 4 Will. 4, c. 74, s. 31.

The husband of a married woman taking an estate for her separate use under a settlement is not a bare trustee under the settlement within this section (*Keer* v. *Brown*, Johns. 138).

Under this section a trustee, having the first *immediate* estate of *freehold*, will be protector of a settlement made *before the passing of this act* (28 Aug. 1833). Thus under a settlement to A. for ninety-nine years, if he should so long live, with remainder to trustees during the life of A. upon trust to preserve contingent remainders, with remainder in tail; the trustees would be protectors during the life of A. (See *Smith* v. *Packhurst*, 3 Atk. 135.) A bare trustee, who under this section is protector of a settlement, can insist on retaining the legal estate only so long as the purposes of the trust exist (*Buttanshaw* v. *Martin*, Johns. 89). This section will not apply where all the estates are equitable (*Re Dudson*, 8 Ch. Div. 633).

Power to any settlor to appoint the protector.

32. Provided always, that it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: provided further nevertheless, that the person who but for this clause would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place.

Trustee of

The trustee of an executory settlement is a settlor within this section of

3 & 4 Will. 4, c. 74, s. 32.

executory settlement a settlor within this section.

the act, and as such is entitled to appoint a protector at his discretion. A protector should not be appointed by the court, unless upon a special case (*Bankes* v. *Le Despencer*, 11 Sim. 527). If one of the persons appointed under this section dies, the survivors can act as protector (*Bell* v. *Holtby*, 15 Eq. 178). If they all die, the owner of the first life estate is protector (*Clarke* v. *Chamberlin*, 16 Ch. D. 176).

In cases of lunacy, the Lord Chancellor or Lord Keeper, or Lords Commissioners, or other persons entrusted with lunatics, or in cases of treason or felony, &c., the Court of Chancery to be the protector.

33. Provided always, that if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper or the Lords Commissioners for the custody of the great seal of Great Britain for the time being or other the person or persons for the time being entrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot, or of unsound mind as aforesaid (*i*); or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid (*k*); or if any settlor entailing lands shall in the settlement by which the lands shall be entailed, declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

(*i*) As to the persons by whom the jurisdiction here conferred on the Lord Chancellor can be exercised, see Lunacy Act, 1890, s. 108.

The Lord Chancellor of Great Britain, and not the Lord Chancellor of Ireland, is the protector of a settlement in the place of a lunatic of estates situate in Wales, although the party is resident in Ireland, and has been found lunatic by inquisition issued by the Lord Chancellor of Ireland (*Re Graydon*, 1 Mac. & G. 655). The cases as to the exercise by the Lord Chancellor of his power of consenting are stated in the note to sect. 48, *post*, p. 297.

(*k*) On the husband of a married woman, tenant for life under a settle-

ment, being convicted of felony, the Court of Chancery becomes protector of the settlement (*Re Wainwright*, 1 Phill. C. C. 258). There is an omission in this section of *the case of a person convicted of treason or felony*. But the omission must be supplied by implication, otherwise no effect can be given to the previous words, "if any person, protector of a settlement, shall be convicted of treason or felony" (*Ib.* pp. 261, 262). 3 & 4 Will. 4, c. 74, s. 33.

As to the form of petition, evidence and order on an application to the court to consent as a protector of a settlement to the barring of an entail, see *Re Gravenor* (1 De G. & S. 700; Seton, 6th ed., 1784).

9. *Powers of the Protector.*

34. Provided always, that if at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed. Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

Formerly, where an estate tail was being barred, a tenant for life was a conveying, not merely a consenting, party, which occasioned inconvenience; as to which, see Co. Litt. 203 b, n. by Butl.; 1 Prest. Conv. 107—118; 2 Sand. on Uses, 207, 4th ed.; *Pelham's case* (1 Rep. 14 b); *Smith* v. *Clifford* (1 T. R. 738); *Doe* v. *Mulgrave* (5 T. R. 320); *Jersey* v. *Deane* (5 B. & Ald. 575); *Roper* v. *Halifax* (8 Taunt. 845); *Doe* v. *Scarborough* (3 Ad. & Ell. 43); *Tyrrell* v. *Marsh* (3 Bing. 31); Sug. Pow. 71—78, 8th ed. Advantage of *consent* to a conveyance.

Where in a settlement there was a power of sale and exchange with the assent of the tenant for life, her concurrence in a disentailing deed did not prevent her assenting to a subsequent exercise of the power (*Hill* v. *Pritchard*, Kay, 394).

In a case where there was an adult tenant for life, and an infant tenant in tail, a vesting order under the Trustee Act, 1893, will, if the protector consents to it, bar all estates in remainder, and not pass a base fee only under the act (*Powell* v. *Matthews*, 1 Jur. N. S. 973; *Re Montagu, Faber* v. *Montagu*, 1896, 1 Ch. 549, where see form of order). Vesting order.

35. Provided always, that where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail, if the same had not been barred, to exercise, as to the lands, in respect of which there shall be such protector, the power of disposition hereinbefore contained. Where a base fee and a protector, his consent requisite to the exercising of a power of disposition.

3 & 4 Will. 4, c. 74, s. 36.

The protector to be subject to no control in the exercise of his power of consenting.

36. Any device, shift, or contrivance, by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

It seems that a contract under seal by a protector to give his consent might be such a consent as is required by the act (*Bankes* v. *Small*, 36 Ch. Div. 724). It has been said that this section enables a protector to act from mere caprice, ill-will, or any bad motive (*Bankes* v. *Le Despenser*, 11 Sim. 527).

Certain rules of equity not to apply between the protector and a tenant in tail under the same.

37. Provided always, that the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act.

The rules of equity as to frauds on powers were not extended to the case of a tenant in tail in remainder joining with his father, a tenant for life, in suffering a recovery and resettling the estate, although an *immediate benefit* was conferred on the son as a consideration for his barring the entail (*Tweddell* v. *Tweddell*, T. & R. 1; *Davis* v. *Uphill*, 1 Sw. 129).

Frauds on powers.

Corrupt bargain.

According to the rules of equity an appointment under a power is invalid where the appointee has agreed with the appointor that a benefit shall thereby accrue to the appointor (*Marlborough* v. *Godolphin*, 2 Ves. sen. 70; *Boyle* v. *Peterborough*, 1 Ves. 310; *Farmer* v. *Martin*, 2 Sim. 502; *Arnold* v. *Hardwich*, 7 Sim. 343), or to a stranger to the power (*Pryor* v. *Pryor*, 2 D. J. & S. 205; *Salmon* v. *Gibbs*, 3 D. G. & S. 343; *Birley* v. *Birley*, 25 Beav. 299; *Re Kirwan*, 25 Ch. D. 373; *Crawshay* v. *Crawshay*, 43 Ch. D. 624). A mere suspicion, however, of a corrupt agreement will not be sufficient to invalidate an appointment (*Palmer* v. *Locke*, 15 Ch. Div. 300; *Hamilton* v. *Kirwan*, 2 Jo. & Lat. 393). Again, an appointment will not be invalidated (1) by the mere fact of a bargain between the appointor and appointee (*Langston* v. *Blackmore*, Amb. 288; *Roach* v. *Trood*, 3 Ch. Div. 429; see *Cooper* v. *Cooper*, 5 Ch. 203), as where the bargain did not induce the appointment (*Re Turner*, 28 Ch. Div. 205); or (2) by a bargain between the appointor and all the objects of the power, being *sui juris* (*Davis* v. *Uphill*, 1 Sw. 136); or (3) by reason of the appointor having covenanted to appoint (*Bulteel* v. *Plummer*, 6 Ch. 160; *Palmer* v. *Locke*, 15 Ch. Div. 294). In some cases an appointment to a stranger may be valid if made with the assent of an object of the power; as where it can be considered as in effect an appointment to an object and a settlement by that object (*Daniel* v. *Arkwright*, 2 H. & M. 95; *Wright* v. *Goff*, 22 Beav. 207; *Goldsmid* v. *Goldsmid*, 2 Hare, 187). Where the invalidity arises by reason of a corrupt agreement, the appointment will be wholly bad, even as to the benefit appointed to an object (*Jackson* v. *Jackson*, Dru.

113); unless some consideration (*e.g.*, marriage) has been given which cannot be restored, when the appointment may be good as to the appointee (*Daubeny* v. *Cockburn*, 1 Mer. 643); or unless the honest part of the appointment can be separated from the dishonest part, when the former may be good (*Topham* v. *Portland*, 1 D. J. & S. 572; *Whelan* v. *Palmer*, 39 Ch. D. 659; *Viant* v. *Cooper*, 76 L. T. 768). Where a corrupt appointment has been carried into effect, the appointor may be liable for loss to the trust estate (*Re Deane, Bridger* v. *Deane*, 42 Ch. Div. 9). 3 & 4 Will. 4, c. 74, s. 37.

An appointment is void where there is no bargain, but it is clear that the appointor intends to benefit either himself (*Henty* v. *Wrey*, 21 Ch. Div. 342; *Wellesley* v. *Mornington*, 2 K. & J. 143; *Re Little, Harrison* v. *Harrison*, 40 Ch. Div. 424), or a stranger to the power (*Re Marsden*, 4 Drew. 594; see *Topham* v. *Portland*, 5 Ch. 40; *Whelan* v. *Palmer*, 39 Ch. D. 648; *Re Perkins, Perkins* v. *Bagot*, 1893, 1 Ch. 283; *Re Buckley*, 1893, W. N. 95). A release of a power by the donee with a view to his own benefit is valid (*Re Radcliffe, Radcliffe* v. *Bewes*, 1892, 1 Ch. 227; *Re Somes, Smith* v. *Somes*, 1896, 1 Ch. 250). A *bonâ fide* appointment is not necessarily void merely because a benefit in fact accrues to the *appointor* (*Henty* v. *Wrey, sup.*; *Re Huish*, 10 Eq. 5; *Beere* v. *Hoffmeister*, 23 Beav. 101), or to a stranger (*Fearon* v. *Debrisay*, 14 Beav. 635; *Roach* v. *Trood*, 3 Ch. Div. 440). Corrupt intention.

A purchaser with notice of the invalidity of an appointment will not get a good title (*Palmer* v. *Wheeler*, 2 Ba. & Be. 18), nor will a purchaser without notice, in the case of an equitable interest (*Daubeny* v. *Cockburn*, 1 Mer. 626). But a mere suspicion of a fraudulent appointment is not a good objection by a purchaser to title (*M'Queen* v. *Farquar*, 11 Ves. 467; *Green* v. *Pulsford*, 2 Beav. 70). Purchasers.

10. *Confirmation of Voidable Estates created by Tenant in Tail.*

38. Provided always, that when a tenant in tail of lands under a settlement, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate, in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance other than a lease not requiring inrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this act of confirming the same without such consent (*l*): provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then

A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without notice.

3 & 4 Will. 4, c. 74, s. 38.

and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him (*m*).

(*l*) The proviso in the corresponding clause in the Irish stat. 4 & 5 Will. 4, c. 92, s. 36, is as follows: "provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, and if the deed or instrument creating such voidable estate shall not have been registered previous to such disposition, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him."

Old rule as to the effect of recoveries in confirming prior acts of tenant in tail.

(*m*) If a tenant in tail who had executed any settlement, lease or mortgage, or created any charge or incumbrance by statute, judgment, or otherwise, affecting the entailed land, afterwards suffered a recovery, its effect was to confirm such prior acts, and to make the lands chargeable with them, although before they were defeasible by the issue (*Capel's case*, 1 Rep. 60; *S. C.*, Poph. 5, 6; *Beck* v. *Welsh*, 1 Wills. 277; *Tourle* v. *Rand*, 2 Br. C. C. 652; *Goodright* v. *Mead*, 3 Burr. 1703; *Cheney* v. *Hall*, 3 Atk. 9; Ambl. 526; *Stapleton* v. *Stapleton*, 1 Atk. 2); but not if the settlement was voluntary (*Cormick* v. *Trapaud*, 6 Dow, 60). As to the similar effect of a fine in such a case, see *Shelburn* v. *Biddulph* (6 Br. P. C. 356, Toml. ed.); *Symonds* v. *Cudmore* (Show. 370; 1 Salk. 338; Skin. 284, 317, 328; 3 Salk. 335; Carth. 257; 12 Mod. 32; Holt, 666; 1 Freem. 503; 2 Atk. 204); see 7 Ves. 497; *Lloyd* v. *Lloyd* (4 Dru. & War. 374); *Browne* v. *Blake* (1 Molloy, 368).

Effect of fines.

Cases on s. 38.

A base fee voidable by the issue in tail was, notwithstanding an intervening bankruptcy, confirmed by a subsequent assurance enrolled under the act (*Hankey* v. *Martin*, 49 L. T. 560).

The proviso at the end of this section does not require that the disentailing instrument should pass the estate to the purchaser. It is sufficient if the instrument forms part of a transaction in respect of which the person claiming the benefit of the proviso is a purchaser (*Crocker* v. *Waine*, 5 B. & S. 697).

11. *Enlargement of Base Fees.*

Base fee, when united with the immediate reversion, enlarged, instead of being merged.

39. If a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as a tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person.

Merger of base fees.

On the subject of merger of base fees, the Real Property Commissioners made the following remarks: "If a tenant in tail, claiming the immediate remainder or reversion in fee, bars his estate tail by means of a fine instead of a recovery, he frequently prejudices his title by merging in the remainder or reversion the base fee acquired by the fine, as he thereby not only lets in all the charges and estates made and created by the persons through whom he derived the remainder or reversion, but also renders it necessary, afterwards, to make out his title to the remainder or reversion, which, in many instances, is attended with great difficulty and expense" (1 Real Property Report, p. 28; but see *Sperling* v. *Trevor*,

7 Ves. 497). It will be observed that this difficulty is removed by this section of the act, by preserving base fees from merger, and enlarging them, when united with the immediate reversion, into as large an estate as the tenant in tail, if in possession, could have created. **3 & 4 Will. 4, c. 74, s. 39.**

Merger generally. Generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the larger. But, in freeholds, an estate tail and a reversion in fee may exist together. In such a case, by the operation of the statute *De Donis*, the estate tail is kept alive, not merged in the reversion in fee (*Roe* v. *Baldmere*, 5 T. R. 109; 2 Rep. 61; *Foxwell* v. *Van Grutten*, 1897, A. C. 679); *secus*, in the case of copyholds (*Parker* v. *Turner*, 1 Vern. 458; *Dunn* v. *Green*, 2 P. W. 9). If, however, a tenant in tail with a reversion in fee to himself, levied a fine, the effect was to create a base fee, which became merged in the other fee, and let in all the incumbrances of the ancestor (*Shelburne* v. *Biddulph*, 6 Br. P. C. 356; *Foxwell* v. *Van Grutten*, *supra*). The possibility of reverter on a conditional fee at common law will merge in the fee simple absolute (*Simpson* v. *Simpson*, 4 Bing. N. C. 333; see 2 Ves. sen. 35; Hob. 323; *Symonds* v. *Cudmore*, 1 Salk. 338; Carth. 258; *Roe* v. *Baldmere*, 5 T. R. 109). So, also, an estate tail after possibility of issue extinct (Co. Litt. 27 b), an estate of mere freehold, legal or conventional (Co. Litt. 338 b), a term of years (*Salmon* v. *Swann*, Cro. Jac. 619; *Hughes* v. *Robotham*, Cro. Eliz. 302), or estate at will (Vin. Abr. tit. Est. at Will), will be extinguished by the acquisition of the fee. **Of smaller estate in larger.**

Merger of estates in equity. As regards the merger of equitable estates, it was said, before 1873, that *primâ facie* the rule of law prevailed also in equity; but that a court of equity would not allow merger if it saw equitable reasons against it. It was said, further, that even where there was an actual legal merger, a court of equity would, on sufficient grounds, hold that there was no merger of the equitable interest (*Brandon* v. *Brandon*, 31 L. J. Ch. 49). The Judicature Act, 1873, s. 25 (4), provided that there should not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. Since the act it has been laid down that the court is guided by intention; and in the absence of express intention either in the instrument or by parol, looks to the benefit of the person in whom the two estates become vested (*Ingle* v. *Vaughan Jenkins*, 1900, 2 Ch. 368). And the rule of intention applied by courts of equity in the merger of equitable estates (see *Snow* v. *Boycott*, 1892, 3 Ch. 110; *Thellusson* v. *Liddard*, 1900, 2 Ch. 635) has been applied in the case of legal estates (*Snow* v. *Boycott*, *supra*; *Ingle* v. *Vaughan Jenkins*, 1900, 2 Ch. 371; see *Capital, &c. Bank* v. *Rhodes*, 1902, W. N. 94).

It has also been held that a term held by a person in his own right does not merge in the reversion held by the same person as an administrator (*Chambers* v. *Kingham*, 10 Ch. D. 743; see *Re Radcliffe*, *Radcliffe* v. *Bewes*, 1892, 1 Ch. 227); or in right of his wife (*Jones* v. *Davies*, 31 L. J. Ex. 116; 7 H. & N. 507).

Merger of equitable estate in legal. The rule, that where there is in the same person a legal and an equitable interest the former absorbs the latter (*Wade* v. *Paget*, 1 Br. C. C. 367; *Re Douglas*, *Wood* v. *Douglas*, 28 Ch. D. 327), holds only where the legal and equitable estates are co-extensive and commensurate, but is not admitted where a party has the whole legal estate and a *partial* equitable estate (*Champernoon* v. *Williams*, 2 Ch. C. 63—78; 1 Vern. 13; *Robinson* v. *Cummings*, Forr. 164; 1 Atk. 473; *Brydges* v. *Brydges*, 3 Ves. 126; see *Capel* v. *Girdler*, 9 Ves. 509; *Selby* v. *Alston*, 3 Ves. 339; *Alston* v. *Wells*, Dougl. 771, 2nd ed.). Thus, an equitable estate tail in a copyhold does not merge by the accession of the legal fee (*Merest* v. *James*, 6 Madd. 118; *Brown* v. *Blake*, 1 Molloy, 382), nor an equitable term by the accession of a legal estate for life (*Ingle* v. *Vaughan Jenkins*, 1900, 2 Ch. 368).

An equitable tenancy in common and a legal joint tenancy were held to be equal and co-extensive, and to merge accordingly (*Re Selous*, *Thomson* v. *Selous*, 1901, 1 Ch. 921).

3 & 4 Will. 4, c. 74, s. 40.

12. *Modes in which Dispositions of Land under this Act by Tenants in Tail are to be effected.*

Tenant in tail to make a disposition by deed as if seised in fee, but not by will or contract; and if a married woman, with her husband's concurrence.

40. Every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed (*n*); and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed (*o*).

Old rule as to effect of contracts by tenant in tail.

(*n*) This section of the act adopts an established rule that the issue in tail was not bound, either at law or in equity, to complete any contract made by his ancestor, respecting the estate tail, because the issue claims by a paramount title *per formam doni*, from the person by whom the estate tail was originally granted, and not from his ancestors (3 Rep. 41 b; 1 P. Wms. 271; 2 Ves. sen. 634; Hob. 203; 1 Ch. Cas. 171; 2 Ventr. 350; 1 Lev. 237; 2 Eq. Cas. Abr. 28, pl. 34; *A.-G.* v. *Day*, 1 Ves. sen. 218). And such rule applied, although the ancestor had received part, or even the whole of the purchase-money, and a decree had been made against him to levy a fine (Prec. Ch. 278; 2 Vern. 306; Gilb. Eq. R. 104; 1 Ves. sen. 224; see *Franks* v. *Mainwaring*, 2 Beav. 115). And even where tenant in tail, in pursuance of a covenant had acknowledged a fine, but died before it was perfected (2 Vern. 3). And the rule was applicable to copyholds, and to equitable tenants in tail of lands whether freehold or copyhold (see Sugd. V. & P. 227, 11th ed.; 1 Prest. Conv. 153).

Effect of this section upon contracts by tenant in tail.

There is nothing in this section to affect contracts as such, and therefore, although they will not operate to bar or bind the entail under the act, nor can equity give to them that operation, yet they may be recovered upon at law, or be the foundation of a specific performance against the tenant in tail. Specific performance of a covenant for further assurance in a mortgage by a tenant in tail in remainder not inrolled was refused in *Davis* v. *Tollemache* (2 Jur. N. S. 1181). But it has since been decided by the Court of Appeal that, notwithstanding sect. 47 (*post*, where see note), the court will decree, as against the tenant in tail, specific performance of a contract for disentailment entered into by him with a purchaser (*Bankes* v. *Small*, 36 Ch. Div. 716). Where a tenant in tail of copyholds deposited his title deeds with an agreement to "make a formal surrender" to secure a loan, a remainderman who joined in the deposit was held bound to carry out the agreement (*Bryce* v. *Bury*, 2 Drew. 11). See further, Sugd. R. P. Stat. 197, 2nd ed.; *Hilbers* v. *Parkinson* (25 Ch. D. 202); *Hall-Dare* v. *Hall-Dare* (31 Ch. Div. 251); *Dering* v. *Kynaston* (6 Eq. 210).

No particular form of disentailing deed necessary.

No particular form of disentailing deed is necessary; any deed which by its legal operation would have conveyed the fee simple, if the grantor had been seised in fee, will, if executed by a tenant in tail in possession and duly inrolled, bar the entail (*Nelson* v. *Agnew*, I. R. 6 Eq. 232). A

mere declaration of trust is not a "disposition" under this act (*Green* v. *Paterson*, 32 Ch. Div. 95).

Where a disentailing deed operates as a grant, and not by the Statute of Uses, it must be executed by the grantee; if not, it may be rendered inoperative by the subsequent disclaimer by the grantees (*Peacock* v. *Eastland*, 10 Eq. 21). But where the disentailing deed operates by the Statute of Uses, it is not necessary that it should be executed by the grantees to uses (*Nelson* v. *Agnew*, *sup.*).

As to the form of disentailing assurance necessary under this act, see further, 1 Hayes, Conv. 154 *et seq.* In every case the question to be asked is, what mode of assurance, if the estate or interest were really a fee simple at law, would be necessary to convey it (*Ib.* 158). As to the effect of an order under the Trustee Act, 1893, vesting the estate of an infant tenant in tail, see *Re Montagu*, *Faber* v. *Montagu* (1896, 1 Ch. 549), and cases there cited. Forms of disentailing assurances will be found in 3 Davidson, Conv. 1166 *et seq.*

Acknowledgment by married woman, tenant in tail, need not precede inrolment.

(*o*) In the case of a married woman tenant in tail, it is not necessary that the acknowledgment should precede the inrolment (*Ex parte Tavener*, 7 De G. M. & G. 627). Independently of the Married Women's Property Act, 1882, the concurrence of the husband was held necessary in the case of separate property (*Cooper* v. *Macdonald*, 7 Ch. D. 295). The husband might concur, though a discharged bankrupt (*Ib.* 298). But in the case of women married since 1882, or of property acquired by a married woman since 1882, no concurrence or acknowledgment is necessary (*Re Drummond and Davie*, 1891, 1 Ch. 531).

Every assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rack rent, or not less than five-sixths of a rack rent, to be inoperative unless inrolled in Chancery within six months.

41. Provided always, that no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five sixth parts of a rack rent) shall have any operation under this act unless it be inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his Majesty King Henry the Eighth, intituled "For Inrolment of Bargains and Sales," shall, if inrolled in the said Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of Henry the Eighth.

The inrolment of the deed of disposition under this statute may be effected either by the vendor or the purchaser; and as the inrolment relates to the execution of the deed, it follows that a tenant in tail, who has not barred the entail under the statute, can nevertheless make a good title in fee simple (*Cattell* v. *Corrall*, 4 Y. & Coll. 228). If the disentailing deed requires inrolment or registration by any other statute, the requisitions of such statute must be observed; if lands lie within a registry district, the deed must be registered. But the inrolment of a bargain and sale, or of a conveyance to charitable uses, according to this act, will satisfy the requisition of the statutes 27 Hen. 8, c. 13; 9 Geo. 2, c. 36.

3 & 4 Will. 4, c. 74, s. 41.

A deed is valid if inrolled within six months, although such inrolment is after the death of the tenant in tail who executed the deed (*Re Piers*, 14 Ir. Ch. R. 452. See further, as to inrolment, the note to sect. 74, *post*, p. 312). As to inrolment in the case of copyholds, see sect. 54 (*post*, p. 301).

Assurances under this act are now inrolled in the Enrolment Department of the Central Office (R. S. C. Ord. 61, r. 9).

Consent of the protector to be given by the same assurance or by a distinct deed.

42. The consent of the protector of a settlement to the disposition under this act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

If by distinct deed, to be considered unqualified, unless he refer to the assurance.

43. If the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

It has been said that a contract under seal by a protector to give his consent might amount to a consent within the act (*Bankes* v. *Small*, 36 Ch. Div. 724).

Protector not to revoke his consent.

44. It shall not be lawful for the protector of a settlement who under this act shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

A married woman protector to consent as a feme sole.

45. Any married woman, being either alone or jointly with her husband protector of a settlement, may under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

Consent of a protector by distinct deed void, unless inrolled with or before the assurance.

46. Provided always, that the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be effected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's High Court of Chancery either at or before the time when the assurance shall be inrolled.

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual.

47. In cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of

disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this act in a court of law.

3 & 4 Will. 4, c. 74, s. 47.

This section prevents the court from holding that a contract to execute a disentailing deed is, as against the issue in tail and remaindermen, as effectual as if a disentailing deed had been executed; or from remedying any defects in the execution of a deed intended to bar an estate tail (*Bankes* v. *Small*, 36 Ch. Div. 723; see *Mills* v. *Fox*, 37 Ch. D. 162). But the section does not prevent the court from ordering, as against a tenant in tail, specific performance of a contract for disentailment entered into by him with a purchaser (*Bankes* v. *Small*, *sup.*; see *Petre* v. *Duncombe*, 7 Hare, 24; *Re Montagu*, *Faber* v. *Montagu*, 1896, 1 Ch. 549). It would seem that under the ordinary covenant to settle after-acquired property a married woman could not be compelled to execute a disentailing deed (*Hilbers* v. *Parkinson*, 25 Ch. D. 200; see *Re Anstis*, *Chetwynd* v. *Morgan*, 31 Ch. Div. 605; *Mills* v. *Fox*, 37 Ch. D. 162; *Dering* v. *Kynaston*, 6 Eq. 210). An infant has been ordered under Debts Recovery Act, 1830, s. 11, to execute a disentailing deed (*Radcliffe* v. *Eccles*, 1 Keen, 130; see *Hargreaves* v. *Wright*, 1 W. R. 408). To give effect to an election an infant tenant in tail was declared a trustee and a person was appointed to convey his estate so as to bar the entail (*Re Montagu*, *Faber* v. *Montagu*, 1896, 1 Ch. 549). As to lunatics, see *ante*, p. 275. The above section does not prevent the rectification, on the ground of mistake, of a deed enrolled under the act (*Hall-Dare* v. *Hall-Dare*, 31 Ch. Div. 251).

Lord Chancellor, &c. to have the power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector, the disposition not to be valid without his consent.

48. Provided always, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons entrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so entrusted as aforesaid (*p*), or the said Court of Chancery (as the case may be), while protector of such settlement, shall, on the motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under this act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), to make such orders in the matter as shall be thought necessary (*q*); and if such Lord High Chancellor,

3 & 4 Will. 4, c. 74, s. 48.

Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

(*p*) See *ante*, p. 288.

(*q*) The cases *Re Blewitt* (3 M. & K. 259); *Re Wood* (3 My. & Cr. 266); deciding that the Lord Chancellor has no jurisdiction where the tenant in tail in possession is a lunatic, have been overruled (*Re Blewitt*, 6 D. M. & G. 187; see *ante*, p. 284).

As protector of the settlement, the only duty of the court is to see what, in reference to the interests of the family, it would be proper for the tenant for life to do; and the object must be rather to protect the objects of the settlement, than to give any benefit to one member of the family to the exclusion of the others (*Re Newman*, 2 My. & Cr. 112). So, consent was refused to a disposition which would benefit the husband of the tenant in tail to the detriment of the brother of the lunatic (*ib.*; *Re Graydon*, 1 Mac. & G. 655). Consent was also refused to the sale of the next presentation to a family living, the sale not being for the benefit of the lunatic tenant for life (*Re Tharp*, 3 Ch. Div. 59). Consent, however, was given, for the purpose of carrying out a reasonable arrangement likely to have been made by the lunatic (*Re Blewitt*, 6 D. M. & G. 198); also, for the purpose of enabling a tenant in tail in remainder to secure by mortgage the repayment to the estate of a lunatic tenant for life of an allowance made to the tenant in tail out of the surplus income forming part of the tenant for life's estate (*Re Sparrow*, 20 Ch. Div. 320; *Re Beridge*, 50 L. T. 653); also, for the purpose of raising money for the advancement of a son of the lunatic (*Grant* v. *Yea*, 3 M. & K. 245).

Order of the Lord Chancellor, &c. to be evidence of consent.

49. Provided always, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound mind (*r*), or his Majesty's High Court of Chancery, shall be the protector of a settlement, no document or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

(*r*) See *ante*, p. 288, n. (*i*).

13. *Estates Tail in Copyholds.*

The previous clauses to apply to copyholds, with certain variations.

50. All the previous clauses in this act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court roll, except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate

shall be an estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be merely an estate in equity, may be made either by surrender or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained. 3 & 4 Will. 4, c. 74, s. 50.

Entails in copyholds.

Copyholds are not within the stat. *De donis* (13 Edw. 1, c. 1; Cro. Car. 44, 45), and therefore not entailable, except by special custom (*Doe* v. *Truby*, 2 W. Bl. 946; see *Goold* v. *White*, Kay, 683; 3 Rep. 8). Where no custom exists, the party, who would otherwise be tenant in tail, will take a fee simple conditional (*Doe* v. *Clark*, 5 B. & Ald. 458; *Simpson* v. *Simpson*, 4 Bing. N. C. 333; *Moore* v. *Moore*, 2 Ves. sen. 596; *Doe* v. *Simpson*, 3 Scott, N. R. 774; *Hardcastle* v. *Dennison*, 10 C. B. N. S. 606; see *ante*, p. 264).

Copyholds were devised to trustees for a term, and subject thereto, to A. for life with remainder in tail, and the trustees were admitted. The property having been sold, a question arose as to the fine payable, it was held that the tenant for life and remainderman in tail might by one surrender have barred the entail and conveyed to the purchaser, and that only one fine would in such case have been payable (*Reg.* v. *Weedon-Beck*, 13 Q. B. 808). As to the enrolment of an assurance dealing with copyholds, see sect. 54, *post*, p. 301.

Old mode of barring entails in copyholds.

Before the passing of this act there were several modes of barring entails in copyholds besides that by recovery:—By forfeiture and re-grant (*Pilkington* v. *Stanhop*, 1 Sid. 314; 2 Keb. 127; *Pilkington* v. *Bagshaw*, Sty. 450; *Carr* v. *Singer*, 2 Ves. sen. 606). By surrender (*Goold* v. *White*, Kay, 683; *Carr* v. *Singer*, *sup.*). Concurrent customs to bar entails by recovery and by surrender were good (*Doe* v. *Ossingbrooke*, 2 Bing. 70; *Everall* v. *Smalley*, 2 Str. 1197; 1 Wils. 26; *Doe* v. *Truby*, 2 W. Bl. R. 944; *Doe* v. *Dauncey*, 7 Taunt. 674; see *Roe* v. *Jeffrey*, 2 Maule & Selw. 92; *Doe* v. *Mason*, 3 Wils. 63; see 1 Watk. on Cop. 178; Scriv. on Cop. p. 42, 6th ed.). Before this act the same mode of barring an equitable entail in copyholds must have been pursued as was required by the special custom of the manor for barring an entail in the legal estate (3 Ves. 127; 3 Atk. 815; 1 Watk. on Cop. 180, 181). By this act, an equitable entail in copyholds may be barred either by surrender or by deed (see *post*, s. 53, p. 300). An entail in copyholds may be barred by an enfranchisement by the tenant in tail (*Challoner* v. *Marshall*, 2 Ves. 524). A bar may be presumed after long possession in fee (*Roe* v. *Lowe*, 1 H. B. 459).

As to the deed of consent and the entry of it on the court rolls where the protector of a settlement of copyholds consents by deed to the disposition of a tenant in tail.

51. Provided always, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall be given by deed, such deed shall, either at or before the time when the surrender shall be made by which the disposition shall be effected, be executed by such protector, and produced to the lord of the manor of which the lands are parcel, or to his steward, or to the deputy of such steward; and the consent of such protector shall be void unless such deed shall be so executed and produced; and on the production of the deed the lord, or steward or deputy steward, shall, by writing under his hand to be indorsed on the deed, acknowledge that the same was produced within the time limited, and shall cause such deed, with the indorsement thereon, to be entered on the court rolls of the manor; and the indorsement, purporting to be so signed, shall of itself be

3 & 4 Will. 4, c. 74, s. 51.

primâ facie evidence that the deed was produced within the time limited, and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward; and after such deed shall have been so entered the lord of the manor or his steward, or the deputy of such steward, shall indorse thereon a memorandum signed by him, testifying the entry of the same on the court rolls.

As to the consent of the protector of a settlement of copyholds when not given by deed, and the preserving of evidence of the same on the court rolls.

52. Provided always, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall not be given by deed, then and in such case the consent shall be given by the protector to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of such surrender that such consent had been given, and such memorandum shall be signed by the protector; and the lord of the manor of which the lands are parcel, or his steward, or the deputy of such steward, shall cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; and such memorandum shall be good evidence of the consent and of the surrender therein stated to be made; and the entry of the memorandum on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof; but if the surrender shall be made in court, the lord of the manor, or his steward, or the deputy of such steward, shall cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court rolls; and the entry of such surrender on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof.

Evidence of entry in court rolls.

A copy of a court roll under the steward's hand is good evidence to prove the copyholder's estate (1 Keb. 567, 720; Comb. 138, 337; 12 Mod. 24; Bull. N. P. 247 a, 7th ed.). A surrender and admittance may be proved by the original entries made by the steward, without producing a copy stamped, as required by stat. 48 Geo. 3, c. 149 (*Doe* v. *Hall*, 16 East, 208), or by an examined copy of the court roll (*Doe* v. *Mee*, 4 B. & Ad. 617; *Doe* v. *Freeman*, 12 M. & W. 844); or where a surrender of a copyhold was duly made and presented by the homage, but no entry of such surrender and presentment was made on the court rolls, it was proved by a draft of an entry produced from muniments of the manor, and the parol testimony of the foreman of the homage who made such presentment (*Doe* v. *Calloway*, 6 Barn. & Cress. 484). In ejectment for copyholds, the court rolls of the manor, containing an entry of a presentment by the homage of a surrender to the plaintiff out of court, and of his admittance, are evidence of his title against the alleged surrenderor (*Doe* v. *Olley*, 12 Ad. & Ell. 481; see further Scriv. 392 *et seq.*, 6th ed.).

Power to equitable tenants in tail of copyholds

53. Provided always, that a tenant in tail of lands held by copy of court roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands

under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls (*s*); and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls: provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the minor* of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered (*t*).

3 & 4 Will. 4, c. 74, s. 53.

to dispose of their lands by deed.

[* *Lege* manor.]

(*s*) It seems to be the intention of the act that the deed of consent must be entered on the court rolls at or before the time when the principal assurance is so entered (Dart, V. & P. 781, n. (*q*)). In applying for a mandamus to the steward of a manor to inrol a deed of disposition pursuant to the above section, it is not necessary to annex a copy of the deed itself, if the contents are stated in the affidavit (*Crosby* v. *Fortescue*, 5 Dowl. P. C. 275). See further *Green* v. *Paterson*, 32 Ch. Div. 95, where the documents were held not to amount to a disposition of an equitable estate tail in copyholds.

(*t*) In commenting upon the proviso at the end of this section, Lord *St. Leonards* considered it probable that notice would not be held to supply in equity the want of an entry on the court rolls (Sugd. R. P. Stat. 223, 2nd ed.; and V. & P. 471).

This section does not apply to customary freeholds (*R.* v. *Ingleton*, 8 Dowl. P. C. 693; see *Carlisle* v. *Towns*, 2 B. & Ad. 585).

Customary freeholds.

54. Provided always, that in no case where any disposition under this act of lands held by copy of court roll, by a tenant in tail thereof, shall be effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require inrolment, otherwise than by entry on the court rolls.

Inrolment not necessary as to copyholds.

A disentailing assurance of copyholds must be entered on the court

Entry on

3 & 4 Will. 4, c. 74, s. 54.

court rolls to be within six months.

rolls within six calendar months after the date of its execution (*Honeywood* v. *Foster*, 30 Beav. 1; *Gibbons* v. *Snape*, 1 D. J. & S. 621; *Green* v. *Paterson*, 32 Ch. Div. 95; see sect. 41, *ante*, p. 295). An indorsement by the steward of a manor at his residence, that the same was produced before him at his residence, is not a sufficient inrolment within the statute (*Boyd* v. *Pawle*, 14 W. R. 1009).

14. *Bankrupt's Estate Tail.*

[*Sect.* 55, *which repealed the bankruptcy provisions of* 6 *Geo.* 4, *c.* 16, *was itself repealed by* 37 *&* 38 *Vict. c.* 35.]

The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, by deed to dispose of the lands of the bankrupt to a purchaser.

56. Any commissioner acting in the execution of any fiat which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act (1 & 2 Will. 4, c. 56), under which any person shall be adjudged a bankrupt who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: provided always, that if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector.

Clauses in 3 & 4 Will. 4, c. 74, with respect to the disposition of estates tail under bankruptcies, extended to proceedings under subsequent bankruptcy acts.

Sect. 56 of the Bankruptcy Act, 1883, empowers the trustee of the bankrupt's estate to deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have deal with the same. And the same section provides that sects. 56—73 (both inclusive) of the Fines and Recoveries Act, 1833, shall extend and apply to proceedings in bankruptcy under the Bankruptcy Act, 1883, as if those sections were there re-enacted and made applicable in terms to such proceedings.

Where in the case of copyholds, the entail in which by custom could not be barred until it fell into possession, the tenant in tail in remainder obtained his certificate and purchased from his assignees his life estate, the assignees could not on the death of the tenant for life bar the entail and acquire the remainder in fee (*Johnson* v. *Smiley*, 17 Beav. 223).

3 & 4 Will. 4, c. 74, s. 57.

Commissioner in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

57. Any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this act by the person so entitled if he had not become bankrupt.

As to the consent of the protector in case of bankruptcy.

58. The commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining the certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act with the consent of such protector; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the inrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected, shall, except so far as the same may be varied by the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

As to the inrolment in Chancery of

59. Every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act,

3 & 4 Will. 4, c. 74, s. 59.

dispose of lands not held by copy of court roll, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands held by copy of court roll, shall be entered on the court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court roll, and he shall give his consent by a distinct deed, the consent shall be void, unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor every deed required by this present clause to be entered on the court rolls, and he shall indorse on every deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls.

the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands, and of the deed of consent.

Subsequent enlargement of base fees created by the disposition of the commissioner.

60. If any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of any lands of any tenure, of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created, and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

Enlargement of base fees subsequent to the sale or conveyance of the same under the Bankrupt Acts.

61. If a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the adjudication of such bankruptcy there had been no such protector, and

the commissioner acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act. 3 & 4 Will. 4, c. 74, s. 61.

62. Provided always, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act: provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to be a protector; but not against a purchaser without notice.

3 & 4 Will. 4, c. 74, s. 62.

voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

See *Beck* v. *Welsh* (1 Wils. 276); *Pye* v. *Daubuz* (3 Br. C. C. 595); *Edwards* v. *Appleby* (2 Br. C. C. 652, n.); *Ex p. Fripp* (1 D. G. 293); *Ex p. Wise* (1 Mont. & M. 65); *Sturgis* v. *Morse* (2 D. F. & J. 223); *Hankey* v. *Martin* (49 L. T. 560).

Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

63. All acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands, or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

64. Provided always, that, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt.

See *Davis* v. *Tollemache* (2 Jur. N. S. 1181).

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

65. Any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands, shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say,) in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any

issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition.

3 & 4 Will. 4, c. 74, s. 65.

66. Every disposition which under this act may be made by any commissioner acting in the execution of any such fiat as aforesaid of lands held by copy of court roll shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person to whom the lands shall have been so disposed of by such commissioner may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues which could have been lawfully demanded upon such admittance if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, passed by surrender into the hands of the lord, to the use of the person so admitted.

Every disposition by the commissioner of copyhold lands where the estate shall not be equitable, to have the same operation as a surrender; and the person to whom such land shall have been disposed of may claim to be admitted on paying the fines, &c.

Sect. 50, sub-sect. 4, of the Bankruptcy Act, 1883, enacts, that where any portion of the bankrupt's estate consists of copyhold or customary property or any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to such property, but may deal with the same in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly (See *Poole* v. *Bursell*, 10 W. R. 861).

As to copyholds and customary lands of bankrupt.

67. The rents and profits of any lands of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required

Assignees to recover rents of the lands of a bankrupt of which the commissioner has power to

3 & 4 Will. 4, c. 74, s. 67.

make disposition, and to enforce covenants as if entitled to the reversion. This clause to apply to all copyhold lands, but as to other lands only to such as the commissioner may dispose of after the bankrupt's death.

for the benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and in case any action of trespass shall be brought for taking any such distress may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to avow or make cognizance generally in such manner and form as any landlord may now do by virtue of the statute 11 Geo. 2, c. 19, or by any other law or statute now in force or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents and servants, shall also have all such and the same remedies, powers, privileges and advantages of pleading, avowing and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof as landlords, their bailiffs, agents and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions and agreements in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands for the non-observance of any such covenant, condition and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions and agreements, as the bankrupt would have had in case he had not been adjudged a bankrupt: provided always that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

This section does not apply to a case where there has been, before the bankruptcy, a voidable estate created in favour of a purchaser (*Hankey* v. *Martin*, 49 L. T. 564).

All the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

68. All the provisions in this act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall be adjudged bankrupts after the thirty-first day of December, one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in Ireland of such persons as fully and effectually as if this act had throughout extended to lands of any tenure in Ireland; saving always the rights of the King's most excellent

Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland. 3 & 4 Will. 4, c. 74, s. 68.

Sections 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59 of the 4 & 5 Will. 4, c. 92, as to bankrupts' lands in Ireland, with the omission of copyholds, agree in substance and effect with sects. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 67 of the 3 & 4 Will. 4, c. 74. By the 4 & 5 Will. 4, c. 92, s. 60, it is enacted, that all the provisions in that act contained for the benefit of the creditors of persons who, under such commissions as aforesaid, (i. e. *issued under Irish stat.* 11 & 12 *Geo.* 3, *c.* 8,) shall be adjudged bankrupts after the 31st October, 1834, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in England of such persons, as fully and effectually as if the act had throughout extended to land of any tenure in England. Provisions of the Irish Act as to bankrupts apply to their lands in England.

69. Provided always, that in all cases of bankruptcy, every deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in England. Deeds relating to the lands of bankrupts in Ireland to be inrolled in the Court of Chancery there.

The 61st section of the Irish stat. 4 & 5 Will. 4, c. 92, provides, that in all cases of bankruptcy every deed of disposition under that act of lands in England, by any commissioner acting in the execution of any such commission as aforesaid, and also every deed by which the protector of a settlement of lands in England shall consent, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland. Deeds relating to Irish bankrupts' lands in England to be inrolled in Court of Chancery there.

15. *Money to be laid out in Lands to be Entailed.*

[*Sect.* 70, *which repealed* 7 *Geo.* 4, *c.* 45, *was itself repealed by* 37 & 38 *Vict. c.* 35, *without reviving the former statute.*]

71. Lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and The previous clauses, with certain variations, to apply to lands of any tenure to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

3 & 4 Will. 4, c. 74, s. 71.

were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment in the same manner as hereinbefore required in regard to lands not held by copy of court roll.

Old mode of barring estates tail in entailed money.

Money directed to be laid out in the purchase of freehold land is considered by a court of equity as converted into real estate. Formerly a person who would have been entitled to the land, if purchased, as tenant in tail, was enabled by a court of equity to receive the money if he could have acquired the fee by fine, but not if a recovery would have been requisite, in which case it was necessary to purchase land in order to suffer a recovery (5 Ves. 12; 6 Ves. 116; *In re Lord Somerville*, 2 Sim. & Stu. 470; 3 Russ. 369, 416; 5 Russ. 5). The Irish stat. 4 & 5 Will. 4, c. 92, s. 62, repealed the Irish stats. 58 Geo. 3, c. 46, and 7 Geo. 4, c. 45.

For the earlier cases, see *Fletcher* v. *Ashburner*, 1 L. C. Eq. 327, 7th ed.; and as to entailed money see also *Mosley* v. *Ward* (29 Beav. 407).

Payment out of court of entailed money.

A fund in court representing entailed land will not be paid out to a tenant in tail without a disentailing deed having been executed (*Re Butler*, 16 Eq. 479; *Re Broadwood*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. Div. 61; *Re Norcop*, 31 L. T. 85; *Re Tylden*, 11 W. R. 869; *Re Smythe*, 3 M. & K. 249; see *contra*, *Sowry* v. *Sowry*, 8 W. R. 339; *Re Row*, 17 Eq. 300; *Re Wood*, 20 Eq. 372; *Stead* v. *Harper*, 1896, W. N. 46). An affidavit proving the execution has been required (*Bishop* v. *De Burgh*, 15 L. J. Ch. 35; *Re Field*, 11 W. R. 927; see, however, *Re Butler*, *sup.*; *Re Reynolds*, *sup.*) As to an affidavit of no incumbrances, see *Thornhill* v. *Milbank* (12 W. R. 523).

Where entailed land had been sold and the money paid into court, a subsequent deed which purported to disentail the land did not disentail the money (*Mills* v. *Fox*, 37 Ch. D. 153).

Where the money had been paid into court by a company and a disentailing deed had been executed, the company was ordered to pay the costs of the deed (*Re Brooking*, 2 Giff. 31; *Re North Staffordshire R. Co.*, 3 Giff. 224).

Under this section an entail may be barred of lands to be purchased

with rents hereafter to become due to trustees (*Fordham* v. *Fordham*, 34 Beav. 59; see the order in this case, Seton, 6th ed., 1786) or to be purchased under a trust for investing money in land at a future date (*Re Harvey, H.* v. *H.*, 1901, 2 Ch. 290). 3 & 4 Will. 4, c. 74, s. 71.

72. So far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly hereinbefore contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subjected to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be possessed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to Ireland: provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland to be so sold, as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland to be sold.

Lands of any tenure in Ireland to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to this act in cases of bankruptcy.

This saving is not in the corresponding section in the Irish stat. 4 & 5 Will. 4, c. 92, s. 64.

16. *The Inrolment of Deeds, &c.*

73. Any rule or practice requiring deeds to be acknowledged before the inrolment shall not apply to any deed by this act required to be inrolled in his Majesty's High Court of Chancery in England or Ireland.

As to deeds being acknowledged before inrolment.

The Petty Bag Act, 1849, ss. 17, 18, directs a seal to be provided for the inrolment office, and certificates of inrolment to be written upon every deed to be inrolled, which certificates, when sealed, are to be admitted as evidence.

By the Irish Act, 4 & 5 Will. 4, c. 92, s. 73, it is provided that any rule or practice requiring deeds to be acknowledged before inrolment shall not apply to any deed by that act required to be inrolled in the Court of Chancery in Ireland.

3 & 4 Will. 4, c. 74, s. 74.

Every deed to be inrolled by which lands or money shall be disposed of under this act, to take effect as if inrolment not required.

74. Every deed required to be inrolled in his Majesty's High Court of Chancery in England or Ireland, by which lands or money subject to be invested in the purchase of lands shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled.

See sect. 41 (*ante*, p. 295). Sect. 74 renders it necessary for purchasers and mortgagees to have the deed under which they take inrolled without any delay, and it will be proper for them to ascertain, by search at the inrolment office, that no conveyance prior to that under which they claim, made by the tenant in tail, has been inrolled. Compare the case of a bargain and sale, *Marlborough* v. *Godolphin* (2 Ves. sen. 79). See Com. Dig. Bargain and Sale (B. 9).

It has been held, under the corresponding section of the Irish Act (4 & 5 Will. 4, c. 92, s. 66), that this section applies only to disentailing deeds executed by the same tenant in tail, and not to deeds executed by successive tenants in tail (*Re Piers*, 14 Ir. Ch. R. 452).

[*Sect.* 75 *dealing with fees on inrolment was repealed by* 42 & 43 *Vict. c.* 78, *s.* 29. *For the present fees, see the order stated Shelf. R. P. Stat., 9th ed.*, 310.]

The Court of Common Pleas to regulate the fees for entries on court rolls and indorsements on deeds, and for taking consents, &c.

76. It shall be lawful for his Majesty's Court of Common Pleas at Westminster from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the entries of deeds by this act required to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of lands held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under this act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders or the memorandums thereof on the court rolls.

[*For sects.* 77—91, *see post, pp.* 313 *et seq.*]

17. *Ireland.*

Ireland.

92. This act shall not extend to Ireland, except where the same is expressly mentioned.

By 4 & 5 Will. 4, c. 92, the provisions of this act have been extended to Ireland, with the omission of sects. 4, 5 and 6 (*ante*, pp. 268, 269, 270), relating to lands, held by ancient demesne, and sects. 50—54, 66, 76, 90, relating to copyholds (see *ante*, pp. 298, 307, 312, and 325, *post*). The other variations between the two statutes are noticed *ante*, pp. 262, 274, 277, 292, 309, 311, and *post*, p. 314.

The clauses in 4 & 5 Will. 4, c. 92, with respect to the disposition of estates tail under bankruptcies, are extended to proceedings under the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58, s. 50).

This act applies to lands locally situate in the town of Berwick-upon-Tweed (the Berwick-on-Tweed Act, 1836).

MARRIED WOMEN'S PROPERTY.

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A married woman, with her husband's concurrence, to dispose of lands and money subject to be invested in the purchase of lands and of any estate therein; and to release and extinguish powers as a feme sole.

77. After the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act (*a*), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release (*b*), surrender or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole, save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that this act shall not extend to lands held by a copy of court roll of or to which a married woman, or she and her

Not to extend to copyholds in certain cases.

3 & 4 Will. 4, c. 74, s. 77.

husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.

(*a*) See sections 15 and 40, *ante*, pp. 274, 294.
(*b*) The Irish stat. 4 & 5 Will. 4, c. 92, s. 68, contains the word "disclaim."

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By Real Prop. Act, 1845, s. 6 (*post*, p. 519), contingent and other like interests, and also rights of entry, may be disposed of by a married woman conformably to the provisions of this act (see *Crofts* v. *Middleton*, 8 D. M. & G. 192).

(1) Cases when acknowledgment necessary.

Under the present section, read in connection with the interpretation clause, a married woman may by deed acknowledged dispose of any interest in land either at law or in equity, or any charge, lien or incumbrance in or upon or affecting land either at law or in equity (*Briggs* v. *Chamberlain*, 11 Hare, 74); including a right to dower (*Dent* v. *Clayton*, 12 W. R. 903); but not of a mere *spes successionis* (*Allcard* v. *Walker*, 1896, 2 Ch. 369). This power of disposition includes (1) the married woman's equitable interest in a mortgage debt (*Williams* v. *Cooke*, 4 Giff. 343; *Miller* v. *Collins*, 1896, 1 Ch. 573; overruling *Re Newton*, 23 Ch. D. 181; *secus*, where the charge had been paid off: *Re Algeo*, I. R. 2 Eq. 485); (2) the married woman's interest whether in possession or reversion in proceeds of real estate devised on trust for sale, whether the sale be or be not made (*Briggs* v. *Chamberlain*, 11 Ha. 69; *Tuer* v. *Turner*, 20 Beav. 560; *Re Jakeman*, 23 Ch. D. 344). So where personalty in which the married woman had a reversionary interest under a settlement prior to M. W. Rev. Int. Act, 1857 (*post*, p. 333), had in breach of trust been invested in land, she could dispose of her interest under this section (*Re Durrant and Stonor*, 18 Ch. Div. 106). And a conveyance by *cestui que trusts* of land held on trust for sale to the trustee for sale who had purchased it, was held void as against a married woman *c. q. t.* who had not acknowledged the deed (*Franks* v. *Bollans*, 3 Ch. 717). The formalities prescribed by this section must be observed in dealings by the married woman with land of which she is trustee (*Re Harkness and Allsopp*, 1896, 2 Ch. 358).

A declaration of trust whereby the married woman effectually parts with the entire equitable interest in property is a "disposition" within this section (*Carter* v. *Carter*, 1896, 1 Ch. 67). And where the property is copyhold the declaration binds her heir, the case not falling within the final proviso (*Ib.*).

The fact that the husband is at the time an undischarged bankrupt does not invalidate a conveyance under this section (*Re Jakeman*, 23 Ch. D. 344). As to the effect of a lease by a husband and wife of the wife's land not acknowledged by her, see *Toler* v. *Slater*, L. R. 3 Q. B. 42.

(2) Cases when acknowledgment unnecessary.

The formalities of this section are unnecessary in the following cases: (1) Generally in the case of separate estate whether independently of, or under, the M. W. P. Act, 1882 (see *post*, pp. 319, 343); including the case where a married woman is dealing as a mortgagee with land on the security whereof her separate money has been advanced (*Re Brooke and*

Fremlin, 1898, 1 Ch. 647). (2) In cases within the proviso at the end of the section; see *Green* v. *Paterson*, 32 Ch. Div. 95; *Carter* v. *Carter*, *sup.* (3) Where a married woman trustee is conveying land as bare trustee under sect. 16 of the Trustee Act, 1893 (*post*, p. 758; *Re Howgate and Osborn*, 1902, 1 Ch. 451; *Re Docwra, Docwra* v. *Faith*, 29 Ch. D. 693; and compare *Re Harkness and Allsopp*, 1896, 2 Ch. 358, *sup.*). (4) Where the provisions of an act of parliament substitute other proceedings (*Ex p. Ellison*, 2 Y. & Coll. 528). (5) Under sect. 52 of the Conv. Act, 1881 (*post*, p. 595), a married woman may now by deed unacknowledged release her power over any property, whether real or personal, and whether in possession or reversion and (where the power is coupled with an interest) whether in respect of such interest she is restrained from anticipation or not (*Re Chisholm, Hemphill* v. *Hemphill*, 1901, 2 Ch. 82). As to leases or sales of a married woman's property under S. E. Act, 1877 (*post*, p. 625), see sects. 12, 22, 50 and 51 of that act. In the case of conveyances by a married woman under the S. L. Act, 1882, sect. 61 of that act (*post*, p. 703) seems to render an acknowledgment unnecessary. Where her property is sold in a partition action, she can, without deed acknowledged, request a sale under sect. 6 of the Partition Act, 1876 (*post*, p. 740), and elect by examination in court to take the proceeds as personalty (*Standering* v. *Hall*, 11 Ch. D. 652; *Wallace* v. *Greenwood*, 16 Ch. D. 362).

3 & 4 Will. 4, c. 74, s. 77.

Purchase-money of real estate belonging to a married woman, which has been paid into court, may be paid out to her upon her examination without a deed acknowledged (*Re Hayes*, 9 W. R. 769; see *Re Trevylyan*, 31 L. J. Ch. 560; *Gibbons* v. *Kibbey*, 10 W. R. 55; *Clark* v. *Clark*, 14 W. R. 449; *White* v. *Herrick*, 4 Ch. 345). Where the fund is small the examination will be dispensed with (*Re Clark*, 13 W. R. 401; *Knapping* v. *Tomlinson*, 18 W. R. 684; *Frith* v. *Lewis*, 1881, W. N. 145).

Purchase-money in court belonging to married woman.

Where the married woman is a lunatic, her heir and her own beneficial, but not her legal, interest can be bound by an order of the court (*Re Stables*, 4 D. J. & S. 257).

Lunacy.

(3) Contracts.

By the present section a married woman was enabled, with the concurrence of her husband, to contract by an acknowledged deed so as to bind her non-separate land, but not herself personally (*Crofts* v. *Middleton*, 8 D. M. & G. 192; *Pride* v. *Bubb*, 7 Ch. 64). A contract unacknowledged will not bind her so far as regards non-separate land (*Castle* v. *Wilkinson*, 5 Ch. 534; *Cahill* v. *Cahill*, 8 App. Cas. 420; *Williams* v. *Walker*, 9 Q. B. D. 576); even if she is a trustee for sale (*Avery* v. *Griffin*, 6 Eq. 606; see *Re Harkness and Allsopp*, 1896, 2 Ch. 358). Nor will her husband's contract bind her (*Barnes* v. *Wood*, 8 Eq. 424; *Nicholl* v. *Jones*, 3 Eq. 696). Non-separate land is now less common having regard to M. W. P. Act, 1882. In cases falling within that act, see as to contracts, sect. 1, subsect. 2 (*post*, p. 342), and M. W. P. Act, 1893, s. 1, *post*, p. 360.

As to the effect of fines under the old law, see *May* v. *Roper*, 4 Sim. 360; *Forbes* v. *Adams*, 9 Sim. 462.

(4) Affirmation of voidable settlements.

In some cases a married woman could by election bind her non-separate real estate without acknowledged deed. Thus where previous to the marriage of a female infant a settlement was executed of her real property the settlement was not void but voidable (*Cooke* v. *Cooke*, 38 Ch. D. 209); and on attaining her majority she could by her acts during coverture without any acknowledged deed affirm the settlement so as to bind the property (*Barrow* v. *Barrow*, 4 K. & J. 409; see *Re Hodson, Williams* v. *Knight*, 1894, 2 Ch. 421; *Wilder* v. *Pigott*, 22 Ch. D. 263, the case of a reversionary interest in personalty). A similar conclusion was arrived at in the case of a reversionary interest in personalty, where previous to the marriage of an adult female there was an agreement for settlement which did not comply with the Statute of Frauds (*Greenhill* v. *North British Insurance Co.*, 1893, 3 Ch. 474). Where, however, a married

3 & 4 Will. 4, c. 74, s. 77.

woman executed but did not acknowledge a separation deed purporting to deal with her real estate, she could not by acting upon it make the deed binding (*Harle* v. *Jarman*, 1895, 2 Ch. 419). Similarly in the case of a post-nuptial settlement purporting to deal with the married woman's reversionary interest in personalty (*Seaton* v. *Seaton*, 13 App. Cas. 61).

As to the affirmation or repudiation of voidable settlement, see further the note to the Infant Settlements Act, 1855, *post*, p. 726.

(5) Disclaimer by married women.

The Irish statute 4 & 5 Will. 4, c. 92, s. 68, contains the additional word *disclaim*, after the words "dispose of." By Real Prop. Act, 1845, s. 7, *post*, p. 520, a married woman may disclaim by deed made conformable to this act. As to the release and extinguishment of powers, see *post*, p. 318.

Disclaimer generally.

An interest devised vests in the devisee by presumption of law before entry (Co. Litt. 111 a). The old doctrine was, that an estate of freehold could be disclaimed only by matter of record (*Butler and Baker's case*, 3 Rep. 26). But it is now established that a deed is sufficient for that purpose (*Townson* v. *Tickell*, 3 B. & Ald. 31). This case has been followed in a case where a deed of disclaimer by a devisee in trust of freehold and copyhold property was held to vest the entire legal estate in his co-trustees (*Begbie* v. *Crook*, 2 Bing. N. C. 70; and see observations on *Townson* v. *Tickell*, in 4 M. & R. 189). The disclaimer must be clear and unequivocal (*Doe* v. *Smyth*, 6 B. & C. 112).

It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, but there may be conduct which amounts to a clear disclaimer (*Re Birchall*, *Birchall* v. *Ashton*, 40 Ch. Div. 436). As where a trustee under a will purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended, upon the disclaimer of the trust (*Stacey* v. *Elph*, 1 M. & K. 195). A disclaimer by one of the three executors of a will, who were directed to sell copyholds, by a deed executed some time after the sale, reciting that he had from the testator's decease declined to act, and had never acted in the executorship or trusts of the will, was held to be a refusal *ab initio*, there being nothing to impeach the *bona fides* of the transaction (*Peppercorn* v. *Wayman*, 5 De G. & S. 230; see *Harris* v. *Watkins*, 2 K. & J. 473, as to presuming a disclaimer by a devisee). A disclaimer after the exercise of various acts of ownership is void (*Bence* v. *Gilpin*, L. R. 3 Ex. 76). A devise of copyholds may be disclaimed by word of mouth only before the devisee has been admitted (*R.* v. *Wilson*, 10 B. & C. 5; see Shepp. Touchs. 452). A gift of personal chattels or a term of years, may be waived and avoided by parol (1 Ventr. 128). On a disclaimer by a devisee the estate will descend to the heir, or pass to a remainderman (*Ib.* 116). And on the disclaimer of one of two assignees of a term, the whole interest will vest in the other (*Smith* v. *Wheeler*, 1 Vent. 128). The disclaimer of one of several trustees has the effect of vesting the estate in the other trustees exclusively (*Small* v. *Marwood*, 9 B. & C. 300; *Brownell* v. *Reed*, 1 Hare, 435; see *Re Birchall*, *Birchall* v. *Ashton*, 40 Ch. Div. 436; *Doe* v. *Harris*, 16 M. & W. 517). A trustee cannot disclaim part of a trust, *e.g.*, as to all property in England (*Re Lord and Fullerton*, 1896, 1 Ch. 228).

The execution of a conveyance of trust premises has been held sufficient evidence of acceptance of the trust (*Urch* v. *Walker*, 3 M. & C. 702). In *Crewe* v. *Dickin* (4 Ves. 97), one of two trustees released and conveyed to his co-trustee; and it was held, that the trustee must be considered as having accepted the trust (see, however, *Nicholson* v. *Wordsworth*, 2 Swanst. 371). A trustee of real estate, who disclaimed all estate, powers, &c., in the estate devised, was held not to be a necessary party in a conveyance to a purchaser, nor in a receipt for the purchase-money (*Adams* v. *Taunton*, 5 Madd. 433. See, in addition to the cases cited, Litt. ss. 684, 685; stat. 21 Hen. 8, c. 4; Co. Litt. 113 a; *Bonifant* v. *Greenfield*, Cro. Eliz. 80; Godb. 77; *Anon.*, 4 Leon. 207; *Hawkins* v. *Kemp*, 3 East, 410; *Thomson* v. *Leach*, 2 Vent. 198; Carth. 211, 230; 2 Salk. 616; Show. P. C. 151; 3 Lev. 284; 1 Show. 296; Rep. temp. Holt, 665). It was

held, that a discretionary power given to two trustees to sell copyholds, one of whom disclaimed, might be exercised by the other trustee (*Affleck* v. *James*, 13 Jur. 739). In *Sharp* v. *Sharp* (2 B. & Ald. 405), it was held that trustees had not acted, though they had conveyed the estate instead of disclaiming. 3 & 4 Will. 4, c. 74, s. 77.

A *feme covert* made a disposition of property, as to which it was doubtful whether it was settled to her separate use. The husband disclaimed: it was held, that, whether separate property or not, the husband's disclaimer gave effect to the disposition of the wife (*Rycroft* v. *Christy*, 3 Beav. 238). See, further, as to disclaimer, Lewin on Trusts, 209 *et seq.*, 10th ed.

78. Provided always, that the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition. The powers of disposition given to a married woman by this act not to interfere with any other powers.

In the corresponding clause in the Irish statute, 4 & 5 Will. 4, c. 92, s. 69, the following qualification is added, "but such powers of disposition shall not enable a married woman to dispose of lands, or any estate therein, where the settlement or other instrument under which she may be entitled to the same shall contain a valid restriction against the anticipation thereof by such married woman." This has been said to be an expression by the legislature of what was meant by the English act (*Baggett* v. *Meux*, 1 Phil. 628). As regards powers of appointment, it was held under the Irish statute, that a restraint imposed on a life interest would not prevent the release of a power (*Heath* v. *Wickham*, 5 L. R. Ir. 285; see as to England, *Re Chisholm*, *Hemphill* v. *Hemphill*, 1901, 2 Ch. 82, *ante*, p. 315). As to how far other statutory powers of disposing of a married woman's property are affected by a restraint on anticipation, see S. E. Act, 1877, s. 50, *post*, p. 645; S. L. Act, 1882, s. 61, *post*, p. 703. Irish statute. Restraint on anticipation.

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(1) Other statutory powers.

By the custom of London, confirmed by statute 34 & 35 Hen. 8, c. 22, and of several other cities and boroughs, as Norwich, &c., &c., a married woman, on being privately examined before the mayor, may bind herself by a deed acknowledged and inrolled (Hob. 225; Com. Dig. London (N. 3); 2 Inst. 673; 1 Prest. Abst. 336; Roper on Husband and Wife, 531; 4 Cruise's Dig. tit. xxxii. ch. 2, pl. 33). By statute 32 Hen. 8, c. 28, the husband and wife were empowered to make leases of the wife's lands (see *Doe* v. *Weller*, 7 T. R. 478). This act has been repealed by S. E. Act, 1856, s. 35, and certain powers of leasing a married woman's lands are given by the S. E. Act, 1877, s. 46, *post*, p. 643; see also S. L. Act, 1882, s. 61, *post*, p. 703. By Infants' Prop. Act, 1830, s. 12, power was given to a married woman under an order of court to surrender leases and take new leases (extended to Ireland, 5 & 6 Will. 4, c. 17).

(2) Dominion of married

Prior to the M. W. P. Act, 1882, the disabilities of married women at common law, independent of statute or particular customs, to alien their

3 & 4 Will. 4, c. 74, s. 78.

property, whether real or personal, either by deed or will, were well known (see Harg. Co. Litt. 111 b, n (4)). The wife of a man who had abjured the realm, or been transported, might act as if her husband were dead (Co. Litt. 132; 2 Vern. 104; 3 P. Wms. 37). Through the medium of powers and trusts, however, a married woman was long allowed to have, both at law and in equity, the full dominion over property independent of her husband. A wife might, without her husband, execute a naked authority to sell lands whether given before or after coverture, and though no special words were used to dispense with the disability of coverture (Co. Litt. 112 a, and n. (6)). The rule was the same where both an *interest* and an authority passed to the wife, if the authority was collateral to and did not flow from the interest, because then the two were unconnected, as if they were vested in different persons (Rep. temp. Finch. 346). As, too, a *feme covert* might convey lands in execution of a mere power, so she might with equal effect in performance of a *condition*, where land was vested in her on condition to convey to others (W. Jones, 137, 138). As regards estates of freehold which a married woman had as trustee, the better opinion was that no effectual conveyance could formerly be made by her without fine or recovery, nor, after the present act, without a deed duly acknowledged (1 Prest. on Abs. 337; *Re Caine*, 10 Q. B. D. 284; see *Avery* v. *Griffin*, 6 Eq. 606). And the M. W. P. Act, 1882, has not altered this (*Re Harkness and Allsopp*, 1896, 2 Ch. 358).

women over their property by means of powers.

Powers of appointment to married women.

Before the M. W. P. Act, 1882, a power of disposing of real estate was often given to a married woman (1) by way of trust, *e.g.*, by a proper conveyance of an estate to trustees in trust for her for life, and afterwards in trust for such person as she should appoint; or (2) by way of power over a use, as where an estate was conveyed to the use of herself for life, remainder to the use of such persons as she should appoint (*Peacock* v. *Monk*, 2 Ves. sen. 191). Where by articles before marriage it was agreed that the wife should have a power of appointment over her property, the power was held well created and exercisable (*Ripon* v. *Dawding*, Amb. 565; *Wright* v. *Cadogan*, 1 Br. P. C. 486; Amb. 468; 2 Eden, 239; see *Doe* v. *Staple*, 2 T. R. 684; Sug. Pow. 158).

(3) Different kinds of powers.

A power may be (1) *appendant*, when the exercise of it takes effect out of the estate of the donee, as a power of leasing; (2) *in gross*, when the exercise of it takes effect after the determination of the estate of the donee, as a power of a tenant for life to jointure; or (3) simply *collateral*, when the donee has no estate at all in the property the subject of the power (1 Saund. on Uses, 4th ed. 169; Sug. Pow. 8th ed. 46; Tudor, L. C. Conv. 4th ed. 539).

Exercise of powers by married women.

It has long been settled, that a married woman may execute a power whether appendant, in gross or simply collateral (*Harris* v. *Graham*, 1 Roll. Abr. 329, pl. 12; 2 Roll. Abr. 247, pl. 6; *Gibbons* v. *Moulton*, Finch, 346; *Daniel* v. *Upley*, Latch. 39; Godb. 327, pl. 419; *Tomlinson* v. *Dighton*, 1 P. Wms. 149; *Travel* v. *Travel*, 3 Atk. 711; cited 2 Ves. sen. 191; *Doe* v. *Eyre*, 5 C. B. 741, 745); unless a contrary intention appears in the instrument creating it (*Antrim* v. *Buckingham*, 1 Ch. Cas. 17). She may exercise power as well over a copyhold as a freehold estate (*Driver* v. *Thompson*, 4 Taunt. 294). See further Sug. Pow. 154, 8th ed.; *Wood* v. *Wood*, 10 Eq. 220).

Release of powers.

The Fines and Recoveries Act, s. 77 (*ante*, p. 313), provided a machinery whereby a married woman could release or extinguish certain powers as if she were a *feme sole*. And as regards release of powers by *femes sole*, it was settled that, prior to the Conv. Act, 1881, powers appendant or in gross could be released (*Albany's case*, 1 Rep. 111; *Leigh* v. *Winter*, Sir W. Jones, 411; Sug. Pow. 8th ed. 82). But powers simply collateral could not (Co. Litt. 265 b; 11 Rep. 111 a; see *Weller* v. *Ker*, L. R. 1 H. L. Sc. 11; *Saul* v. *Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831); unless the power was for the benefit of the donee (*West* v. *Berney*, 1 R. & M. 434). Further provisions as to releasing and disclaiming powers are now contained in Conv. Act, 1881, s. 52 (*post*, p. 595); Conv. Act, 1882,

s. 6 (*post*, p. 613); and it has been decided that, under the Conv. Act, 1881, s. 52, a married woman can release any power by deed unacknowledged (*Re Chisholm, Hemphill* v. *Hemphill*, 1901, 2 Ch. 82). **3 & 4 Will. 4, c. 74, s. 78.**

Formerly a power appendant or in gross could be extinguished by a fine or a recovery (*Digge's case*, 1 Rep. 173; *Bird* v. *Christopher*, Styles, 389; *King* v. *Melling*, 1 Ventr. 225; *Tomlinson* v. *Dighton*, 1 P. Wms. 149; *Saville* v. *Blackett*, *ib.* 777); even where the power was for the benefit of the donee's children (*Bickley* v. *Guest*, 1 Russ. & M. 440; *Smith* v. *Death*, 5 Madd. 371; see, however, *Jesson* v. *Wright*, 2 Bligh, 15). **Extinguishment of powers—**

A power appendant to a life estate—including a power of leasing (*Simpson* v. *Bathurst*, 5 Ch. 193; *Lonsdale* v. *Lowther*, 1900, W. N. 165), a power to consent to a sale of the corpus (*Alexander* v. *Mills*, 6 Ch. 124; *Re Bedingfield and Herring*, 1893, 2 Ch. 332), or to consent to an advancement thereout to children (*Re Cooper*, *Cooper* v. *Slight*, 27 Ch. D. 565)—is not extinguished by an alienation of the donee's interest. It is immaterial whether the alienation is by the donee's assignment (*Alexander* v. *Mills*, *sup.*; *Ren* v. *Bulkeley*, 1 Dougl. 292; *Simpson* v. *Bathurst*, 5 Ch. 193), or upon his bankruptcy (*Holdsworth* v. *Goose*, 29 Beav. 111; *Eisdale* v. *Hammersley*, 31 Beav. 255; *Doe* v. *Britain*, 2 B. & Ald. 93; *Hole* v. *Escott*, 2 Keen, 444). The power, however, cannot be exercised without the consent of the alienee (*Re Cooper*, *Cooper* v. *Slight*, 27 Ch. D. 565; *Re Bedingfield and Herring*, 1893, 2 Ch. 332), unless the power is expressly reserved upon the alienation (*Warburton* v. *Farne*, 16 Sim. 625; *Long* v. *Rankin*, Sug. Pow. 8th ed. 899; *Morgan* v. *Rutson*, 16 Sim. 234; see *Re Wright and Marshall*, 28 Ch. D. 93); or the exercise of it does not derogate from the donee's grant, as in the case of a power to appoint new trustees (*Hardaker* v. *Moorhouse*, 26 Ch. D. 417). **appendant;**

A power in gross may be exercised notwithstanding the alienation of the donee's interest (*Parsons* v. *Parsons*, 9 Mod. 464), whether by his assignment (*Re Stone*, I. R. 8 Eq. 621), or by means of a clause of forfeiture on bankruptcy (*Wickham* v. *Wing*, 2 H. & N. 436; *Re Aylwin*, 16 Eq. 585; see *Jones* v. *Winwood*, 3 M. & W. 653; *Haswell* v. *Haswell*, 2 D. F. & J. 456; *Re Evans*, 1897, 1 I. R. 410). **in gross.**

The trustee in bankruptcy can exercise a power which the bankrupt could have exercised for his own benefit (Bankcy. Act, 1883, s. 44 (ii.)). This does not apply after the death of the bankrupt (*Nichols* v. *Nixey*, 29 Ch. D. 1005); nor in the case of a married woman made bankrupt under the M. W. P. Act, 1882 (*Ex p. Gilchrist*, 17 Q. B. Div. 521). A judicial separation does not prevent a wife from joining in the exercise of any joint power given to herself and her husband (Matrim. Causes Act, 1857, s. 26). **Bankruptcy.** **Judicial separation.**

See further as to the extinguishment of powers, Sug. Pow. 8th ed. 57 *et seq.*; Farwell, 11 *et seq.* 2nd ed.

(4) **Trust for separate use of married woman.**

A further power conferred on a married woman by the general law (independently of the M. W. P. Acts, 1870 and 1882, which see *post*, pp. 336, 342) was the power of disposing of separate estate, whether real or personal. Thus, by the general law, a married woman, in the absence of any clause against alienation, can deal with the equitable interest in real property to which she is entitled to her separate use, as if she were a *feme sole* (*Taylor* v. *Meads*, 4 D. J. & S. 597; *Hall* v. *Waterhouse*, 5 Giff. 64; *Pride* v. *Bubb*, 7 Ch. 64; *Cooper* v. *Macdonald*, 7 Ch. Div. 288; *Adams* v. *Gamble*, 12 Ir. Ch. R. 102; see *Major* v. *Lansley*, 2 R. & M. 355). Her power exists not only as to strangers, but as to her husband (*Logan* v. *Birkett*, 1 M. & K. 220). As to the legal estate in such property where there are no trustees, see the note to sect. 91, *post*, p. 328. **Realty.**

Again, by the general law, a married woman entitled to personal property to her separate use, without any restraint on alienation, may not only receive and apply to her separate use the income, but dispose of the corpus, either by an act *inter vivos* or by will (*Rich* v. *Cockell*, 9 Ves. 369; *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; 3 Br. C. C. 8; see also *Peacock* v. *Monk*, 2 Ves. sen. 191; *Hearle* v. *Greenbank*, 3 Atk, 696; 1 Ves. sen. 298). And her power of disposition extends to reversionary interest in personalty **Personalty.**

3 & 4 Will. 4, c. 74, s. 78.

settled to her separate use as well as to interests in possession (*Keene* v. *Johnstone*, 1 Jones & Carey, I. R. 255; *Sturgis* v. *Corp*, 13 Ves. 190; see *King* v. *Lucas*, 23 Ch. Div. 712); and to contingent as well as vested interests (*Lechmere* v. *Brotheridge*, 32 Beav. 353; but see *Batt* v. *Cuthbertson*, 4 Dr. & War. 392; *Stamford Co.* v. *Ball*, 10 W. R. 196); but not to property to which she has no title whatever at the date of the disposition (*Smith* v. *Lucas*, 18 Ch. D. 545). As to gifts to a husband by his wife of her separate personalty whether capital or income, see *Woodward* v. *Woodward*, 3 D. J. & S. 672; *Re Flamank, Wood* v. *Cock*, 40 Ch. D. 461; *Edwards* v. *Cheyne* (No. 2), 13 App. Cas. 385.

Contracts binding separate estate.

Further, by the general law the contract of a married woman bound her separate estate, when it appeared that such contract was made with reference to and upon the faith or credit of that estate (*Johnson* v. *Gallagher*, 3 D. F. & J. 515; *London Chartered Bank* v. *Lempriere*, L. R. 4 P. C. 597; *Wainford* v. *Heyl*, 20 Eq. 324); such a contract, however, being enforceable only against so much of the separate estate to which at the time of the contract the married woman was entitled, free from restraint, as remained at the time of judgment (*Pike* v. *Fitzgibbon*, 17 Ch. Div. 454).

Creation of separate use.

No particular form of words was necessary to create separate use (*Stanton* v. *Hall*, 2 R. & M. 175). As to what words would do so, see *Massy* v. *Rowen* (L. R. 4 H. L. 288); *Re Peacock* (10 Ch. D. 490); *Bland* v. *Dawes* (17 Ch. D. 794), and the cases there referred to; *Williams* v. *Waters* (14 M. & W. 166); *Acton* v. *White* (1 Sim. & Stu. 429); *Carnegie* v. *Carnegie* (22 W. R. 783). A trust for separate use will not be inferred from the existence of a restraint on alienation (*Stogdon* v. *Lee*, 1891, 1 Q. B. 661). An immediate gift by a husband to his wife was said to raise a presumption of separate use; but not in the case of an interest commencing after his death (*Re Turner, Turner* v. *Fitzroy*, 66 L. T. 758).

As to whether a trust for separate use can be created by parol, see, in the case of real estate, *Dye* v. *Dye* (13 Q. B. Div. 147); and in the case of personal estate, *Simmons* v. *Simmons* (6 Ha. 352); *Warden* v. *Jones* (2 De G. & J. 76); *Re Whitehead* (14 Q. B. Div. 419) (cases of ante-nuptial agreements); and *Haddon* v. *Fladgate* (27 L. J. Prob. 21, a post-nuptial agreement).

Duration of separate use.

There is no such thing as separate property of an unmarried woman (*Pelton* v. *Harrison*, 1891, 2 Q. B. 425; *Re Price, Stafford* v. *Stafford*, 28 Ch. D. 712; *Axford* v. *Reid*, 22 Q. B. Div. 553; see, however, *Re Wheeler, Briggs* v. *Ryan*, 1899, 2 Ch. 722). But a trust for separate use will apply to any existing coverture and to all subsequent covertures (*Tullett* v. *Armstrong*, 4 My. & Cr. 377; *Re Gaffee*, 1 Mac. & G. 541; *Hawkes* v. *Hubback*, 11 Eq. 5). Such a trust may be destroyed during discoverture, *e.g.*, by conversion of the property (*Wright* v. *Wright*, 2 J. & H. 647). And on its creation it may be confined to an existing coverture (*Moore* v. *Morris*, 4 Drew. 33; *Stogdon* v. *Lee*, 1891, 1 Q. B. 661), or to future covertures (*King* v. *Lucas*, 23 Ch. Div. 712; see *Steedman* v. *Poole*, 6 Ha. 193).

Restraint on anticipation.

Operation of.

A restraint may be imposed on the alienation or anticipation of property given to a woman for her separate use (*Tullett* v. *Armstrong*, 4 M. & Cr. 377; *Baggett* v. *Meux*, 1 Phil. 627). Such a restraint can never exist except as an accessory to a gift for separate use (*Stogdon* v. *Lee*, 1891, 1 Q. B. 670; *Pike* v. *Fitzgibbon*, 17 Ch. Div. 464); but the character of separate property arising under the M. W. P. Act, 1882, is sufficient to support it (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690). The principle recognised in *Pike* v. *Fitzgibbon* (*sup.*) is that a married woman can in no way dispose by way of anticipation of property subject to such a restraint. She cannot dispose of it by making an engagement authorizing another person to intercept it (*Re Glanvill, Ellis* v. *Johnson*, 31 Ch. Div. 539; see the form of judgment in *Scott* v. *Morley*, 20 Q. B. Div. 132). She cannot do so even by practising a fraud (*Stanley* v. *Stanley*, 7 Ch. D. 589; *Bateman* v. *Faber*, 1898, 1 Ch. 144, 151), nor can she bind her restrained property by estoppel (*Bateman* v. *Faber*, *sup.*). She cannot be compelled to elect in respect of restrained property (*Re Wheatley, Smith* v. *Spence*,

27 Ch. D. 606; *Re Vardon*, 31 Ch. Div. 275), even where subsequently to the instrument of gift coming into operation she becomes discovert (*Haynes* v. *Foster*, 1901, 1 Ch. 361; see, however, *Hamilton* v. *Hamilton*, 1892, 1 Ch. 396). If she is the "true owner" of restrained property, she cannot "consent" to its being in the "order or disposition" of a bankrupt (*Re Mills*, 1895, 2 Ch. 564). The restraint may control a married woman's statutory powers of disposition (see note, *ante*, p. 317). The restraint did not prevent a married woman from releasing a power (*Re Chisholm, Hemphill* v. *Hemphill*, 1901, 2 Ch. 82), nor from barring an entail (*Cooper* v. *Macdonald*, 7 Ch. D. 288); nor, where the fee is given to her, does it make the land settled land, so as to give her the powers of a tenant for life under the S. L. Acts (*Bates* v. *Kesterton*, 1896, 1 Ch. 159). The effect may be to prevent alienation only during a particular period (*Re Bown*, 27 Ch. Div. 411; see *Re Spencer, Thomas* v. *Spencer*, 30 Ch. D. 183). A restraint on anticipation will be void if it transgresses the rule against perpetuities (*Re Ridley, Buckton* v. *Hay*, 11 Ch. D. 645; *Cooper* v. *Laroche*, 17 Ch. D. 368; *Shute* v. *Hogge*, 58 L. T. 546; see *Herbert* v. *Webster*, 15 Ch. D. 610; *Re Fereley*, 1902, W. N. 27). **3 & 4 Will. 4, c. 74, s. 78.**

The restraint may be imposed whether the property be real or personal, and whether it be absolute or for life (*Baggett* v. *Meux*, 1 Phil. 627). Where the restraint is attached to an absolute bequest, the question whether it is effectual does not depend on whether the gift is of an income-bearing fund or of a sum of cash (see this distinction taken in the older cases, *Re Ellis*, 17 Eq. 409; *Re Benton, Smith* v. *Smith*, 19 Ch. D. 277; *Re Clarke*, 21 Ch. D. 748); but on whether the testator has shown an intention that the trustees are to keep the fund and pay only the income to the married woman, or, on the other hand, an intention that the capital shall be paid to her (*Re Bown, O'Halloran* v. *King*, 27 Ch. Div. 411). Accordingly, if the intention be that the capital shall be paid to her, this may be done (*Ib.; Re Fearon, Hotchkin* v. *Mayor*, 45 W. R. 232; see *Re Croughton*, 8 Ch. D. 460); but payment will be refused if this intention is absent (*Re Grey, Acason* v. *Greenwood*, 34 Ch. Div. 712; *Re Tippett and Newbold*, 37 Ch. Div. 444; see *Re Currey, Gibson* v. *Way*, 32 Ch. D. 361, a case of real estate). Property on which imposed.

No particular form of words is necessary to impose a restraint on anticipation, the question being one of intention (*Baker* v. *Bradley*, 25 L. J. Ch. 7). As to what words will create a restraint, see *Harrop* v. *Howard* (3 Hare, 624); *Moore* v. *Moore* (1 Coll. 54); *Medley* v. *Horton* (8 Jur. 853); *Brown* v. *Bamford* (1 Phil. 620); *Field* v. *Evans* (15 Sim. 375); *Harnett* v. *Macdougall* (8 Beav. 187); *Steedman* v. *Poole* (6 Hare, 193); *Re Ross* (1 Sim. 190); *Sturgis* v. *Corp* (13 Ves. 190); *Parkes* v. *White* (11 Ves. 222); *Alexander* v. *Young* (6 Hare, 393); *Goulder* v. *Camm* (1 D. F. & G. 146); *Re Lavender* (1898, 1 Ir. R. 175). A life estate in land without impeachment of waste is not inconsistent with a restraint on anticipation (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690), except in a case of waste (*Ib.; Clive* v. *Clive*, 7 Ch. 433). What words will create a restraint on anticipation.

A restraint on anticipation is in force only during coverture (*Barton* v. *Briscoe*, Jac. 603; *Brown* v. *Pocock*, 2 M. & K. 189; *Massey* v. *Parker*, *Id.* 174; *Woodmeston* v. *Walker*, 2 R. & M. 197; *Re Young*, 18 Beav. 199), and does not therefore prevent a disposition by will (*Re Grey, Acason* v. *Greenwood*, 34 Ch. Div. 714; *Re Currey, Gibson* v. *Way*, 56 L. T. 80). The restraint continues in force after a decree for judicial separation or a protection order, except (during the separation or protection) as to property acquired after the decree or order (*Waite* v. *Morland*, 38 Ch. Div. 135; *Hill* v. *Cooper*, 1893, 2 Q. B. 85). If property be given to a woman for her separate use subject to a restraint on anticipation, the restraint will operate during any existing or subsequent coverture (*Tullett* v. *Armstrong*, 4 M. & C. 377; see *Hamilton* v. *Hamilton*, (1892) 1 Ch. 396; *Stroud* v. *Edwards*, 77 L. T. 280). It may, however, be destroyed by the acts done during discoverture, *e.g.*, by the woman converting the property from its original form (*Wright* v. *Wright*, 2 J. & H. 647), or by entering into a covenant to settle it (*Re Wood, Wood* v. *Hooper*, 61 L. T. 197). On Duration of the restraint.

3 & 4 Will. 4, c. 74, s. 78.

the creation of the restraint it may be confined to a particular coverture (*Re Gaffee*, 1 Mac. & G. 541; *Shafto* v. *Butler*, 19 W. R. 595). The restraint does not affect income of a married woman which has accrued due (*Hood-Barrs* v. *Heriot*, 1896, A. C. 174). A judgment can be enforced against income which has accrued due at the date of the judgment whether it has come to her hands or not (*Ib.*), but cannot be enforced against income which accrues afterwards (*Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; see *Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690; *Colyer* v. *Isaacs*, 77 L. T. 198).

Dispensing with the restraint.

When a trustee has committed a breach of trust at the request of a *cestui que trust* who is a married woman restrained from anticipation, the court may, under sect. 45 of the Trustee Act, 1893 (*post*, p. 788, where see note), impound her interest to indemnify him. Restrained property may in some cases be made available for payment of costs (Solicitors Act, 1860, sect. 28; M. W. P. Act, 1893, s. 2 (*post*, p. 361)). The court may also in certain cases dispense with the restraint, under sect. 39 of the Conv. Act, 1881 (*post*, p. 585). Independently of these provisions, the court cannot dispense with the restraint, even where it would be for the benefit of the married woman (*Robinson* v. *Wheelwright*, 6 D. M. & G. 535; *Peillon* v. *Brooking*, 25 Beav. 218; *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. Div. 532; see *Michell* v. *Michell*, 1891, P. 208); even in cases of fraud (*Arnold* v. *Woodhams*, 16 Eq. 29; *Stanley* v. *Stanley*, 7 Ch. D. 589).

In the case of an executory trust for the separate use of a married woman, the court has directed a restraint on anticipation to be inserted in the settlement (*Turner* v. *Sargent*, 17 Beav. 515; *Dunnill* v. *Dunnill*, I. R. 6 Eq. 323; *Loch* v. *Bagley*, 4 Eq. 122; *Re Parrott, Walter* v. *Parrott*, 33 Ch. Div. 274). See further as to the restraint, the notes to the M. W. P. Act, 1882, *post*, pp. 342 *et seq.*

Restraint on alienation in the case of men and unmarried women.

Neither a *feme sole* nor a man can be restrained from disposing by way of anticipation of any property to which she or he is entitled (*Pike* v. *Fitzgibbon*, 17 Ch. Div. 464; see *Brandon* v. *Robinson*, 18 Ves. 429, the case of a life interest). Further, a gift over upon an attempt to alien an absolute interest previously given is void as a condition, both in the case of real and personal estate (*Re Dugdale, Dugdale* v. *Dugdale*, 38 Ch. D. 180; *Re Machu*, 21 Ch. D. 838; *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285). But such a gift over will be good if it follows a life interest (*Dugdale* v. *Dugdale, sup.*; *Hurst* v. *Hurst*, 21 Ch. D. 278). So property may be well limited to a man until he shall become bankrupt, and after his bankruptcy over (*Brandon* v. *Robinson*, 18 Ves. 433). The effect of gifts for life determinable on bankruptcy or alienation was discussed in *Samuel* v. *Samuel* (12 Ch. D. 158); see also *Robertson* v. *Richardson* (30 Ch. D. 623); *Metcalfe* v. *Metcalfe* (1891, 3 Ch. 1); *Sartoris* v. *Sartoris* (1892, 1 Ch. 11); Tud. L. C. Conv., 4th ed., 522 *et seq.*

Condition restraining alienation of realty.

A condition in a feoffment or grant not to alien to any person is void (6 Rep. 41 b; see *Bradley* v. *Peixoto*, Tudor's L. C. Conv. 514, 4th ed.). A grantee may, however, be restrained from aliening to a particular person (*Large's case*, 2 Leon. 82; 3 Leon. 182; *Muschamp's case*, Bridgm. 134). So, a devise in fee on condition that the devisees should not alien, except to their sisters or their children, is good (*Doe* v. *Pearson*, 6 East, 172; *Cuthbert* v. *Purrier*, Jac. 417; *Ross* v. *Ross*, 1 Jac. & W. 158; *Re Macleay*, 18 Eq. 186; *Martin* v. *Martin*, 19 L. R. Ir. 72; see, however, *Attwater* v. *Attwater*, 18 Beav. 330). But a condition in absolute restraint of alienation during a particular time is void (*Rosher* v. *Rosher*, 26 Ch. D. 801).

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

79. Every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or before [*two of the perpetual*

commissioners, or two special commissioners], to be respectively appointed as hereinafter provided. 3 & 4 Will. 4, c. 74, s. 79.

For the words in italics the following have been substituted, "one of the perpetual commissioners or one special commissioner" (Conv. Act, 1882, s. 7, sub-s. (1), *post*, p. 329).

An acknowledgment may be received by a judge of a county court in England or Wales (County Courts Act, 1888, s. 184). Acknowledgments may be received by judge of county court.

A married woman and her husband may convey land for the purpose of sites for schools by deed, without any acknowledgment thereof (School Sites Acts, 1841, s. 5).

As to acknowledgments being taken by persons interested, see Conv. Act, 1882, s. 7, sub-s. (3), and rules under that section (*post*, pp. 329, 330). And as to the effect of an acknowledgment, see *Tennant* v. *Welch*, 37 Ch. D. 622; *Roberts* v. *Cooper*, 1891, 2 Ch. 347, and the other cases quoted *post*, p. 331.

80. Such judge or commissioners aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void. The judge, &c., before receiving such acknowledgment, to examine her apart from her husband.

As to the examination of a married woman, see *post*, p. 331. No person connected with the husband ought to be present when a married woman's examination as to her consent is taken (*Re Bendyshe*, 26 L. J., Chan. 814; see, however, *Re Lewis*, 24 W. R. 103). The court directed the officers to file an acknowledgment of a married woman who was deaf and dumb (*Re Harper*, 6 M. & G. 732).

The court has no jurisdiction to compel a conveyance under this act by a married woman (*Jordan* v. *Jones*, 2 Phil. 170; *Field* v. *Moore*, 7 D. M. & G. 691). In such cases, however, the married woman may usually be established to be a trustee, and a vesting order obtained under the Trustee Acts (Dart, V. & P. 6th ed. 1347; see *Billing* v. *Webb*, 1 De G. & S. 716). Court cannot order married woman to convey under this act.

81. For the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke or place, for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their place of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at West- As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

3 & 4 Will. 4, c. 74, s. 81.

minster with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

The appointment is now made by the Lord Chief Justice of England (44 & 45 Vict. c. 68, s. 26). As to entering the names on the lists, see Solicitors Act, 1860, s. 30.

Power of perpetual commissioners not confined to any particular place.

82. Provided always, that any person appointed commissioner for any particular county, riding, division, soke or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

The commissioner who takes the acknowledgment in England need not be appointed for the county in which the acknowledgment is taken (*Blackmur* v. *Blackmur*, 3 Ch. D. 633; see formerly *Webster* to *Carline*, 4 M. & G. 27).

The commissioners for taking acknowledgments have a lien for their fees on the instruments in their possession (*Ex p. Grove*, 3 Bing. N. C. 364).

If, from being beyond seas, &c., a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

83. In those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any person therein named to be commissioner to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit.

Provisions as to taking abroad acknowledgments required for the purpose of enrolling deeds in Chancery were contained in 15 & 16 Vict. c. 86, s. 22 (see *Re Smith*, 43 L. T. 438). These have been repealed by Commrs. for Oaths Act, 1889, which contains fresh provisions (see sects. 6 and 11).

When time for returning commission will be enlarged.

The court will not enlarge the time for returning a special commission for taking an acknowledgment, where it has been executed after the return day named therein (*Re Carter*, 9 C. B. N. S. 701; see, however, *Re Grierson*, I. R. 4 C. L. 232); unless its return has been unavoidably

delayed (*Re Van Ufford*, 9 C. B. N. S. 789); as by reason of the remoteness of the residences of the parties (*Re Booth*, 5 C. B. N. S. 540); or by reason of the loss of the documents in the post (*Ex p. White*, L. R. 8 C. P. 106). In the last case a duplicate commission was sent. 3 & 4 Will. 4, c. 74, s. 83.

Where the signatures of the commissioners differed from the names in the commission, affidavits of identity were required (*Re Booth*, 5 C. B. N. S. 541; *Re Price*, 17 C. B. 708; *Re Smith*, 10 C. B. N. S. 344; *Re Edsall*, L. R. 10 C. P. 472). Where the acknowledgment had been taken under peculiar circumstances before two gentlemen who were not named in the commission, the court allowed the commission to be amended by inserting their names therein (*Re Stubbs*, 4 M. & G. 609). The court allowed a commission for taking the acknowledgment of a married woman to go out with a blank for her christian name, which was unknown (*Re Appleton*, 1 C. B. 477); but when the commission is returned, the court will require strict proof of her identity (*Re Atherton*, 3 Dowl. & L. 26). So, also, where the husband's name was not known (*Re Legge*, 15 C. B. 364). It is not necessary to state in a certificate under this section the specific place at which the acknowledgment has been taken; it is enough if the deed appear to have been executed within the terms of the commission (*Ex p. Hutchinson*, 17 L. J. C. P. 111). Variances between signatures of commissioners and names in commission.

As to *primâ facie* evidence of the sealing of a deed acknowledged by a married woman before special commissioners appointed under this section, see *Re Sandilands* (L. R. 6 C. P. 411).

84. When a married woman shall acknowledge any such deed as aforesaid, the judge or commissioners taking such acknowledgment shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed. When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned.

The latter part of this section, and sects. 85—88 inclusive, which referred to certificates of acknowledgments and affidavits verifying the same, have been repealed (Conv. Act, 1882, s. 7, *post*, p. 329), and have accordingly been omitted (see as to the repealed sections, Shelford's R. P. Stat. 8th ed., pp. 388 *et seq.*). The memorandum should be in the form given in rule 3 of the new rules made under sect. 7 of the Conv. Act, 1882 (*post*, p. 330), which form has been substituted for the form originally given in sect. 84. As to the effect of the memorandum, see Conv. Act, 1882, s. 7, sub-s. (2), *post*, p. 329.

Sect. 89 gave power to make rules as to taking acknowledgments and as to fees. The power of making rules as regards acknowledgments (under this section and sect. 7 of the Conv. Act, 1882) is now vested in the Rule Committee (Judicature Act, 1879, s. 22).

For the present rules as to taking examinations, and as to fees, see *post*, p. 330 *et seq.*

90. In every case in which a husband and wife shall, either in or out of court, surrender into the hands of the lord of the manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married A married woman to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal.

3 & 4 Will. 4, c. 74, s. 90.

woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid.

A feme covert who surrenders copyhold lands ought previously to be examined separately from her husband by the steward of the manor, although by special custom such examination may be made before two customary tenants (*Driver* v. *Thompson*, 4 Taunt. 293; see 1 Watk. on Cop. by Cov. 89). Special customs must be strictly observed (*Doe* v. *Shelton*, 3 Ad. & Ell. 265). It seems that a special custom may authorize a surrender by the wife alone, with the assent of the husband (*Taylor* v. *Phillips*, 1 Ves. sen. 229; 1 Watk. on Cop. 64). But a custom for the wife to dispose of her copyhold estate by surrender without the husband's assent is bad (*Stevens* v. *Tyrrell*, 2 Wils. 1; see *White* v. *Driver*, 4 Taunt. 294; *Doe* v. *Bartle*, 5 B. & Ald. 492). A surrender of a copyhold estate, after secret examination by the steward, to the use of a married woman's husband, in his presence and with his consent, testified by his immediate admittance, was valid (*Scamon* v. *Maw*, 3 Bing. 378). A surrender by the wife of a copyholder with his consent, and after having been separately examined, was held effectual to bar her right to freebench (*Wood* v. *Lambirth*, 1 Phil. 8). See further, Scriven on Copyholds, 90, 7th ed. As to whether previously to this act a married woman could have conveyed an equitable interest in copyholds by fine, see Scriven, 50, 52, 7th ed.

Court of Common Pleas, in the case of a husband being lunatic, &c., may dispense with his concurrence, except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

91. Provided always, that if a husband shall in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred: provided always, that this clause shall not extend to the case of a married woman where under this act the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound

mind, or His Majesty's High Court of Chancery, shall be the protector of the settlement in lieu of her husband. 3 & 4 Will. 4, c. 74, s. 91.

Application for orders under this section should now be made to the King's Bench Division of the High Court (see Jud. Act, 1873, ss. 16 and 34; Order in Council of 16 Dec. 1880; *Re Caine*, 10 Q. B. D. 284; *Re Giles*, 1894, W. N. 73; 70 L. T. 757), though it may be that the Chancery Division has jurisdiction under special circumstances (*Ib.*; *Re Hart*, 1882, W. N. 36).

This section gives no authority to the court to grant a dispensation order unless the land is actually contracted to be sold or conveyed (*Re Graham*, 13 W. R. 782; see, however, *Re Hart*, 1882, W. N. 36). Where the concurrence of the husband is dispensed with under this section, the deed need not be acknowledged (*Goodchild* v. *Dougal*, 3 Ch. D. 650). A dispensation order under this section does not deprive the husband of his common law rights in the property (*Fowke* v. *Draycott*, 29 Ch. D. 996). If an order is obtained by fraud it may be set aside (*Ex p. Cockerell*, 4 C. P. D. 39).

Husband of unsound mind.

Where the application is on the ground that the husband is of unsound mind, the affidavit must show in distinct terms, or by necessary inference, that the husband is a lunatic *at the time of the application* (*Re Turner*, 3 C. B. 166). The court refused to act upon an affidavit merely stating that the husband and wife were living apart, and that the former was in a very nervous and excitable state, and that it was believed that it would be very difficult, if not wholly impossible, to procure the execution by him of any deed, but required an affidavit showing an ineffectual application to him for the purpose (*Re Murphy*, 4 M. & G. 635; *Re Clare*, 49 L. J. C. P. 557). The affidavit as to mental condition should be by a medical man (*Re Reeves*, 24 W. R. 848; *Re Clare*, *sup.*).

Husband abroad—dispensation granted;

Orders have been made in the following cases:—Where the husband had absconded after committing an act of bankruptcy, and had never been heard of since (*Ex p. Gill*, 1 Bing. N. R. 168; see Cruise's Dig. vol. vii. p. 1, 4th ed.). Where the husband had resided abroad for more than twenty years with another woman (*Ex p. Shirley*, 5 Bing. N. S. 226). Where the husband had absconded from home, and had since sailed for a foreign port, and had been made a bankrupt (*Ex p. Stone*, 9 Dowl. P. C. 843). Where it appeared that the parties lived together only seventeen weeks after marriage, when the husband went away, and the wife after many inquiries was not able to find him (*Anon.*, 2 Jur. 945). Where the affidavit stated that about two months previously the husband went to Australia with the intention of never returning (*Re Kelsey*, 16 C. B. 197).

dispensation refused.

The court refused to dispense with the concurrence of a husband in the following cases:—Where the wife's affidavit merely stated that her husband entered a government steamer in January, 1844, and that the last the wife had heard of him was, that in January, 1845, he was on board another government steamer at New Zealand; and that she believed it was his intention never to return (*Ex p. Gilmore*, 3 C. B. 967). Where it appeared that the husband was in correspondence with the wife, and remitting sums of money for her support, however small (*Re Squires*, 17 C. B. 176). Where, in 1852, the husband went to Australia and had not been heard of since 1857, and the wife deposed to her belief that he would never return to this country, it also appearing that no application had been made to him to concur (*Re Eden*, 5 C. B. N. S. 232). Upon the mere statement that the husband, a seaman, had gone abroad, and had not been heard of for some years, and that the wife had been informed that he was dead. The affidavit must show some reasonable ground for presuming the statement to be true (*Ex p. Taylor*, 7 C. B. 1).

Husband and wife separated.

Under the words of the section as to living apart, orders have been made in the following cases:—Where she and her husband lived separate from each other, and he had been found lunatic by inquisition (*Ex p. Thomas*, 4 M. & Scott, 331). Where the husband left his wife, and she had never

3 & 4 Will. 4, c. 74, s. 91.

heard of him since, and his present residence was altogether unknown to her; and where, if the application were not granted, the wife would be liable to incur a forfeiture (*Ex p. Shuttleworth*, 4 M. & Scott, 332, n. (b); see *Re Hart*, 1882, W. N. 36). Where she held the property as trustee for sale, and they were living apart, and the husband contributed to her support, but refused to concur except on payment (*Re Caine*, 10 Q. B. D. 284). Where the husband had deserted the wife, but they were in communication (*Ex p. Sutcliffe*, 29 L. T. 747; see, however, *Re Horsfall*, 3 M. & G. 132). An order was refused where the wife had left her husband in consequence of his violence (*Re Price*, 13 C. B. N. S. 286). In addition to an affidavit that the parties were living apart, the court has required a further affidavit that the husband has refused to concur (*Ex p. Trenery*, 1 C. B. N. S. 187), and that he contributes nothing to the wife's support (*Ex p. Fish*, 9 C. B. N. S. 715; *Re Carburton*, 16 W. R. 84; *Re Fletcher*, 17 W. R. 319; *Ex p. Robinson*, L. R. 4 C. P. 205). An order having been made upon the usual affidavit that the husband and wife were living apart by mutual consent, the court refused to rescind the order after it had been acted upon, and the rights of third parties had intervened, upon the application of the husband, who swore that though he resided apart from his wife (upon an allowance made to him out of her separate estate) he occasionally visited and slept with her (*Re Rogers*, L. R. 1 C. P. 47).

Wife's separate property.

In cases not within the M. W. P. Act, 1882, where there are no trustees of separate property, the husband is trustee of the legal estate (*Bennet* v. *Davis*, 2 P. Wms. 316). Orders under this section to enable a married woman to convey the legal estate in her separate property have been made in the following cases:—Where the husband was a minor (*Re Haigh*, 2 C. B. N. S. 198). Where he had absconded, and had not been heard of for eighteen years, although it also appeared that she had in the meantime married again (*Ex p. Yarnall*, 17 C. B. 189). Where the husband lived separate from his wife and had refused to execute the deed (*Re Perrin*, 14 C. B. 420; *Re Woodcock*, 1 C. B. 437). As to conveyance of separate property by a married woman when living apart by a sentence of judicial separation without alimony, see *Ex p. Andrews* (19 C. B. N. S. 371). As to the equitable interest in a married woman's separate property, see *ante*, p. 319.

Affidavits.

The court will not dispense with the affidavit of the married woman herself (*Ex p. Bruce*, 9 Dowl. P. C. 840), and if speechless, she must be examined (*Re Williams*, 1 M. & G. 881). The affidavit is sufficient if sworn (where the party is residing abroad) before an officer, whom the certificate of a notary public certifies to be a person empowered by law to take affidavits (*Re Schiff*, 1 Dowl. & L. 911). The affidavit must describe the deponent as "the wife of, &c.," even though circumstances are disclosed showing a well-grounded belief that the husband is dead (*Ex p. Sparrow*, 12 C. B. 334; *Re Noy*, 7 Scott, N. R. 434; *Re Anderson*, 2 C. B. N. S. 811). The affidavit must contain the addition or description of the husband (*Re Gardner*, 1 C. B. N. S. 215; see also *Re Firth*, 1872, W. N. 220).

Form of rule to dispense with husband's concurrence.

An order under this section was made in the following form:—"It is ordered that the said Ann Tanner Duffill be at liberty, by deed or surrender, to dispose of, release, surrender or extinguish all her estate and interest of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing to the court, by the said affidavit, that the said Henry Holland Duffill is living apart from his said wife by sentence of divorce" (*Ex p. Duffill*, 5 M. & G. 378).

Final proviso.

See, in connection with the final proviso in the above section, sects. 24, 33, and *Re Wainwright* (1 Phil. 258).

II.—The Conveyancing Act, 1882, s. 7.

45 & 46 Vict. c. 39, s. 7.

Acknowledgment of deeds by married women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner"; and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner"; and all other provisions of those acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

(3.) A deed acknowledged before or after the commencement of this act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise in the transaction giving occasion for the acknowledgment; and general rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such rule shall make invalid any acknowledgment; and those rules shall, as regards England, be deemed rules of court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed rules of court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this act, to take effect on or after the commencement of this act.

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.
40 & 41 Vict. c. 57.

(4.) The enactments described in the schedule to this act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this act, of the taking of an acknowledgment by a married

45 & 46 Vict. c. 39, s. 7.

woman of a deed executed before the commencement of this act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

Schedule.

Sect. 7 (4).

Repeals.

3 & 4 Will. 4, c. 74... in part.	The Fines and Recoveries Act—in part; namely,— Section eighty-four, from and including the words "and the same judge," to the end of that section. Sections eighty-five to eighty-eight inclusive.
4 & 5 Will. 4, c. 92... in part.	The Fines and Recoveries (Ireland) Act - - - in part; namely,— Section seventy-five, from and including the words "and the same judge," to the end of that section. Sections seventy-six to seventy-nine, inclusive.
17 & 18 Vict. c. 75 ...	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.
41 & 42 Vict. c. 23 ...	The Acknowledgment of deeds by Married Women (Ireland) Act, 1878.

Rules as to acknowledgments.

Under the above section and sect. 89 of Fines and Recoveries Act, 1833, the following rules have been made:—

Rules under the Act for the Abolition of Fines and Recoveries, and Section 7 of the Conveyancing Act, 1882.

1. No person authorised or appointed under the act 3 & 4 Will. 4, c. 74 (in these rules referred to as the Fines and Recoveries Act), to take the acknowledgments of deeds by married women shall take any such

acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment (*c*); but if it shall appear to him that it is intended that provision is to be made for the married woman, then the commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.

(*c*) If the married woman answers in the affirmative, the purchase-money becomes the absolute property of the husband, even though it is never reduced into possession by him, but remains outstanding for any purpose (*Tennant* v. *Welch*, 37 Ch. D. 622). The examination of a married woman was taken into consideration on a question affecting her equity to a settlement (*Roberts* v. *Cooper*, 1891, 2 Ch. 335). See also as to the importance of her examination, *Cahill* v. *Cahill*, 8 App. Cas. 428.

The following cases were decided on the old rule for which the above has been substituted, viz., *Re Foster* (7 C. B. 120); *Ex parte Webber* (5 C. B. 179); *Re Dowling* (18 C. B. N. S. 223); *Re Dixon* (4 C. B. 631); *Re Dallas* (10 C. B. N. S. 346). See the statement of these cases in Shelf. R. P. Stat. 8th ed. 401.

3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:

This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her.

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:

And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment.

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memo-

Rules.

randum purporting to be signed by a person authorised to take the acknowledgment:—

(Signed) A. B.
A Judge of the High Court of Justice in England,
or A Judge of the County Court of ,
or A perpetual Commissioner for taking acknowledgments of deeds by married women,
or The special Commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorised to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every commission appointing a special commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office.

8. The costs to be allowed to solicitors in respect of the matters hereinafter mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors' Remuneration Act, 1881, or by special agreement, shall be as follows; anything in the Rules of the Supreme Court as to costs, dated the 12th August, 1875, to the contrary notwithstanding:—

Charges under the Act 3 & 4 *Will.* 4, *c.* 74 (*The Fines and Recoveries Act*).

	£	*s.*	*d.*
For the indorsements on deeds required by the Fines and Recoveries Act, to be entered on the court rolls of manors of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5*s.*, together - - - - - - - - - - -	0	10	0
For the entries on the court rolls of deeds and the indorsements thereon, at per folio of 72 words - - - -	0	0	6
For taking the consent of each protector of settlement of lands - - - - - - - - - - - -	0	13	4
For taking the surrender by each tenant in tail of lands -	0	13	4
For entries of such surrenders or the memorandums thereof in the court rolls, at per folio of 72 words - - -	0	0	6

9. The following rules and orders are hereby repealed, except as to certificates not lodged before the 1st January, 1883, of acknowledgments by married women of deeds executed before the 1st January, 1883, and the affidavits relating thereto:—

The General Rules of the Court of Common Pleas, Hil. Term, 1834.

The General Rules of the Court of Common Pleas, Trin. Term, 1834.

Rules.

The General Order of the Court of Common Pleas, dated the 24th November, 1862.

The General Order of the Court of Common Pleas, dated the 13th January, 1863.

10. These rules shall take effect from and after the 31st December, 1882.

For the old rules and the practice cases decided upon them, see Shelf. R. Stat. 8th ed. 400 *et seq.* And as to the fees payable in respect of acknowledgments, see the order as to court fees made in January, 1883, Shelf. R. P. Stat. 9th ed. 310.

III.—The Married Women's Reversionary Interests Act, 1857.

20 & 21 Vict. c. 57.

An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate. [25th August, 1857.]

Be it enacted as follows:

20 & 21 Vict. c. 57, s. 1.

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such estate in possession.

1. After the thirty-first day of December, one thousand eight hundred and fifty-seven, it shall be lawful for every married woman by deed to dispose of (*d*) every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever, to which she shall be entitled under any instrument made after the said thirty-first day of December, one thousand eight hundred and fifty-seven (*e*) (except such a settlement as after mentioned), and also to release or extinguish any power (*f*) which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will or instrument, by which she shall be restrained from alienating or affecting the same.

Married woman unable to dispose of reversionary

(*d*) For a married woman's power of disposition over reversionary interests in personalty settled to her separate use, see the note to Fines and Recoveries Act, s. 78, *ante*, p. 320. As regards her reversionary interests in personalty not settled to her separate use, it was well established before

20 & 21 Vict. c. 57, s. 1.

choses in action not settled to her separate use, except under 20 & 21 Vict. c. 57.

the present act, that a husband could not assign or release his wife's reversionary choses in action so as to bind her surviving (*Honner* v. *Morton*, 3 Russ. 65); and the fact of her joining in the assignment made no difference (*Purdew* v. *Jackson*, 1 Russ. 1; *Cresswell* v. *Dewell*, 4 Giff. 460; see *Winter* v. *Easum*, 2 D. J. & S. 272; *Bolitho* v. *Hillyar*, 34 Beav. 180; *Rogers* v. *Ancaster*, 14 Beav. 445; *Hore* v. *Becher*, 12 Sim. 465; *Fitzgerald* v. *Fitzgerald*, L. R. 2 P. C. 87). Nor could a married woman by election part with her reversionary choses in action (*Williams* v. *Mayne*, I. R. 1 Eq. 519; see *Harle* v. *Jarman*, 1895, 2 Ch. 419). A husband and wife could not effectually dispose of the life interest of the wife in a fund not settled to her separate use beyond the duration of the coverture (*Stiffe* v. *Everitt*, 1 M. & C. 37; *Re Godfrey*, I. R. 1 Eq. 533). A husband and son, having surrendered and released their respective interests in a fund to the wife, for the express purpose of enabling her to assign it to the son, the court refused to establish a merger to defeat its own protection of married women (*Whittle* v. *Henning*, 2 Phill. C. C. 731; *Story* v. *Tonge*, 7 Beav. 91; *Hanchett* v. *Briscoe*, 22 Beav. 496; see, however, 14 Sim. 592—599; *Bishop* v. *Colebrooke*, 16 Sim. 39; and see *Re Davenport*, *Turner* v. *King*, 1895, 1 Ch. 361, a case since the M. W. P. Act, 1882, and dealing with separate property).

Cases under section.

An assignment under this act ought not to be regarded as that of the husband and wife according to their respective interests (*Re Batchelor*, *Sloper* v. *Oliver*, 16 Eq. 485). Where the property assigned consisted of a wife's reversionary interest under a will, the assignment prevented the executors from exercising any right of retainer over the interest assigned in respect of a debt due from the husband to the testator (*Re Batchelor*, *sup.*; compare the effect on such retainer of the wife's equity to a settlement: *Re Briant*, *Poulter* v. *Shackel*, 39 Ch. D. 471). A policy of insurance effected by a married woman in her own name may be disposed of under this act (*Witherby* v. *Rackham*, 60 L. J. Ch. 511; 39 W. R. 393; see *Re Turner*, *Turner* v. *Fitzroy*, 66 L. T. 758). But mere possibilities or expectancies are not within this act (*Allcard* v. *Walker*, 1896, 2 Ch. 369).

If the Infant Settlements Act (*post*, p. 726) applies to post-nuptial settlements, it does not enable a married woman to evade the formalities of this act (*Seaton* v. *Seaton*, 13 App. Cas. 70).

An acknowledgment under this act by a married woman of an assignment was taken into consideration even where the act did not apply (*Roberts* v. *Cooper*, 1891, 2 Ch. 335).

(*e*) An appointment of a reversionary interest in personalty by deed after 1857, under a special power in a deed dated before 1857, does not bring the interest within this act, even if the prior life interest is assigned at the same time (*Re Butler*, I. R. 3 Eq. 138); nor did the powers of the act apply where the reversionary interest arose under a will dated before 1857, but the testator had made a codicil (not confirming the will) since 1857 (*Re Elcom*, *Layborn* v. *Grover Wright*, 1894, 1 Ch. 303). But where a woman was entitled to a reversionary interest created before 1857, and after 1857 while unmarried re-settled that interest, the power of the act applied (*Re Bennett*, *Capes* v. *Ferrand*, 73 L. T. 17).

Powers.

(*f*) As to the various kinds of powers, their suspension and extinction, and as to the execution of powers by married women, see the note to Fines and Recoveries Act, s. 78, *ante*, p. 318).

Deeds to be acknowledged by married women in the manner required by 3 & 4 Will. 4, c. 74, for disposing of

2. Every deed to be executed in England or Wales by a married woman for any of the purposes of this act shall be acknowledged by her, and be otherwise perfected, in the manner by the act 3 & 4 Will. 4, c. 74, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of the act shall be acknowledged

by her and be otherwise perfected in the manner by the act 4 & 5 Will. 4, c. 92, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land: and all and singular the clauses and provisions in the said acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said acts mentioned shall extend and be applicable to such interests in personal estate, and to such powers as may be disposed of, released, or extinguished by virtue of this act, as fully and effectually as if such interests or powers were interests in or powers over land.

20 & 21 Vict. c. 57, s. 2.

interests in or powers over land in England or Wales; In Ireland, as by 4 & 5 Will. 4, c. 92.

An order was made under this act, enabling a married woman, without the concurrence of her husband, to dispose of a reversionary interest in government stock (*Re Rogers*, L. R. 1 C. P. 47). If such an order be obtained by fraud or suppression of facts it will be set aside (*Ex p. Cockerell*, 4 C. P. D. 39).

3. Provided always, that the powers of disposition given to a married woman by this act shall not interfere with any power which independently of this act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

The powers of disposition given by this act not to interfere with any other powers.

4. Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage.

Act not to extend to settlements of married women upon marriage.

An agreement in contemplation of marriage was executed by the husband and wife to settle a money fund of the wife's for her separate use —to return to the husband if he should survive. The court considered that the wife was to have the absolute interest in the event of her surviving, and that the case fell within the exception contained in this section (*Clarke* v. *Green*, 2 H. & M. 474).

5. This act shall not extend to Scotland.

Not to extend to Scotland.

IV.—Married Women's Property Act, 1870.

33 & 34 Vict. c. 93.

An Act to amend the Law relating to the Property of Married Women. [9th August, 1870.]

33 & 34 Vict. c. 93, s. 1.

Whereas it is desirable to amend the law of property and contract with respect to married women:

Be it enacted as follows:

Earnings of married women to be deemed their own property.

1. The wages and earnings of any married woman acquired or gained by her after the passing of this act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

This act has been repealed, saving all acts done and rights or liabilities acquired thereunder (M. W. P. Act, 1882, s. 22, *post*, p. 358).

Law before the section.

Under the law before this act a husband might in his own name recover his wife's wages (*Dengate* v. *Gardiner*, 4 M. & W. 7), or the profits of a business carried on by her (*Savile* v. *Sweeny*, 4 B. & Ad. 524). And payment to her of her own earnings was not good, unless she had her husband's authority to receive them (*Offley* v. *Clay*, 2 M. & G. 172). As to a married woman's separate trading before this act under her husband's agreement, see 2 Bright's Husband and Wife, 292; and under the custom of the city of London, see 2 Bright, 76.

Cases under the section.

The question whether a trade was carried on by a married woman separately from her husband was held to be one of fact, to be determined on the circumstances of the case (*Petty* v. *Anderson*, 3 Bing. 170; *Smallpiece* v. *Dawes*, 7 C. & P. 40; *Lovell* v. *Newton*, 4 C. P. D. 7; *Laporte* v. *Cortick*, 31 L. T. 434; 23 W. R. 131; *Whittaker* v. *Whittaker*, 46 L. T. 802; 30 W. R. 787; *Re Dearmer*, *James* v. *Dearmer*, 53 L. T. 905). All the stock-in-trade and property connected with the trade was protected by this section, as well as the earnings (*Ashworth* v. *Outram*, 5 Ch. Div. 923). The earnings were equitable assets (*Re Poole*, *Thompson* v. *Bennett*, 6 Ch. D. 739). This section did not protect the earnings from an unlawful industry (*Mason* v. *Mitchell*, 34 L. J. Ex. 68). As to the liability of the husband in respect of a separate trade of his wife, see *Re Shepherd* (39 L. T. 652). And as to a married woman's bankruptcy, see the note to sect. 12, *post*, p. 339, and sect. 1, sub-s. 5, of the M. W. P. Act, 1882, *post*, pp. 342, 347.

Sects. 2—6.

[By sect. 2, deposits in savings banks and government annuities in the name of a married woman were deemed to be her separate property, subject to a power for the court to order payment to the husband when his money had been used without his consent. By sect. 3, a married woman or woman about to be married might require any sum she was entitled to in the public funds to be placed in her name as a married woman entitled to her separate use, and while so entered it was to be deemed her separate property, subject to a power for the court to order transfer to the husband of investments made with his money without his consent. (For orders under this section,

see *Re Bartholomew*, 23 L. T. 433; *Re Butlin*, *Ib.* 523; *Re Tanner*, 1874, W. N. 198; *Howard* v. *Bank of England*, 19 Eq. 295.) Sect. 4 contained similar provisions in regard to shares, debentures, &c. in joint stock companies (see *R.* v. *Carnatic R. Co.*, L. R. 8 Q. B. 299; and as to previous law, *Re Matthewman*. 3 Eq. 788; *Butler* v. *Cumpston*, 7 Eq. 16; *Dalton* v. *Midland R. Co.*, 13 C. B. 474). Sect. 5 contained similar provisions in regard to a woman's interest in industrial and other societies. Sect. 6 provided for the case of investments made in fraud of creditors. See, now, as to these matters, sects. 6—10 of the M. W. P. Act, 1882.] **33 & 34 Vict. c. 93, s. 1.**

7. Where any woman married after the passing of this act shall, during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same. **Personal property not exceeding 200*l.* coming to a married woman to be her own.**

The words "become entitled" include the case of a reversionary legacy falling into possession (*Lane* v. *Oakes*, 30 L. T. 726; 22 W. R. 709). The limit of 200*l.* applies only to sums given by deed or will (*Re Voss*, *King* v. *Voss*, 13 Ch. D. 504). Where a married woman was entitled under the same will to a reversionary legacy and also to a share of residue, together exceeding 200*l.*, they were held not within this section (*Re Davies*, *Harrison* v. *Davis*, 1897, 2 Ch. 204).

Before this act, a legacy left to a married woman in general terms must have been paid to her husband (*Palmer* v. *Trevor*, 1 Vern. 261). Where, however, she had obtained a protection order under 20 & 21 Vict. c. 85. s. 25, payment to herself was ordered (*Re Kingsley*, 6 W. R. 849; *Re Rainsdon*, 4 Drew. 446).

The inaccuracy of the marginal note to this section should be observed. The marginal note forms no part of the act (*Sutton* v. *S.*, 22 Ch. D. 511; *Claydon* v. *Green*, L. R. 3 C. P. 511; *Re Venour*, *Venour* v. *Sellon*, 2 Ch. D. 522; *A.-G.* v. *G. E. R. Co.*, 11 Ch. Div. 461, 465). But the preamble and title of an act may be referred to where the enacting words of the sections are not clear (*Re Griffith*, *Carr* v. *Griffith*, 12 Ch. D. 661; *Re Harkness and Allsopp*, 1896, 2 Ch. 361; *Powell* v. *Kempton Co.*, 1897, 2 Q. B. 265; *A.-G.* v. *Margate Co.*, 1900, 1 Ch. 749).

8. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same. **Freehold property coming to a married woman, rents and profits only to be her own.**

This section does not enable a married woman to convey descended freeholds by an unacknowledged deed (*Johnson* v. *Johnson*, 35 Ch. D. 345; see *Re Voss*, *King* v. *Voss*, 13 Ch. D. 504).

[*Sect.* 9 *contained provisions for settling questions between husband and wife. See now sect.* 17 *of the M. W. P. Act*, 1882.]

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face **Married woman may effect policy of insurance.**

33 & 34 Vict. c. 93, s. 10.

of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

As to insurance of a husband for benefit of his wife.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

Old law.

Before this act it was held that a wife had an insurable interest in the life of her husband, but that a husband had not such an interest in the life of his wife (*Reed* v. *Royal Exchange Co.*, Peake's Add. Cases, 70).

As to policies effected since 1st January, 1883, see the further provisions of sect. 11 of M. W. P. Act, 1882 (*post*, p. 352). The following cases have been decided under the above section:

Cases under this section.

Where the husband after the passing of this act substituted for a policy he already had a policy expressed to be for the benefit of his wife, the latter policy was held within this section (*Holt* v. *Everall*, 2 Ch. Div. 266). On an application under this section to appoint trustees there is no jurisdiction to declare the rights of the parties (*Re Adams*, 23 Ch. D. 525; but see *Re Mellor*, 6 Ch. D. 127). A policy for the benefit of wife and children is an executed, not an executory, trust (*Ib.*). Where a policy was expressed to be for the benefit of wife and children, it was said that the policy should be read in connection with this section, and should be construed as giving the wife a life interest, with remainder to the children (*Re Adams*, *sup.*). It has since been held that under a policy so worded the wife and children took as joint tenants (*Re Seyton*, *Seyton* v. *Satterthwaite*, 34 Ch. D. 511; *Re Davies*, 1892, 1 Ch. 90). Where the trust in the policy was for the wife and children as the husband should appoint, but no appointment was made, the wife and children took in equal shares (*Re Edwards*, 41 L. T. 434). When the husband became of unsound mind, trustees were appointed and authorized to surrender the policy for a fully paid one of less amount (*Schultze* v. *Schultze*, 56 L. T. 231). A single trustee will not be appointed (*Ib.*; *Re Howson*, 1885, W. N. 213). As to a policy effected by a husband for the benefit of his wife who was subsequently convicted of murdering him, see *Cleaver* v. *Mutual Association* (1892, 1 Q. B. 147). In the case of policies effected under this act, sect. 11 of the M. W. P. Act, 1882, does not apply, and on the death of the husband a trustee must be appointed under this section; the petition being entitled under the Act of 1870 only (*Re Adams*, 23 Ch. D. 525; *Re Turnbull*, *Turnbull* v. *Turnbull*, 1897, 2 Ch. 415; *Re*

Kuyper, 1899, 1 Ch. 38; see *contra*, *Re Soutar*, 26 Ch. D. 236). The application may be made by petition (*Re Atkinson*, 13 R. 285). 33 & 34 Vict. c. 93, s. 10.

[*Sect.* 11 *contained provisions as to a married woman suing. See now the M. W. P. Act*, 1882, *s.* 1, *sub-s.* (2), and note, p. 344, *post.*]

12. A husband shall not, by reason of any marriage which shall take place after this act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried. Husband not to be liable on his wife's contracts before marriage.

According to the old law a husband was liable at law for the debts of his wife contracted before marriage (2 Bright, Husband and Wife, 2). And in equity her separate property was liable to satisfy such debts (*Biscoe* v. *Kennedy*, 1 Bro. C. C. 17, n.; *Chubb* v. *Stretch*, 9 Eq. 555). Old law.

Having regard to sects. 22 and 13 of the M. W. P. Act, 1882, this section and the decisions thereunder remain of importance with respect to women married before the last-mentioned act. Under this section such a married woman's separate property was made liable at law to satisfy debts contracted by her before marriage. The section extends to property settled to her separate use without power of anticipation (*Sanger* v. *Sanger*, 11 Eq. 470; *London Bank* v. *Bogle*, 7 Ch. D. 773; *Re Hedgely, Small* v. *Hedgely*, 34 Ch. D. 379; *Axford* v. *Reid*, 22 Q. B. Div. 548). An order under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, may be made upon such a married woman (*Dillon* v. *Cunningham*, L. R. 8 Ex. 23). As to her arrest in execution for a debt contracted *dum sola*, see *Nagle* v. *O'Donnell* (I. R. 7 C. L. 79). A judgment may also be given against a married woman under R. S. C. Ord. 14, r. 1, without proof of the existence of separate estate (*Downe* v. *Fletcher*, 21 Q. B. D. 11). But this section does not make her liable to the bankruptcy law (*Re Grissell*, 12 Ch. Div. 484; *Ex p. Holland, Re Heneage*, 9 Ch. 307; see *Day* v. *Freunel*, 35 L. T. 551; *R.* v. *Robinson*, L. R. 1 C. C. 80). Where a woman joined with a surety in making a promissory note which fell due and on which judgment was recovered before her marriage, the surety who had paid the full amount after her marriage could not recover against the husband (*Conlon* v. *Moore*, I. R. 9 C. L. 190). As to the liability of the husband in the case of marriages from 1874 to 1882, see M. W. P. Act, 1874 (*post*, p. 340). And in the case of marriages after 1882, see M. W. P. Act, 1882, s. 14 (*post*, p. 354). Cases under this section.

[*Sects.* 13 *and* 14 *rendered a married woman liable for the maintenance of her husband and children. See now sects.* 20 *and* 21 *of the M. W. P. Act*, 1882, *post, p.* 358.]

15. This act shall come into operation at the time of the passing of this act. Commencement of act.

16. This act shall not extend to Scotland. Act not to extend to Scotland.

17. This act may be cited as the Married Women's Property Act, 1870. Short title.

This act was intended to protect married women in the enjoyment of the rights of property, and has not by a side wind given them political or municipal rights (*R.* v. *Harrald*, L. R. 7 Q. B. 361).

V.—The Married Women's Property Act, 1870, Amendment Act, 1874.

37 & 38 Vict. c. 50.

An Act to amend the Married Women's Property Act (1870).

[30th July, 1874.]

37 & 38 Vict. c. 50, s. 1.

Whereas it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment:

Be it enacted as follows:

Husband and wife may be jointly sued for her debts before marriage.

1. So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this act, and a husband and wife married after the passing of this act may be jointly sued for any such debt.

Extent to which husband liable.

2. The husband shall, in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned.

The liability of the husband under this act ceases on the death of his wife (*Bell* v. *Stocker*, 10 Q. B. D. 129). An Englishman marrying a native of Jersey, where a husband is liable for his wife's antenuptial debts, is protected in England by this act (*De Greuchy* v. *Wills*, 4 C. P. D. 363). Notwithstanding this act a husband is, under sect. 78 of the Companies Act, 1862, liable as a contributory in his own right on shares registered in the name of his wife, though acquired by her before her marriage (*Ex p. Hatcher*, 12 Ch. D. 284). See the cases collected, Buckley, 8th ed., 246.

Under this section it is sufficient to allege in the statement of claim that the husband is liable for the debts, without alleging that he has received assets from his wife (*Matthews* v. *Whittle*, 13 Ch. D. 811).

If husband without assets he shall have judgment for costs.

3. If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife.

Creditors were allowed to add to their debt and recover against the

wife costs which they had to pay to the husband under this section (*London Bank* v. *Bogle*, 7 Ch. D. 773). 37 & 38 Vict. c. 50, s. 3.

Joint and separate judgment against husband and wife for debt.

4. When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife.

Assets for which husband liable.

5. The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows:

(1.) The value of the personal estate in possession of the wife which shall have vested in the husband:

(2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession:

(3.) The value of the chattels real of the wife which shall have vested in the husband and wife:

(4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received:

(5.) The value of the husband's estate or interest in any property real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person:

(6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors:

Provided that when the husband after marriage pays any debt of his wife or has a judgment *bonâ fide* recovered against him in any such action as is in this act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable.

Extent of act.

6. This act shall not extend to Scotland.

Short title.

7. This act may be cited as the Married Women's Property Act (1870) Amendment Act, 1874.

VI.—The Married Women's Property Act, 1882.

45 & 46 Vict. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

45 & 46 Vict. c. 75, s. 1.

Be it enacted as follows:

1. (1.) A married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee (*e*).

Married woman to be capable of holding property and of contracting as a *feme sole*.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise (*f*).

(3.) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown* (*g*).

(4.) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire* (*g*).

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole (*h*).

Sub-sect. (1).

(*e*) Sub-sect. (1) is to be construed along with sects. 2 and 5 (*Re Cuno, Mansfield* v. *Mansfield*, 43 Ch. Div. 12). Accordingly, in the case of a woman married before 1883, sub-sect. (1) applies only to property acquired since 1882 (*ib.*; sect. 5, *post*; *Re Harris*, 28 Ch. D. 171). Similarly, it has been held to apply only to what is done by the married woman during coverture in relation to property of which during coverture she is possessed (*Re Price, Stafford* v. *Stafford*, 28 Ch. D. 712). A gift or conveyance to a married woman and her husband since the act creates a joint tenancy, not a tenancy by entireties as before the act, the share of the wife being for her separate use (*Re Jupp, Jupp* v. *Buckwell*, 39 Ch. D. 148; *Thornley* v. *Thornley*, 1893, 2 Ch. 229). But the capacity of a married woman is only altered as between herself and her husband; so in the case of a gift to a husband and wife and a third person, the construc-

tion, as regards the amount taken by the husband and wife, is not altered by the act (*Re Jupp, sup.*; *Re March, Mander* v. *Harris*, 27 Ch. Div. 166, 170; see *Re Dixon, Byram* v. *Tull*, 42 Ch. D. 306; *Re Gue, Smith* v. *Gue*, 61 L. J. Ch. 510; 67 L. T. 823). In the disposition of land to which she is beneficially entitled the act (where it applies) has abolished the necessity of the husband's concurrence and an acknowledged deed (*Re Drummond & Davie*, 1891, 1 Ch. 531); so in the case of real estate conveyed to her by way of mortgage to secure money which was her separate property (*Re Brooke & Fremlin*, 1898, 1 Ch. 647). But where she is trustee for sale she can only convey with the concurrence of her husband and by deed acknowledged (*Re Harkness & Allsopp*, 1896, 2 Ch. 358). Sub-sect. (1) does not enable a married woman to make a gift for a church under 43 Geo. 3, c. 108, the words of such statute excluding "women covert without their husbands" (*Re Smith, Clements* v. *Ward*, 35 Ch. D. 589). The act does not affect the general law as to gifts of paraphernalia (*Tasker* v. *Tasker*, 1895, P. 1).

45 & 46 Vict. c. 75, s. 1. Sub-sect. (1).

The separate use arising by virtue of this act is sufficient to support a restraint on anticipation (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690).

Where money was bequeathed in trust as to the income for a woman married since 1882 for life, and as to the capital as she should appoint by will, and in default for her executors, administrators and assigns, it was held that the reversion was under the act her separate property, and that on her releasing her power the two interests would coalesce, and she would be absolutely entitled (*Re Davenport, Turner* v. *King*, 1895, 1 Ch. 361; see *Re Williams, Williams* v. *Grant*, 76 L. T. 150).

The provisions of this act relating to the wills of married women are sect. 1, sub-sect. (1), and sect. 4; see also sect. 23, and M. W. P. Act, 1893, s. 3, *post*, p. 361. Sect. 1, sub-sect. (1), did not enable a married woman by a will made during coverture to dispose of property acquired after coverture (*Re Price, Stafford* v. *Stafford*, 28 Ch. D. 709; see *Re Cuno, Mansfield* v. *Mansfield*, 43 Ch. Div. 12; see now M. W. P. Act, 1893, s. 3, *post*, p. 361). As to the effect of this act on a will dated prior to its passing, see *Re Bowen, James* v. *James* (1892, 2 Ch. 291); and as to the wills of married women independently of this act, and the present form of probate of wills of married women, see note to sect. 8 of the Wills Act, *post*.

Wills and intestacy.

As regards the beneficial title to a married woman's property after her death, it has been decided that, notwithstanding this act, a husband is entitled to recover from his wife's executor separate personalty undisposed of by her (*Re Lambert, Stanton* v. *Lambert*, 39 Ch. D. 626), and also non-separate choses in action not reduced into possession during the coverture (*Smart* v. *Tranter*, 43 Ch. Div. 587). On the death intestate of a married woman, her separate leaseholds may be taken by her husband, without taking out administration, subject, however, to any contracts binding them (*Surman* v. *Wharton*, 1891, 1 Q. B. 491; see *Re Bellamy, Elder* v. *Pearson*, 25 Ch. D. 620). A husband is still entitled to curtesy in real estate as to which his wife has died intestate (*Hope* v. *Hope*, 1892, 2 Ch. 336).

(*f*) As to the meaning of the word "contract" in the M. W. P. Act, 1882, see sect. 24, *post*, p. 359. It was said that the words of sub-sect. (2) do not create any personal liability; they only subject the married woman to a "proprietary liability—*i.e.*, in respect of her separate property (*Scott* v. *Morley*, 20 Q. B. Div. 128; *Draycott* v. *Harrison*, 17 Q. B. D. 153. But see as to this *Pelton* v. *Harrison*, 1892, 1 Q. B. 118; *Holtby* v. *Hodgson*, 24 Q. B. Div. 103).

Sub-sect. (2).

A married woman can under this sub-section enter into a joint contract, and if judgment be obtained against her joint contractor she cannot afterwards be sued (*Hoare* v. *Niblett*, 1891, 1 Q. B. 781). As regards her husband, the rule before the act was that a married woman could during coverture contract with him so as to bind her separate estate (*Vansittart* v. *Vansittart*, 4 K. & J. 70); and this has not been altered by the act (*Butler* v. *Butler*, 16 Q. B. Div. 374). A *bonâ fide* purchase by the wife

45 & 46 Vict. c. 75, s. 1.

from the husband of goods which are paid for out of her separate estate, and remain in the conjugal domicil, will be good against the husband's creditors (*Ramsay* v. *Margrett*, 1894,2 Q. B. 18). As to the effect of contracts by married women, see further the cases decided under sub-sects. (3) and (4) of this section (now repealed), *post*, p. 346; and M. W. P. Act, 1893, s. 1 (*post*, p. 360).

Married woman suing.

A married woman may present a petition under the Trustee Act (*Re Outwin*, 48 L. T. 410; 31 W. R. 374). She may also consent to a petition under the S. E. Act, 1877 (*post*); see *Riddell* v. *Errington* (26 Ch. D. 220), in which case she need not, if she was married since 1882, be examined as regards any property whenever acquired (*Ib.*); nor, if she was married previously, as regards property acquired since 1882 (*Re Harris*, 28 Ch. D. 171; *Re Batt*, 1897, 2 Ch. 65). She can sue alone, without a trustee, on a covenant by her husband in a separation deed (*Sweet* v. *Sweet*, 1895, 1 Q. B. 12), and can sue him for an account of her separate rents and profits (*Thornley* v. *Thornley*, 1893, 2 Ch. 229). She may sue alone in respect of a trespass on a house which is her separate property under the M. W. P. Act, 1870 (*Weldon* v. *De Bathe*, 14 Q. B. Div. 339; see *Symonds* v. *Hallett*, 24 Ch. Div. 346; *Heimbs* v. *Newcastle Society*, 76 L. T. 109); or in respect of a tort committed before the present act (*Weldon* v. *Winslow*, 13 Q. B. Div. 784; *Lowe* v. *Fox*, 15 Q. B. Div. 667; *James* v. *Barraud*, 31 W. R. 786; *Severance* v. *Civil Service Association*, 48 L. T. 485). For the purpose of such an action she became discovert within the meaning of the Limitation Act, 1623, s. 7 (*ante*, p. 232). upon the commencement of the present act (*Lowe* v. *Fox*, *sup.*; *Weldon* v. *Neal*, 51 L. T. 289; 32 W. R. 828). Where an injunction is claimed her sole undertaking in damages must be accepted (*Pike* v. *Cave*, 62 L. J. Ch. 937; 68 L. T. 650; *Re Prynne*, 53 L. T. 465); and such an undertaking can be enforced by the husband (*Hunt* v. *Hunt*, 54 L. J. Ch. 289). A married woman cannot act as guardian *ad litem* or next friend (*Re Somerset*, *Thynne* v. *St. Maur*, 34 Ch. D. 465). Damages for personal injuries awarded to a wife are her separate property, notwithstanding that her husband was co-plaintiff (*Beasley* v. *Roney*, 1891, 1 Q. B. 509). A plaintiff who is a married woman should be so described (*Re Poinons*, *Sutton* v. *Martin*, 1891, W. N. 139).

Married woman being sued.

The effect of sub-sect. (2) is to allow a married woman to be sued in respect of anything in respect of which a man could be sued, subject to this, that her power to contract is limited, and the remedy is confined to her separate estate (*Whittaker* v. *Kershaw*, 45 Ch. Div. 329); and the fact that she has no separate estate except subject to a restraint on anticipation does not prevent her being sued (*Ib.*; see *Braunstein* v. *Lewis*, 64 L. T. 265). She may be sued by an executor to refund a legacy (*Ib.*) She may be sued by her husband for money lent after marriage (*Butler* v. *Butler*, 16 Q. B. Div. 374), but not for money lent before marriage (*S. C.*, 14 Q. B. D. 831). She may be sued for torts committed after marriage, either alone or jointly with her husband (*Seroka* v. *Kattenburg*, 17 Q. B. D. 177; see *Earle* v. *Kingscote*, 1900, 2 Ch. 585). Judgment may be ordered against her, under R. S. C. Ord. 14 (*Downe* v. *Fletcher*, 21 Q. B. D. 11; *Perks* v. *Mylrea*, 1884, W. N. 64), or under R. S. C. Ord. 16, r. 52, as a third party, and in respect of a liability created before this act (*Gloucestershire Co.* v. *Phillipps*, 12 Q. B. D. 533).

Judgments against married women.

For the law before this act as to judgment in common law actions against married women, see *Scott* v. *Morley* (20 Q. B. Div. 123, 124); and for the judgments in Chancery actions as regards her separate estate, see *McHenry* v. *Davies* (10 Eq. 92); *Picard* v. *Hine* (5 Ch. 278). The proper form of judgment against a married woman in ordinary cases, after the Act of 1882, was settled by the Court of Appeal in *Scott* v. *Morley* (20 Q. B. Div. 120). It directs that the sum recovered be payable out of her separate property, and not otherwise; and that execution be limited to her separate property not subject to restriction against anticipation, unless by reason of sect. 19 the property is liable to execution notwithstanding such restriction (see *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Downe* v. *Fletcher*, 21 Q. B. D. 11;

Scott v. *Morley* form.

Nichols v. *Morgan*, 16 L. R. Ir. 409; *Brown* v. *Morgan*, 12 L. R. Ir. 122). There is no jurisdiction to make an order that she pay the amount recovered within a fixed time (*Hulbert* v. *Cuthcart*, 1894, 1 Q. B. 244). The form of judgment in *Scott* v. *Morley* was held appropriate in an action brought after the M. W. P. Act, 1893, against a widow on a contract made during coverture before the passing of the last-named act (*Softlaw* v. *Welch*, 1899, 2 Q. B. 419); as to the proper form where the contract was made after the 1893 Act, see *Barnett* v. *Howard* (1900, 2 Q. B. 784). The same form was also held appropriate in an action to compel a married woman administratrix to make good a devastavit (*Re Turnbull, Turnbull* v. *Nicholas*, 1900, 1 Ch. 180). It was said that a judgment against a married woman under this section was a judgment against her personally, but payable only out of her separate property (*Holtby* v. *Hodgson*, 24 Q. B. Div. 103; *Pelton* v. *Harrison*, 1892, 1 Q. B. 118). **45 & 46 Vict. c. 75, s. 1.**

Since the M. W. P. Act, 1882, judgment in common form can be obtained against a married woman personally in respect of an antenuptial debt (*Robinson* v. *Lynes*, 1894, 2 Q. B. 577). As to enforcing the same against restrained separate property, however, see *Maloney* v. *Harvey* (1895, 2 Ir. R. 169). Where judgment in common form was recovered against a married woman who had obtained a protection order, a receiver was refused of restrained property which had vested in her before the order (*Hill* v. *Cooper*, 1893, 2 Q. B. 85; see *Waite* v. *Morland*, 38 Ch. D. 135). An order directing a married woman administratrix to pay into court money belonging to the intestate and shown to be in her possession (there being no devastavit) should be in common form (*Re Turnbull, Turnbull* v. *Nicholas*, 1900, 1 Ch. 180). Where a married woman is rated as owner of house property, she is liable (in proceedings against her to recover poor rate) to distress, and imprisonment in default of a sufficient distress (*Re Allen*, 1894, 2 Q. B. 924). **In common form.**

A judgment in the *Scott* v. *Morley* form is not a final judgment against the married woman on which bankruptcy proceedings can be founded (*Ex p. Coulson*, 20 Q. B. D. 251; *Ex p. Lester, Re Lynes*, 1893, 2 Q. B. 113; *Re Elliott*, 1900, 2 Ir. R. 439), even after the death of her husband (*Re Hewett, Ex p. Levene*, 1895, 1 Q. B. 328). She may be ordered to attend for examination as to her means (*Holtby* v. *Hodgson, sup.*; *Aylesford* v. *G. W. Ry.*, 41 W. R. 42). But no other person can be examined (*Hood-Barrs* v. *Heriot, Ex p. Blyth*, 1896, 2 Q. B. 338). A married woman, however, cannot be committed under sect. 5 of the Debtors Act, 1869, for default in payment (*Scott* v. *Morley, sup.*; *Draycott* v. *Harrison*, 17 Q. B. D. 147; *Re Turnbull, Turnbull* v. *Nicholas, sup.*; see *Johnson* v. *Brown*, 20 L. R. Ir. 443, where a married woman was committed). On a judgment in the *Scott* v. *Morley* form, a garnishee order may be obtained under R. S. C. Ord. 45, r. 1 (*Holtby* v. *Hodgson*, 24 Q. B. Div. 103; *Barnett* v. *Howard*, 1900, 2 Q. B. 784). Such a judgment may be enforced against arrears of restrained income accrued due at the date of the judgment whether paid over or not (*Hood-Barrs* v. *Heriot*, 1896, A. C. 174; but see as to cases within the M. W. P. Act, 1893, *Barnett* v. *Howard*, 1900, 2 Q. B. 784); but not against income which accrues due after that date (*Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; *Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690; *Lowry* v. *Derham*, 1895, 2 Ir. R. 123). Where a creditor delayed entering judgment until an instalment of income had just become due a receiver was refused (*Colyer* v. *Isaacs*, 77 L. T. 198). **Enforcing judgments against married women.**

The court refused to appoint a receiver of furniture settled on the husband and wife in *Whitaker* v. *Cohen* (69 L. T. 451). Orders have been enforced against separate property by an inquiry and a receiver (*Re Peace and Waller*, 24 Ch. Div. 405; *Perks* v. *Mylrea*, 1884, W. N. 64).

A writ of sequestration in a divorce action is not limited in its terms, but will not affect property subject to a restraint until after decree absolute (*Hyde* v. *Hyde*, 13 P. Div. 173).

Under the M. W. P. Act, 1882, it was held that a creditor's right of attaching property which had once become bound by a married woman's

45 & 46 Vict. c. 75, s. 1.

contract did not cease on the ground that by reason of the husband's death the property was no longer separate (*Pelton* v. *Harrison*, 1891, 2 Q. B. 426); but that the removal by such death of a restraint on anticipation did not make the property liable (*Ib.* 422; see, however, on the last point, *Re Wheeler, Briggs* v. *Ryan*, 1899, 2 Ch. 722). Under sect. 1 of the M. W. P. Act, 1893, the law appears to be the same (see *Barnett* v. *Howard*, 1900, 2 Q. B. 784).

Where an action was brought on a married woman's covenant, and the defendant paid money into court on the condition of her being allowed to defend, the successful plaintiff was held in any event entitled to the money (*Bird* v. *Barstow*, 1892, 1 Q. B. 94).

Costs.

As to costs of proceedings instituted by a married woman, see M. W. P. Act, 1893, *post*, p. 361. An appeal by a married woman will, if it fail, be dismissed with costs in the usual way (*Perrins* v. *Bellamy*, 68 L. J. Ch. 397). Costs ordered to be paid by a married woman can be recovered out of any unrestrained separate property to which she is entitled at the date of the order (*Cox* v. *Bennett*, 1891, 1 Ch. 617). As to arrears of restrained income, see cases quoted, *sup.*, p. 345. Where an action by a married woman was dismissed with costs to be taxed and payable out of her separate property, a receiver of the only separate property she had was appointed before taxation (*Cummins* v. *Perkins*, 1899, 1 Ch. 16). As to actions before this act, see *Re Glanvill, Ellis* v. *Johnson* (31 Ch. Div. 532). A married woman need not give security for costs (*Threlfall* v. *Wilson*, 8 P. D. 18; *Severance* v. *Civil Service Association*, 48 L. T. 485), even if she has no separate estate (*Re Isaac, Jacob* v. *Isaac*, 30 Ch. Div. 418; see *Re Robinson, Pindar* v. *Robinson*, 1885, W. N. 147), except in the case of an appeal (*Whittaker* v. *Kershaw*, 44 Ch. Div. 296; *Weldhen* v. *Scattergood*, 1887, W. N. 69), but not on an appeal against an order of attachment (*Hood-Barrs* v. *Heriot*, 1896, 2 Q. B. 375). If she sues by a next friend, the next friend may be ordered to give security (*Re Thompson, Stevens* v. *Thompson*, 38 Ch. Div. 317). In the case of a judgment against a married woman an order to set off costs may be made under Ord. 65, r. 27, sub-sect. (21) (*Pelton* v. *Harrison*, 1892, 1 Q. B. 118).

Contracts.

(*g*) As to the power of a married woman, independently of this act, to deal by way of contract with her non-separate land, and with her separate estate, real and personal, see *ante*, pp. 315, 320. Sub-sects. (3) and (4) were repealed by the M. W. P. Act, 1893, s. 4, and replaced by sect. 1 of that Act (*post*, p. 360). The note next following contains the cases decided on the repealed sub-sections.

Decisions under sub-sects. (3) and (4), now repealed.

Sub-sects. (2), (3) and (4) were held not to apply to a contract made before 1883 (*Comolan* v. *Leyland*, 27 Ch. D. 632; *Turnbull* v. *Forman*, 15 Q. B. Div. 234; *Roper* v. *Doncaster*, 39 Ch. D. 482; *contra*, *Bursill* v. *Tanner*, 13 Q. B. D. 691). In order to bind her separate property by contract, it was held under sub-sect. (3) that a married woman must have some free separate property at the date of the contract, otherwise she could not contract (*Palliser* v. *Gurney*, 19 Q. B. Div. 521; *Braunstein* v. *Lewis*, 64 L. T. 265; *Re Shakespear, Deakin* v. *Lakin*, 30 Ch. D. 169; *Stogdon* v. *Lee*, 1891, 1 Q. B. 661). The onus was on the person suing on the contract to prove that she had separate property at that date (*Palliser* v. *Gurney*, *sup.*). And it was said that the statement of claim should contain an allegation to that effect (*Tetley* v. *Griffith*, 57 L. T. 673). The test of liability was whether at the date of the contract the married woman had separate property with respect to which she could reasonably be deemed to have contracted (*Leak* v. *Driffield*, 24 Q. B. D. 101; see *Bonner* v. *Lyon*, 38 W. R. 541; *Everett* v. *Paxton*, 65 L. T. 383). It was held not sufficient that she was then possessed of clothes (*Ib.*), or of inalienable property (*Harrison* v. *Harrison*, 13 P. Div. 180), in which last case it was said that the inalienability of the property showed "the contrary" within sub-sect. (3) (see *Draycott* v. *Harrison*, 17 Q. B. D. 147; *Myles* v. *Burton*, 14 L. R. Ir. 259). As to property over which a married woman has an unexercised power of appointment, see *Ex p. Gilchrist, Re*

Armstrong (17 Q. B. Div. 521); *Re Roper, Roper* v. *Doncaster* (39 Ch. D. 482). 45 & 46 Vict. c. 75, s. 1.

Under sub-sect. (4) it was also held that separate property of a married woman having once become bound by her contract during coverture was not freed by ceasing to be "separate" on her husband's death (*Pelton* v. *Harrison*, 1891, 2 Q. B. 426). And that where the separate property was subject to a restraint on anticipation it was not brought within sub-sect. (4) by reason of the subsequent death of the husband (*Beckett* v. *Tasker*, 19 Q. B. D. 7; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422). The property referred to in sub-sect. (4) must have been acquired during coverture (*Ib.*); but it was sufficient if it had been acquired during a second coverture (*Jay* v. *Robinson*, 25 Q. B. Div. 467).

(*h*) A married woman with separate property, not trading separate from her husband, is not subject to the bankruptcy laws (*Ex p. Coulson*, 20 Q. B. D. 249). And a receiving order cannot be made against her after marriage, even on a petition presented before marriage (*Re A Debtor*, 1898, 2 Q. B. 576). Sub-sect. (5). Bankruptcy.

"Separate property" in this sub-section does not include property over which a married woman has an unexercised general power of appointment (*Ex p. Gilchrist*, 17 Q. B. Div. 521); and she cannot be compelled to exercise such a power for the benefit of creditors (*Ib.*); but it does include a life estate under a settlement where there is no restraint on anticipation (*Ex p. Boyd*, 21 Q. B. Div. 264). Where a married woman entitled to a restrained life interest and trading separately from her husband became bankrupt in 1891, and her husband subsequently died, it was held that under sub-sect. (5) and sect. 19 the whole life interest vested in the bankruptcy trustee subject only to the restraint on anticipation, and on such restraint ceasing by the husband's death the bankruptcy trustee was entitled (*Re Wheeler, Briggs* v. *Ryan*, 1899, 2 Ch. 722; compare the different rule established in the case of judgment creditors; *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; *Softlaw* v. *Welch*, 1899, 2 Q. B. 419; and see *Pike* v. *Fitzgibbon*, 17 Ch. D. 463).

To constitute a separate trading it is not sufficient that the married woman has an interest, which is her separate property, in a business wholly or partially controlled by the husband (*Re Helsby, Ex p. Helsby*, 63 L. J. Q. B. 261; 69 L. T. 864; *Re Edwards, Ex p. Harvey*, 43 W. R. 509; 15 R. 362); but the fact that the business is carried on in the conjugal dwelling-house, and that the husband assists in the management, does not prevent the trading being separate (*Re Worsley*, 1901, 1 Q. B. 309). See further, as to the meaning of trading separately, the note to sect. 1 of the M. W. P. Act, 1870 (*ante*, p. 336).

As regards the initiation of bankruptcy proceedings, a bankruptcy notice cannot be issued upon a judgment (in the *Scott* v. *Morley* form) recovered against a married woman in respect of trade debts (*Re Lynes, Ex p. Lester*, 1893, 2 Q. B. 113; see *Re Hewett*, 1895, 1 Q. B. 328), nor upon a judgment in ordinary form against the firm under the name of which she is trading (*Re Handford, Ex p. Handford*, 1899, 1 Q. B. 566). But a bankruptcy petition may be presented against her (*Re Dagnall*, 1896, 2 Q. B. 407), and on such a petition a receiving order can be made in respect of debts incurred while trading, even after the married woman has ceased to trade (*Ib.*; *Re Worsley*, 1901, 1 Q. B. 309).

2. Every woman who marries after the commencement of this act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in Property of a woman married after the act to be held by her as a *feme sole*.

45 & 46 Vict. c. 75, s. 2.

which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

The effect of this section is to add the incident of separate use to the interest of the married woman in any property which belongs to her at the time of marriage (*Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622), or accrues afterwards (*Re Davenport, Turner* v. *King*, 1895, 1 Ch. 361). This separate use is sufficient to support a restraint on anticipation (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 696). It also renders separate examination unnecessary (*Riddell* v. *Errington*, 26 Ch. D. 220; see *Re Batt*, 1897, 2 Ch. 65). This section extends to the enlarging by a married woman after her marriage of a base fee which had been disposed of by her to a purchaser before her marriage (*Re Drummond and Davie*, 1891, 1 Ch. 524; see further, note (*e*), *ante*, p. 342).

By Matrimonial Causes Act, 1857, s. 21, a wife deserted by her husband may apply to a police magistrate or justices in petty sessions for an order to protect any money or property she may acquire by her own lawful industry; and by virtue of the order such earnings and property will belong to her as if she were a *feme sole*.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Generally speaking, the wife claiming to prove in her husband's bankruptcy must show that money lent by her to the husband was not lent for the purpose of his trade (*Re Genese*, 16 Q. B. D. 700; see *Re Cronmire*, 1901, 1 Q. B. 480). She may prove in competition with creditors for money lent to a partnership of which her husband is a member (*Re Tuff*, 19 Q. B. D. 88); or for money lent to the husband for private purposes (*Re Tidswell*, 56 L. J. Q. B. 548; 35 W. R. 666; *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505; *Re Clark, Ex p. Schulze*, 1898, 2 Q. B. 330; see, however, *Alexander* v. *Barnhill*, 21 L. R. Ir. 511). Property mortgaged by a wife to secure a debt owing by her husband to a third party, and subsequently applied in discharge of it, is not lent or entrusted to him within this section (*Alexander* v. *Barnhill*, *sup.*; see *Re Cronmire*, 1901, 1 Q. B. 480). Where a husband, who had borrowed his wife's separate estate for the purposes of his business, died insolvent, having appointed his wife executrix, she could retain the debt (*Re May, Crawford* v. *May*, 45 Ch. D. 499; *Re Simpson*, 1895, 1 Ir. R. 530); but where she was not her husband's representative, and his estate was administered by the court, she was postponed (*Re Leng, Tarn* v. *Emmerson*, 1895, 1 Ch. 652; *contra*, *Moore* v. *Smith*, 1895, 1 Ir. R. 512).

As to how far the act is retrospective, see *Re Home* (54 L. T. 301). As to the rights of a husband lending money to a wife for her business, see *Butler* v. *Butler* (14 Q. B. D. 831; 16 Q. B. D. 374).

Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed

liable for her debts and other liabilities in the same manner as her separate estate is made liable under this act. 45 & 46 Vict. c. 75, s. 4.

The present section was held to apply:—where the appointment was made to be applied in satisfaction of a debt due from another person, which debt was paid by him after the death of the testatrix (*Re Hodgson, Darley* v. *Hodgson*, 1899, 1 Ch. 666); where the married woman's debts had been incurred before the M. W. P. Act, 1882, under a protection order (*Re Hughes, Brandon* v. *Hughes*, 1898, 1 Ch. 529); and where the married woman had no separate property when she contracted the debts (*Re Ann, Wilson* v. *Ann*, 1894, 1 Ch. 549; see now M. W. P. Act, 1893, s. 1, *post*, p. 360).

Before the M. W. P. Act, 1882, it was held that sect. 27 of the Wills Act, 1837 (as to general powers), applied to the wills of married women (*Bernard* v. *Minshull*, Johns. 296). Sect. 24 now also applies to them (M. W. P. Act, 1893, s. 3, *post*, p. 361, where see note).

See, as to the law before this act, the note to the Admon. of Estates Act, 1833, *post*, p. 403, and *Re Roper, Roper* v. *Doncaster* (39 Ch. D. 482); *Ex p. Gilchrist, Re Armstrong* (17 Q. B. D. 521; and see *Re Williams, Green* v. *Burgess*, 59 L. T. 310).

In the case of persons other than married women the execution of a general testamentary power makes the appointed property assets for payment of the appointor's debts (*Fleming* v. *Buchanan*, 3 D. M. G. 976; Land Transf. Act, 1897, s. 1, sub-s. 2).

5. Every woman married before the commencement of this act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid. Property acquired after the act by a woman married before the act to be held by her as a *feme sole*.

The words "her title" mean the title which first accrued to her, whether vested, contingent, in possession, in remainder, or in reversion (*Reid* v. *Reid*, 31 Ch. Div. 411; *Re Tucker, Emmanuel* v. *Parfitt*, 52 L. T. 923; 33 W. R. 932; *Re Adames*, 53 L. T. 198; 33 W. R. 834; *Re Hobson, Webster* v. *Rickards*, 55 L. J. Ch. 300; 34 W. R. 195; *Re Tench, Ex p. McCormack*, 15 L. R. Ir. 406). Where, accordingly, the title in reversion accrued before the act, but the property fell into possession after the act, the section did not apply (*Reid* v. *Reid*, *sup.*).

A mere *spes successionis* claimed by A. as one of a possible class of next of kin, is not a contingent title within this section (*Re Parsons, Stockley* v. *Parsons*, 45 Ch. D. 51; *contra, Re Beaupré*, 21 L. R. Ir. 397). As to how far this section affects settlements, see sect. 19 (*post*, p. 357).

This section applies to money recovered by the verdict of a jury, even in an action in which the husband is co-plaintiff (*Beasley* v. *Roney*, 1891, 1 Q. B. 509).

As to the power of a woman married before this act over separate property acquired before this act, see *ante*, p. 319.

6. All deposits in any post-office or other savings-bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any cor- As to stock, &c., to which a married woman is entitled.

45 & 46 Vict. c. 75, s. 6.

poration, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

As to the probate of the will of a married woman having money standing in her name in the savings bank, see *Harding* v. *Sutton* (59 L. T. 839). As to investments held by a married woman as trustee, see sect. 18 (*post*, p. 356).

As to stock, &c., to be transferred, &c., to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any act of parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

Investments in joint names of married

8. All the provisions hereinbefore contained as to deposits in any post-office or other savings-bank, or in any other bank,

annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England, or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

45 & 46 Vict. c. 75, s. 8. women and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

As to stock, &c., standing in the joint names of a married woman and others.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section seventeen of this act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his

Fraudulent investments with money of husband.

45 & 46 Vict. c. 75, s. 10.

creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict. c. 60.

See the note to sect. 10 of the M. W. P. Act, 1870 (*ante*, p. 338). The section does not apply to policies effected under sect. 10 of the M. W. P. Act, 1870 (*Re Turnbull, Turnbull* v. *Turnbull*, 1897, 2 Ch. 415; *Re Kuyper*, 1899, 1 Ch. 38). Upon a motion to appoint a trustee it was said that there was no jurisdiction to decide the rights of the widow and children *inter se* (*Re Graham*, 29 L. R. Ir. 498).

Where a wife was convicted of murdering her husband, neither she nor anyone claiming under her could claim the amount of a policy effected by the husband for her benefit, but there was a resulting trust in favour of the husband's estate (*Cleaver* v. *Mutual Association*, 1892, 1 Q. B. 147).

45 & 46 Vict. c. 75, s. 12.

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section, it shall be sufficient to allege such property to be her property: and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Under this section a married woman can bring an action for the wrongful entry of a house which is her separate property (*Weldon* v. *De Bathe*, 14 Q. B. Div. 344). She cannot criminally prosecute her husband for personal libel on herself (*R.* v. *London*, 16 Q. B. D. 772). See also as to the proviso in the section, *Lemon* v. *Simmons* (36 W. R. 350; 57 L. J. Q. B. 260). Where a husband took from his wife and retained against her will money belonging to her for her separate use, he was held to be a trustee for her, and the Statute of Limitations was no defence to an action against his executors for the return of it (*Wassell* v. *Leggatt*, 1896, 1 Ch. 554). See further as to actions by a married woman the note to sect. 1, sub-sect. (2), *ante*, p. 344.

Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this act shall operate to increase or diminish the liability of any woman married before the commencement of this act for any such debt,

45 & 46 Vict. c. 75, s. 13.

contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this act, and to which she would not have been entitled for her separate use under the acts hereby repealed or otherwise, if this act had not passed.

The words "before the marriage" mean before the existing marriage, including the period of any previous marriage and the interval between the two marriages (*Jay* v. *Robinson*, 25 Q. B. Div. 472); and the word "debt" includes both common law debts contracted by a woman whilst she is a *feme sole*, and debts contracted under the act in respect of her separate property (*Ib.* p. 474). A husband cannot under this section sue his wife in respect of loans made by him to her before marriage (*Butler* v. *Butler*, 14 Q. B. D. 836). Judgment can be recovered against a married woman personally for an antenuptial debt (*Robinson* v. *Lynes*, 1894, 2 Q. B. 577).

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this act contained shall operate to increase or diminish the liability of any husband married before the commencement of this act for or in respect of any such debt or other liability of his wife as aforesaid.

The husband is still liable for the wrongs committed by his wife after marriage (*Seroka* v. *Kattenburg*, 17 Q. B. D. 177; see *Earle* v. *Kingscote*, 1900, 2 Ch. 585). Judgment recovered against a wife, who has no separate property, in respect of an antenuptial debt, is no defence to an action against the husband for the same debt (*Beck* v. *Pierce*, 23 Q. B. Div. 316). A husband married since 1882 may be sued alone for his wife's antenuptial debts, whether she be alive or dead (*Ib.* p. 321). If the wife is sued alone she cannot require her husband to be joined, and if he is sued alone, he cannot require her to be joined (*Ib.*).

Under the Statutes of Limitation time runs in favour of the husband in respect of an antenuptial debt of the wife from the time of the cause of action arising, not from the marriage; and no acknowledgment or part payment by the wife after marriage will alter the husband's liability (*Ib.* p. 322).

Suits for antenuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any

wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only. 45 & 46 Vict. c. 75, s. 15.

As to this joint judgment, see *Beck* v. *Pierce* (23 Q. B. Div. 321).

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this act, shall in like manner be liable to criminal proceedings by her husband. Act of wife liable to criminal proceedings.

As to a husband or wife giving evidence, see M. W. P. Act, 1884, s. 1 (*post*, p. 360); *R.* v. *Brittledon* (12 Q. B. Div. 266).

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in Questions between husband and wife as to property to be decided in a summary way.

45 & 46 Vict. c. 75, s. 17.

a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be) by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Applications under this section have been made by motion in divorce actions, as regards furniture (*Phillips* v. *Phillips*, 13 P. D. 220), and as regards paraphernalia (*Tasker* v. *Tasker*, 1895, P. 1). In such an action the registrar cannot under this section make an order to hand over property (*Wood* v. *Wood*, 14 P. D. 157). Where there is no action the application should be by originating summons (see the form Dan. C. F. p. 1244, 5th ed., and Table of Titles in the Annual Practice).

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

Under the earlier part of this section a married woman who is an executrix or trustee may sue or be sued in respect of the trust property, whatever its nature may be (*Re Harkness and Allsopp*, 1896, 2 Ch. 363). Where, however, she is trustee for sale of land she cannot convey it to a purchaser except with the concurrence of her husband and by deed acknowledged (*Re Harkness and Allsopp*, 1896, 2 Ch. 358; see *Re Brooke and Fremlin*, 1898, 1 Ch. 647). But where a trust is being administered by the court and the trustee is a married woman, she can convey land under the direction of the court as a "bare trustee" within sect. 16 of the Trustee Act, 1893 (*post*), without any acknowledgment or the concurrence of her husband (*Re Docura, Docura* v. *Faith*, 29 Ch. D. 693). So where

she is a paid-off mortgagee (*Re Howgate and Osborn*, 1902, 1 Ch. 451). As to the form of order directing payment to a married woman trustee, see *Re Hawksworth* (1887, W. N. 113); and as to orders directing payment by her, see note to sect. 24, *post*.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman (*i*), or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument (*k*); but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors (*l*).

(*i*) The earlier part of this section applies to all settlements, whether made before or after marriage, not only to what are popularly called marriage settlements (*Re Armstrong, Ex p. Boyd*, 21 Q. B. Div. 271).

The words "interfere with or affect" mean "invalidate or render inoperative" (*Re Armstrong, Ex p. Boyd*, 21 Q. B. Div. 270, 273). The effect of the settlement is to be determined as it would have been under the old law. And no one who under that law could have taken any interest is to be deprived of such interest (*Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 625). Sect. 19 prevents the act from interfering with any settlement which would have bound the property if the act had not been passed (*Hancock* v. *Hancock*, 38 Ch. Div. 90). So, notwithstanding sect. 5 (*ante*, p. 349), a husband's covenant in a settlement made in 1870, to settle property coming to him in right of his wife, bound property bequeathed to her in 1883 (*Ib.*; disapproving *Re Queade*, 53 L. T. 74; 33 W. R. 816). And a covenant by the husband and wife, in a settlement prior to 1882, to settle property not limited to the wife's separate use, bound property acquired by her after 1882 (*Re Stonor*, 24 Ch. D. 195; *Re Whitaker, Christian* v. *Whitaker*, 34 Ch. Div. 227). And an assignment since 1852 by the intended husband and wife (the latter being an infant) of funds coming to the latter on her marriage was held binding though the wife on attaining twenty-one repudiated the settlement (*Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307; *Buckland* v. *Buckland*, 1900, 2 Ch. 534). But where a married woman was entitled to separate property under a settlement made before the act, the incidents annexed by the act to separate property (*e.g.*, the liability to alienation on bankruptcy) attached to it (*Re Armstrong, Ex p. Boyd*, 21 Q. B. Div. 264). And where a woman entitled under a settlement made in 1878 to a life interest, with remainder (in default of her testamentary appointment) to herself absolutely, remarried since 1882, she held all her interest as *feme sole* (*Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622). And where since 1882 property is settled on a married woman subject to a restraint on anticipation, but without the words "for her separate use," the separate use arising under sects. 1 and 2 will support the restraint (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690).

(*k*) As to the creation and effect of a restraint against anticipation, see

45 & 46 Vict. c. 75, s. 19.

ante, p. 320. And as to enforcing against restrained income judgments recovered against a married woman since the act, see the cases quoted *ante*, p. 345.

(*l*) The latter part of the section has no operation on settlements made before the act (*Beckett* v. *Tasker*, 19 Q. B. D. 12; *Smith* v. *Whitlock*, 34 W. R. 414; 55 L. J. Q. B. 286). The words "before marriage" mean before her existing marriage, and include the period of a previous marriage and the interval between the two marriages (*Jay* v. *Robinson*, 25 Q. B. Div. 472). The word "debts" includes both common law debts contracted by a woman whilst a *feme sole*, and debts contracted under the act in respect of her separate property (*Ib.* 474).

Married woman to be liable to the parish for the maintenance of her husband. 31 & 32 Vict. c. 122.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

See *Peters* v. *Cowie* (2 Q. B. D. 131); *Coleman* v. *Birmingham* (6 Q. B. D. 615).

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

22. *The Married Women's Property Act*, 1870, *and the Married Women's Property Act*, 1870, *Amendment Act*, 1874, *are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such acts was in force, or any right or liability of any husband or wife, married before the commencement of this act, to sue or be sued under the provisions of the said repealed acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this act.*

This section prevented sect. 11 of this act from applying to policies

effected under the M. W. P. Act, 1870 (*Re Turnbull, T.* v. *T.*, 1897, 2 Ch. 415). The section was repealed by S. L. R. Act, 1898, as also the preamble to the present act, which being of a formal character has been omitted. 45 & 46 Vict. c. 75, s. 23.

23. For the purposes of this act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living. Legal representative of married woman.

A husband who takes separate property *jure mariti* is a "legal personal representative" within this section, and liable thereunder to the extent of the property so taken (*Surman* v. *Wharton*, 1891, 1 Q. B. 491).

24. The word "contract" in this act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this act includes a thing in action. Interpretation of terms.

Before this act, the separate estate of a married woman was not in general liable for breaches of trust or torts committed by her (*Wainford* v. *Heyl*, L. R. 20 Eq. 321). Since the act, she may be ordered to make good a loss occasioned by her devastavit, for which purpose the order should be in the *Scott* v. *Morley* (20 Q. B. D. 120) form (*Re Turnbull, Turnbull* v. *Nicholas*, 1900, 1 Ch. 180). Where there is no devastavit, an order directing her to pay money into court should be in the common form (*ib.*).

Where letters of administration are granted to a married woman, it is not now necessary that her husband should join in the administration bond (*Re Ayres*, 8 P. D. 168).

An acknowledged deed and the concurrence of her husband are necessary for an effectual conveyance of freeholds held by a married woman on trust for sale (*Re Harkness and Allsopp*, 1896, 2 Ch. 358).

25. The date of the commencement of this act shall be the first of January one thousand eight hundred and eighty-three. Commencement of act.

26. This act shall not extend to Scotland. Extent of act.

27. This act may be cited as the Married Women's Property Act, 1882. Short title.

VII.—The Married Women's Property Act, 1884.

47 & 48 Vict. c. 14.

An Act to Amend the sixteenth section of the Married Women's Property Act, 1882. [23rd June, 1884.]

47 & 48 Vict. c. 14.

Whereas by section sixteen of the Married Women's Property Act, 1882, a wife is, under the circumstances therein mentioned, declared to be liable to criminal proceedings by her husband, and a doubt has arisen as to whether the husband is admissible as a witness against his wife in such criminal proceedings, while section twelve of the same act declares that in any proceeding under that section a husband or wife shall be competent to give evidence against each other; and it is desirable that the said doubt should be removed, and the said act otherwise amended;

Be it therefore enacted as follows:

Husband or wife competent witness in criminal proceedings under 45 & 46 Vict. c. 75.

1. In any such criminal proceeding against a husband or a wife as is authorized by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence.

See *Re Brittledon* (12 Q. B. Div. 266).

Short title.

2. This act may be cited as the Married Women's Property Act, 1884, and this act, and the Married Women's Property Act, 1882, may be cited together as the Married Women's Property Acts, 1882 and 1884.

VIII.—The Married Women's Property Act, 1893.

56 & 57 Vict. c. 63.

56 & 57 Vict. c. 63, s. 1.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

Effect of contracts by married women.

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed or entitled to any separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating. 56 & 57 Vict. c. 63, s. 1.

See sect. 1, sub-sects. (3) and (4), of the M. W. P. Act, 1882 (now repealed), and the cases decided thereunder, *ante*, pp. 342, 346.

In a case decided since this act, judgment was taken in the *Scott* v. *Morley* form, with the addition of the words of sub-sect. (c) and the proviso. It was recovered against a divorced woman in respect of a contract made before the divorce; and was held not to cover instalments of restrained income which had accrued after the divorce but before judgment (*Barnett* v. *Howard*, 1900, 2 Q. B. 784).

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just. Costs may be ordered to be paid out of property subject to restraint on anticipation.

This section was held to apply to actions pending at the date of the act (*Re Godfrey, Thorne George* v. *Godfrey*, 63 L. J. Ch. 854; 72 L. T. 8; where see form of order charging costs on restrained income); but not to the case of an order for payment of costs made before the act (*Re Lumley, Ex p. Hood-Barrs*, 1894, 3 Ch. 135; *Lowry* v. *Derham*, 1895, 2 Ir. R. 123).

The "proceeding" must be one which initiates litigation; and so the section does not apply in the case of an appeal by a married woman defendant (*Hood-Barrs* v. *Cathcart*, 1894, 3 Ch. 376; *Hood-Barrs* v. *Heriot*, 1897, A. C. 177); nor to a petition in an action presented by a married woman defendant (*Hollington* v. *Dear*, 1895, W. N. 35); nor to a probate action brought by an executor in consequence of a caveat entered by a married woman (*Moran* v. *Place*, 1896, P. 214). But the section does apply to a counterclaim by a married woman defendant (*Hood-Barrs* v. *Cathcart*, 1895, 1 Q. B. 873); and to a written claim made by her to goods taken in execution and served on the sheriff (*Nunn* v. *Tyson*, 1901, 2 K. B. 487); and to an application by her to intervene in a probate action (*Crickitt* v. *Crickitt*, 1902, W. N. 94).

An order under this section may be made subsequently to the order directing payment of costs (*Hood-Barrs* v. *Cathcart*, 1895, 1 Q. B. 873). An order was made in *Paget* v. *Paget* (1898, 1 Ch. 470). As to the form of order, see *Davies* v. *Treharris Brewery Co.* (1894, W. N. 198; 13 R. 219).

See also the power to charge the costs of a married woman on a fund preserved (Solicitors Act, 1860), s. 28.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband. Will of married woman.

In the case of every married woman who dies after 5th December, 1893, this section applies to her will whether made before or after that date (*Re Wylie, Wylie* v. *Moffat*, 1895, 2 Ch. 116).

Before the M. W. P. Act, 1882, it was held that sect. 27 of the Wills

56 & 57 Vict. c. 63, s. 3.

Act, 1837, applied to the wills of married women (*Bernard* v. *Minshull*, Johns. 296). As to the joint effect of sects. 24 and 27, see the cases quoted under sect. 27 of the Wills Act, 1837 (*post*).

Repeal.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

Short title.

5. This act may be cited as the Married Women's Property Act, 1893.

Extent.

6. This act shall not apply to Scotland.

IX.—Dower and Curtesy.

THE DOWER ACT, 1833.

3 & 4 William IV. chapter 105.

§ 1. *Interpretation*...362.
§ 2. *Equitable Estates liable to Dower*...366.
§ 3. *Seisin of Husband not necessary*...367.
§§ 4—10. *How Husband may bar or restrict Dower*...368.
§ 11. *Agreement not to bar Dower enforceable*...370.
§ 12. *Priority of Legacies in lieu of Dower*...370.
§ 13. *Certain Forms of Dower abolished*...371.
§ 14. *Saving and Restraining Clause*...371.
Note on Curtesy...371.

3 & 4 Will. 4, c. 105, s. 1.

Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

Meaning of the words in the act.

"Land."

Number.

The objects of this act.

The principal objects of this statute are—

1st. To make *equitable* estates in possession liable to dower, and to dispense with the necessity of the actual seisin of the husband.

2nd. To take away the right of dower out of lands disposed of by the husband in his lifetime or by his will, and to give partial charges created by the husband priority over the right of dower.

3rd. To enable the husband to bar the right of dower by a declaration in a deed or in a will. The act does not extend to widows married on or before the 1st of January, 1834.

3 & 4 Will. 4, c. 105, s. 1.

Old law of dower.

The old law of dower gave to a surviving wife a right to have assigned to her for her life one-third of all the lands and hereditaments of which her husband was solely seised in law (that is, had the legal property by descent, there being at the same time no possession), or, in fact, for an estate of inheritance in possession at any time during the marriage; with a few exceptions such as common *sans nombre* and personal annuities (see the statement of the old law of dower in the first Report of the R. P. Commrs. 16—19; Co. Litt. 32a; *Lyster* v. *Mahony*, 1 Dru. & War. 236).

Out of what property a woman is entitled to dower.

The widow of a man to whom an estate was devised in fee, with a limitation over to the testator's heir, in case the devisee had no children or issue, was held to be entitled to dower (*Moody* v. *King*, 2 Bing. 447; *Smith* v. *Spencer*, 4 W. R. 729). She was not entitled to dower out of an estate *pur autre vie* (*Low* v. *Burron*, 3 P. W. 262; *Re Michell, Moore* v. *Moore*, 1892, 2 Ch. 99). Where, however, land was limited to the husband *pur autre vie*, with certain contingent estates in remainder over, with ultimate remainder to him in fee, the land was held liable to dower (*Lemon* v. *Mark*, 1899, 1 I. R. 416; see *Re Michell, sup.*) Dower is due of mines wrought during coverture, but not of mines or strata unopened. If lands assigned for dower contain an open mine, tenant in dower may work it for her own benefit (*Stoughton* v. *Leigh*, 1 Taunt. 401; *Dickin* v. *Hamer*, 1 Dr. & Sm. 284). And a dowress may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease (*Dickin* v. *Hamer, sup.*), or of proceeds of timber cut after her husband's decease (*Bishop* v. *Bishop*, 5 Jur. 931; *Dickin* v. *Hamer, sup.*) Where land subject to dower was taken by a railway company, the dowress had the value of her dower paid to her out of the purchase-money (*Re Hall*, 9 Eq. 179). In another case one-third of the purchase-money was carried over to a separate account, the dividends being payable to the dowress for life (*Harrop* v. *Wilson*, 34 Beav. 166). See, further, as to the property out of which a woman is entitled to dower, and the requisites to dower, the note to sect. 2, *post;* Tudor's L. C. Conv. 112 *et seq.*, 4th ed.

Mines.

Timber.

Barring dower.

In consequence of two maxims of the common law—first, that no right can be barred until it accrues; and, secondly, that no right or title to an estate of freehold can be barred by a collateral satisfaction—it was impossible to bar a woman of her dower by any assignment or assurance of lands, either before or during the marriage (*Vernon's case*, 4 Rep. 1; Co. Litt. 36 b).

Legal jointures.

Dower, however, might be barred by a legal jointure. Before the passing of the Statute of Uses (27 Hen. 8, c. 10), the greater part of the lands in England having been conveyed to uses which were not liable to dower (Dyer, 266, pl. 7; 4 Rep. 1 b), it was usual to make a provision for the wife before marriage out of the husband's lands (3 Rep. 58 b; 4 Rep. 1 b; Wilmot's Notes, 184, 185). The Statute of Uses having transferred the legal estate to the *cestui que use*, all women then married would have become dowable of lands held to the use of their husbands, and retained their title to lands settled on them in jointure. To prevent that injustice, it is by the 6th section of the Statute of Uses declared, that a woman having an estate in jointure with her husband (five species of which are enumerated) shall not be entitled to dower; and the 9th section reserves to the wife a right to refuse a jointure or to claim her dower (see Wilmot's Notes, 184, &c.). It was decided that the species of estates enumerated are proposed only as examples, and the courts have in construction extended the operation of the statute to other instances within its principle, though not within its words (4 Rep. 2 a). By the effect of that statute, therefore, no widow can claim both jointure and dower. A jointure within that statute is defined to be a competent livelihood of freehold to the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least, if she herself be not the cause of its determination or forfeiture (Co. Litt. 36 b, 37).

According to Lord Coke (Co. Litt. 36 b), there are six requisites to a strict legal jointure, viz., 1st. The provision for the wife must by original

3 & 4 Will. 4, c. 105, s. 1.

limitation take effect in possession or profit immediately after the husband's death (*Wood* v. *Shirly*, Cro. Jac. 488; see *Re De Hoghton*, *De H.* v. *De H.*, 1896, 2 Ch. 385). 2nd. It must be for the term of her own life or greater estate (Dyer, 97 b). 3rd. It must be made to herself, and no other for her. 4th. It must be made in satisfaction of the *whole*, and not of part, of her dower. 5th. It must be either expressed or averred to be in satisfaction of her dower (see 9 Mod. 152; 3 Atk. 8; 1 Ves. sen. 54; 4 Ves. 391). And 6th. It may be made either before or after marriage (4 Rep. 3).

Jointure before marriage is a peremptory bar of dower; jointure after marriage she has an option to renounce (1 Swanst. 429, n.); but a *feme covert* was held not competent during the coverture to elect between a jointure made to her after marriage and her dower at common law (*Frank* v. *Frank*, 3 M. & C. 171).

A jointure settled on a wife by articles, to which she was not a party, will not deprive her of dower (*Buckingham* v. *Drury*, 3 Br. P. C. 497; *Daly* v. *Lynch*, *Ib.* 48); but an infant having before her marriage a jointure made to her in bar of dower, is thereby bound and barred by the stat. 27 Hen. 8, c. 10 (*Ib.*)

Equitable jointures.

In equity, a trust estate, an agreement to settle lands as a jointure, or a covenant from the husband that his heirs, executors or administrators would pay an annuity to his wife, for her life, in case she survived him, in full for her jointure and in bar of dower, without expressing that it should be charged on lands, or, in short, any provision, however precarious, and whether secured out of realty or personalty, which an adult before marriage accepts in lieu of dower, is a good jointure (*Buckingham* v. *Drury*, 5 Br. P. C. 570; 4 Br. C. C. 506; Wilmot's Notes, 177; *Charles* v. *Andrews*, 9 Mod. 152; *Williams* v. *Chitty*, 3 Ves. jun. 545; *Tinney* v. *Tinney*, 3 Atk. 8; *Carruthers* v. *Carruthers*, 4 Br. C. C. 500; *Estcourt* v. *Estcourt*, 1 Cox, 20; *Simpson* v. *Gutteridge*, 1 Madd. R. 613; 4 Rep. 2 a, n. by Thomas; Harg. Co. Litt. 36 b, n. (5); Sugd. V. & P. 543, 544, 11th ed.; *Dyke* v. *Rendall*, 2 D. M. & G. 209). A future contingent provision, accepted by an adult female upon her marriage in lieu of dower, is in equity a valid bar to dower (*Re Herons*, 1 Flan. & K. 330; see *Power* v. *Sheil*, 1 Moll. 312; *Williams* v. *Chitty*, 3 Ves. 545; *Corbet* v. *Corbet*, 1 Sim. & St. 612; 5 Russ. 254).

A wife had a jointure secured on her husband's estate X. In 1844, the husband contracted to purchase an estate Y., and to enable him to sell the estate X., the wife, in 1845, released her jointure, and he then covenanted to secure it out of "estates he should thereafter acquire." Before the estate Y. had been conveyed, the husband contracted to sell it: it was held, that in equity the estate Y. was charged with the jointure (*Warde* v. *Warde*, 16 Beav. 103; *Wellesley* v. *Wellesley*, 4 M. & C. 554).

Where by a marriage settlement the husband and his father, "for providing a competent jointure" for the wife, settled moneys for the benefit of the husband, his wife, and the issue of the marriage, the wife's right to dower out of land subsequently acquired by the husband was barred (*Dyke* v. *Rendall*, 2 D. M. & G. 209). Marriage articles executed by a tenant in tail in remainder, whereby he agreed to execute a legal post-nuptial settlement, to secure a jointure, were held a bar in equity to the wife's right of dower (*Pennefather* v. *Pennefather*, I. R. 6 Eq. 171). So in the case of marriage articles, whereby the intended husband covenanted that in case he should die in the lifetime of his intended wife, without issue by her, she should be entitled to one-half of what property, real or personal, he should die seised or possessed of (*Hamilton* v. *Jackson*, 2 J. & Lat. 295).

It has been said that in order to exclude the right to dower, there must be either an express declaration or a plain intention (*Hamilton* v. *Jackson*, 2 J. & Lat. 299; *O'Rorke* v. *O'Rorke*, 17 L. R. Ir. 153). A mere grant by a marriage settlement of an annuity to the wife surviving, has been held not to bar dower, even out of the lands charged with the annuity (*Cody* v. *Cody*, 5 L. R. Ir. 620; see *Lemon* v. *Mark*, 1899, 1 I. R. 416).

A stipulation in a marriage settlement, that the provision thereby made for the wife was to be "in lieu of dower or thirds," was held, on the husband dying intestate, to bar the claim of his widow to a distributive share in his personal estate (*Thompson* v. *Watts*, 2 J. & H. 291; see *Sambourne* v. *Barry*, I. R. 6 Eq. 28; *Gurly* v. *Gurly*, 8 Cl. & Fin. 743; *Re Burgess*, 11 Ir. Ch. R. N. S. 164; *Colleton* v. *Garth*, 6 Sim. 19; *Coyne* v. *Duigan*, 1894, 1 I. R. 138; *Re Hogan, H.* v. *H.*, 1901, 1 Ir. R. 168). **3 & 4 Will. 4, c. 105, s. 1.** **Where widow barred of distributive share in husband's personalty.**

As to the law of jointures, see 1 Rop. on Husband and Wife, by Bright, c. 10; Cruise's Dig. tit. 7; Bac. Abr. Dower and Jointure (G.); Gilb. on Uses, by Sugd. p. 321, &c.

As to how far attendant terms could have been used to bar a right to dower, see *Mole* v. *Smith*, Jac. R. 496; *Radnor* v. *Vandebendy*, Show. P. C. 69; Pr. Ch. 65; *Swannock* v. *Lifford*, 2 Atk. 208; Ambl. 6; Co. Litt. 208 a, n.; *Willoughby* v. *Willoughby*, 1 T. R. 763; *Maundrell* v. *Maundrell*, 10 Ves. 246; *Wynn* v. *Williams*, 5 Ves. 130; Butl. Co. Litt. 290 b, n. l. s. 13; *Re Sleeman*, 4 Ir. Ch. R. 563; 8 & 9 Vict. c. 112, *post*; *Corry* v. *Cremorne*, 12 Ir. Ch. R. 136; *Anderson* v. *Pignet*, 8 Ch. 180, *post*; and as to when a court of equity would relieve against them, see *Dudley* v. *Dudley*, Prec. Ch. 241; *Radnor* v. *Rotherham*, *ib.* 65; *Williams* v. *Lambe*, 3 B. C. C. 264; *Wilkins* v. *Lynch*, 1 Hayes, Ir. R. 98. **Attendant terms.**

As to the form of limitation to uses to bar dower, see Gilb. on Uses, by Sugd. 321—325, n.; Fearne, 347, n. by Butl. 7th ed.; 2 Dav. Conv. 210; 3 Dav. Conv. 249, n. (*o*); *Collard* v. *Roe* (4 De G. & J. 525). A limitation to the old uses to bar dower will not deprive of her dower a woman married since the passing of the act (*Fry* v. *Noble*, 7 D. M. & G. 687; *Re Michell, Moore* v. *Moore*, 1892, 2 Ch. 99). **Uses to bar dower.**

As to the defence as against a claim for dower of purchase for value without notice, see *Williams* v. *Lambe*, 3 Brown, C. C. 264; *Collins* v. *Archer*, 1 R. & M. 292; *Phillips* v. *Phillips*, 4 D. F. & J. 217; *Ind, Coope* v. *Emmerson*, 12 App. Cas. 300. **Purchase without notice.**

Under 13 Edw. 1, c. 34, a woman forfeits her dower by adultery, even though brought about by her husband's cruelty (*Hetherington* v. *Graham*, 6 Bing. 139; *Woodward* v. *Dowse*, 10 C. B. N. S. 722; *Bostock* v. *Smith*, 34 Beav. 57). Under the old law a divorce *à vinculo matrimonii* was a bar to dower (*Frampton* v. *Stephens*, 21 Ch. D. 164), and so now is a decree for dissolution of marriage (*Ib.*). As to the effect of a divorce *à mensâ et thoro*, see *Rolfe* v. *Perry*, 11 W. R. 357; *Shute* v. *Shute*, Prec. Ch. 111. **Forfeiture of dower by adultery.**

Dower was extinguished by a deed duly acknowledged by the wife, even where her name was not inserted as a co-grantor (*Dent* v. *Clayton*, 12 W. R. 903). **Bar by acknowledged deed.**

As to the remedies for the recovery of dower before 1860, see *ante*, p. 182. Since that year the usual remedy has been by action in Chancery. For instances of such actions, see *Sheaf* v. *Cave* (24 Beav. 259); *Bamford* v. *Bamford* (5 Hare, 203); *Marshall* v. *Smith* (5 Giff. 37); *Dawson* v. *Bank of Whitehaven* (6 Ch. Div. 218); *Meek* v. *Chamberlain* (8 Q. B. D. 31); see also the forms of orders, Seton, 6th ed., 955, 1546; *Kernaghan* v. *M'Nally* (11 Ir. Ch. Rep. N. S. 52). As to costs, see *Harris* v. *Harris* (11 W. R. 62); *Stormont* v. *Wickens* (14 W. R. 192). **Remedies for the recovery of dower.**

An action for dower must be brought within twelve years from the death of the husband in the case of interests in possession (R. P. Lim. Act, 1833, ss. 2, 3; R. P. Lim. Act, 1874, s. 1; *ante*, pp. 122, 184; *Marshall* v. *Smith*, 5 Giff. 37). As to the arrears of dower which may be recovered, see *ante*, p. 200. **Limitation.**

The Dower Act does not apply to freebench (*Smith* v. *Adams*, 5 D. M. & G. 712). Freebench, in the absence of any custom to the contrary, does not attach even in right until the husband's death (*Benson* v. *Scott*, 12 Mod. 49; 2 Ves. sen. 633; *Godwin* v. *Winsmore*, 2 Atk. 526; *R.* v. *Lopen*, 2 T. R. 580; *Brown* v. *Raindle*, 3 Ves. jun. 256). And therefore any alienation by him *alone*, even by contract (*Hinton* v. *Hinton*, 2 Ves. sen. 631), to take effect in his lifetime, defeated the widow's claim (*Benson* v. *Scott*, 3 Lev. 385; *Goodwin* v. *Windmore*, 2 Atk. 526; *Farley's case*, Cro. Jac. 36; Moor, 758; *Dagworth* v. *Radford*, Sir W. Jones, 462; 1 Freem. **Freebench.**

3 & 4 Will. 4, c. 105, s. 1.

516; Gilb. Ten. 321; see 2 Watk. on Cop. 73—79; Shelford on Copyholds, pp. 68—72). And if a man surrendered his copyhold estate to the use of his will, and then devised it, the widow did not take freebench (*Lacy* v. *Hill*, 19 Eq. 350). Now under sect. 3 of the Wills Act a devise without a surrender has the same effect (*Ib.*; see *Powdrell* v. *Jones*, 2 Sm. & G. 407, where it was held that a devise did not bar freebench, the special custom of the manor being that the title of the wife could only be destroyed by her voluntary surrender; *Riddell* v. *Jenner*, 10 Bing. 29; *Doe* v. *Gwinnell*, 1 Q. B. 682).

Where a purchaser of a copyhold took a surrender, but died before admittance; held, that his widow was not entitled to freebench (*Smith* v. *Adams*, 5 D. M. & G. 712). *Secus*, where the heir of the purchaser had been admitted (*Vaughan* v. *Atkins*, 5 Burr. 2764). A widow was held not entitled to freebench out of a moiety of copyholds to which her husband was entitled in remainder after a life estate (*Smith* v. *Adams*, 18 Beav. 499). Nor out of trust estates (*Forder* v. *Wade*, 4 Bro. C. C. 520).

The widow of a tenant in tail is entitled to freebench, though there is no custom as to the freebench of widows of tenants in tail, but only as to widows of tenants in fee (*Doe* v. *Sanders*, 3 Dougl. 303).

A marriage settlement "in order to make some provision for" the intended wife in case she should survive her husband, settled some of the husband's copyholds, after his death, on her for life: held, that she was not thereby barred of her freebench in other copyholds, as to which the husband died intestate (*Willis* v. *Willis*, 34 Beav. 340).

See further Scriven on Copyholds, 69, 7th ed.

Gavelkind. The Dower Act extends to lands of gavelkind tenure (*Farley* v. *Bonham*, 2 J. & H. 177). By the custom of gavelkind, the wife, after the death of her husband, shall have for her dower a moiety of all lands of her husband so long as she continues chaste (Rob. on Gav. by Wilson, pp. 205—236; see *Re Maskell and Goldfinch*, 1895, 2 Ch. 525).

Widows to be entitled to dower out of equitable estates.

2. When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable (*m*), shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy) (*n*), then his widow shall be entitled in equity to dower out of the same land.

(*m*) For examples of interests partly legal and partly equitable equal to an estate of inheritance in possession, see *Re Michell, Moore* v. *Moore* (1892, 2 Ch. 99). In that case, where the husband was at his death entitled to an equitable estate *pur autre vie*, and also a legal remainder expectant on the death of the *c. q. vie* without a second son, the widow took no dower.

Old law. Before this act there was no dower out of equitable estates (*Dawson* v. *Bank of Whitehaven*, 6 Ch. Div. 221; *D'Arcy* v. *Blake*, 2 Sch. & Lef. 388; *Re Michell, Moore* v. *Moore*, 1892, 2 Ch. 93).

Mortgages. Where an estate was subject to a mortgage *in fee* at the time of the marriage, and continued so during the coverture, the widow was not entitled to dower (*Dixon* v. *Saville*, 1 Br. C. C. 326). Where the husband was seised merely as a mortgagee or trustee, the wife was entitled to dower at law, but subject in equity to the same right of redemption or trust as her husband was liable to; but a court of equity would interfere to prevent a widow from taking advantage of her legal right (*Hinton* v. *Hinton*, 2 Ves. sen. 634; see 2 Freem. 43, 71; 1 Burr. 117; Butl. Co. Litt. 205 a, n. (1), 11th ed.; *Lyster* v. *Mahony*, 1 Dru. & War. 242; *Flack* v. *Longmate*, 8 Beav. 420; *Knight* v. *Frampton*, 4 Beav. 10). Where a

wife, married before the act, joined in a mortgage in fee of her husband's land, to release her dower, she had no right to redeem (*Dawson* v. *Bank of Whitehaven*, 6 Ch. Div. 221). But where the husband died seised in fee, a subsequent mortgage by the heir in which the widow joined did not extinguish her right to dower or reconveyance (*Meek* v. *Chamberlain*, 8 Q. B. D. 31). 3 & 4 Will. 4, c. 105, s. 2.

So a woman is not entitled to dower of estates of which the husband was seised in fee, subject at the time of his marriage to leases for lives, which did not expire during the coverture (*D'Arcy* v. *Blake*, 2 Sch. & Lef. 387; Fitz. Abr. Dower, pl. 184; Br. Abr. Dower, pl. 44; Co. Litt. 32 a; Co. Litt. 203 a, Harg. note; Perk. 333, 348; *Forder* v. *Wade*, 4 Br. C. C. 520). There was no right of dower in land subject to a contract for sale at the time of the marriage. It was the same in the case of a contract made after marriage, but before the legal estate was vested in the husband. So if the husband conveyed a legal estate in remainder, not subject to dower at the time of the conveyance, dower would not afterwards attach on that estate in favour of the wife, merely because, if he had not conveyed the estate, it would have fallen into possession, and become liable to dower (*Lloyd* v. *Lloyd*, 4 Dru. & War. 370). On the surrender in deed or in law of the life estate to the husband the right of dower will attach (1 Roll. Abr. 676, pl. 40). But if a rent be reserved on a lease for years, made before marriage, the wife will be entitled to recover dower of the third part of the rent immediately, and also of the land, with a *cesset executio* during the term (Prec. Ch. 250). And the wife of a man entitled to lands under a devise to him in fee or in tail, subject to a chattel interest for raising the testator's debts, is dowable after payment of them (Co. Litt. 41 a; 8 Rep. 96 a; 2 Vern. 404). Where a husband was seised in fee subject to a trust term to secure life annuities and to pay himself half the surplus rents, his widow was entitled to have her dower set out (*Sheaf* v. *Cave*, 24 Beav. 259). Where a husband was entitled to an equitable estate in fee simple in certain land determinable in the event, which took place, of his dying without leaving issue living at his decease, his widow was, notwithstanding the operation of the executory devise over, entitled under this section to dower out of the land (*Smith* v. *Spencer*, 4 W. R. 729). Reversions and remainders.

(*n*) The widow of a joint tenant in fee or in tail is not entitled to dower, because, upon the death of one of the joint tenants, the estate goes to the survivor, who is then in from the first grantor, and may plead the deed creating the estate as originally made to him, without naming his companion (Litt. s. 45; Co. Litt. 37 b, 30 a, 183 a). And if a joint tenant aliens his share, his wife shall not be endowed (Fitz. N. B. 150; Br. Dow. pl. 30; Cro. Jac. 615). Joint tenants.

A widow concurred in a partition of her husband's estate, and released a moiety allotted to the other tenant in common from her dower; the other moiety was conveyed to the trustees of her husband's will: it was held, that she was entitled to dower out of the entirety of the latter moiety (*Reynard* v. *Spence*, 4 Beav. 103).

3. When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof: provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced. Seisin shall not be necessary to give title to dower.

A right of entry is where a man, who has the possession of lands, is disseised or ousted, or, having a right to the possession, is kept out of it; in which case he may peaceably make an entry upon the lands, or bring an action of ejectment to recover possession (see Rosc. on Real Actions, Right of entry.

3 & 4 Will. 4, c. 105, s. 3.

79, &c.; 1 Real Prop. Rep. 493). The time within which a right of entry must be prosecuted is now prescribed by R. P. Lim. Acts, 1833 and 1874 (see *ante*, pp. 122, 184 *et seq.*)

Seisin.

Seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass (1 Burr. 107). One of the circumstances required to give a title of dower before this act was, that the husband should be seised during the coverture of the estate whereof the wife is to be endowed. A seisin in law was sufficient, without a seisin in deed. A seisin in law, in its usual acceptation, is where the inheritance in lands and hereditaments, of which a man died seised or possessed, descends upon his heir, who dies before entry or possession (Litt. s. 448; see *Leach* v. *Jay*, 6 Ch. D. 496; 9 Ch. Div. 42). In such a case, if the heir leave a widow, she will be entitled to dower (Litt. s. 681). On conveyances under the Statute of Uses, the bargainee or *cestui que use* is seised in law immediately on the delivery of the deed, and therefore his wife was dowable, although no entry had been made by him, or other act done to acquire an actual seisin. As if lands were bargained and sold, and a stranger entered, and then the deed was inrolled and the bargainee died, his wife would be endowed (2 And. 161; Gilb. Uses by Sugd. 213; see Cro. Jac. 604), but if the husband had died before inrolment, she would not have been endowed (Gilb. Uses, 213).

But wherever an actual entry was necessary to give effect to a conveyance, as in the case of an exchange at common law, the wife was not entitled to dower, unless the husband had entered (Perk. s. 368; Park on Dower, 34).

No dower out of estate disposed of.

4. No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

A devise of "all my real estate" to trustees on trust for sale will bar dower under sect. 4 (*Lacey* v. *Hill*, 19 Eq. 346; see *Rowland* v. *Cuthbertson*, 8 Eq. 466).

Priority to partial estates, charges, and specialty debts.

5. All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

By old law the husband alone could not defeat dower.

Before this act, after a title of dower had once attached, it was not in the power of the husband alone to defeat it by any act in the nature of alienation or charge (3 Lev. 386; Co. Litt. 32; F. N. B. 147 (E)). The alienation of the husband, whether voluntarily, as by deed or will, or involuntarily, as by bankruptcy, &c., would not defeat the wife's right of dower against the husband's alienee (Shep. T. 275; *Stoughton* v. *Leigh*, 1 Taunt. 410; Co. Litt. 46 a; 7 Rep. 8, 72; Jenk. Cent. p. 36; see Park on Dower, 237, 238).

Old rule that a devise of lands liable to dower was *primâ facie* a devise of them subject to the right of dower.

In the case of women married before this act, where a benefit was given by the will to the testator's widow, a question was often raised whether she was not thereby precluded from claiming dower out of lands devised by that will. The rule was that a devise of lands liable to dower was *primâ facie* a devise of them subject to the right to dower; and a widow was accordingly entitled to claim both her dower and the benefit given by the will (*Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444; *Ellis* v. *Lewis*, 3 Hare, 313; *Gibson* v. *Gibson*, 1 Drew. 42). But certain provisions were considered as inconsistent with the right to dower, and where a will contained such provisions, the widow was put to her election. Thus she was put to her election where a testator provided that his daughter should

Widow put to her election where

3 & 4 Will. 4, c. 105, s. 5.

have the personal use, occupation and enjoyment of a house (*Miall* v. *Brain*, 4 Mad. 119; see *Butcher* v. *Kemp*, 5 Mad. 61; *Roadley* v. *Dixon*, 3 Russ. 192). Also, where a testator gave to trustees an express power to lease, and also the general power to manage and to cut timber for repairs at their discretion (*Parker* v. *Sowerby*, 4 D. M. & G. 321; overruling *Warbutton* v. *Warbutton*, 2 Sm. & G. 163; see *Linley* v. *Taylor*, 1 Giff. 67). But powers of, or trusts for, sale were held not inconsistent with a widow's right to dower; nor was a direction as to the distribution of the proceeds (*Bending* v. *Bending*, 3 K. & J. 57; see further, 1 Jarm. Wills, 5th ed., 430 *et seq.*; Hawk. Wills, 275.

Will contained provisions inconsistent with right to dower.

Powers of or trusts for sale.

By the above sections all dispositions by the husband are made effectual as against the right of his widow to dower. Thus a mortgage by a husband is a bar *pro tanto* of dower (*Jones* v. *Jones*, 4 K. & J. 361).

New law.

Notwithstanding the Admon. of Estates Act, 1833 (*post*, p. 398), and the 5th section of this act, the widow's right to dower or freebench has still priority over mere creditors of a deceased husband (*Spyer* v. *Hyatt*, 20 Beav. 621; *Jones* v. *Jones*, *sup.*; but see Williams, R. P. 19th ed. 318, n.).

Dower may be barred by a declaration in a deed;

6. A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

A declaration contained in the deed of conveyance is sufficient under this section, although the deed was not executed by the husband (*Fairley* v. *Tuck*, 27 L. J. Ch. 28; 6 W. R. 9). A declaration in bar of dower in a conveyance of real estate, prior to this act, will not deprive a wife, married after this act, of her dower (*Fry* v. *Noble*, 20 Beav. 598; 7 D. M. & G. 687; *Clarke* v. *Franklin*, 4 K. & J. 266).

or by a declaration in the husband's will.

7. A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Dower shall be subject to restrictions.

8. A right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband duly executed as aforesaid.

Devise of real estate to the widow shall bar her dower.

9. Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Old rule as to when widow was put to election.

According to the law before this act a devise by a husband for the benefit of his wife, who was entitled to dower, did not operate as a satisfaction of such right, unless an intention was expressed, or could be inferred, that the gift by the husband was in lieu of dower, in which case the wife could not claim both, but was put to her election (*Thompson* v. *Burra*, 16 Eq. 601; see the cases collected in Rop. on Husb. and Wife, by Bright, c. 11, s. 3; and see 1 Jarman on Wills, 458 *et seq.*; *Lawrence* v.

3 & 4 Will. 4, c. 105, s. 9.

Lawrence, 2 Vern. 365; Freem. 244; 3 Br. P. C. 484; 1 Swanst. 398, n.; 1 Br. C. C. 292, n. by Belt; *Hall* v. *Hill*, 1 Dru. & War. 102; *Holdich* v. *Holdich*, 2 Y. & C. C. C. 18; *Goodfellow* v. *Goodfellow*, 18 Beav. 356); even where the devise was *only for the life* of the widow (*Chalmers* v. *Storil*, 2 Ves. & B. 224; *Dickson* v. *Robinson*, Jac. R. 503; *Roberts* v. *Smith*, 1 S. & St. 513). For cases where the gift of an annuity did not put the widow to her election, see *Dowson* v. *Bell* (1 Keen, 761); *Harrison* v. *Harrison* (1 Keen, 765); *Wetherell* v. *Wetherell* (10 W. R. 818).

Effect of receiving provision given in lieu of dower.

As to how far a widow was prevented from exercising her election, by receiving a provision given in lieu of dower, see *Parker* v. *Downing* (2 Jur. 28); *Eland* v. *Eland* (2 Jur. 852); *Reynard* v. *Spence* (4 Beav. 103); *Sopwith* v. *Maughan* (30 Beav. 235). As to the right of election in such a case possessed by the next of kin of a widow who had not elected, see *Fytche* v. *Fytche* (7 Eq. 494).

New law.

This act has given the husband complete power to defeat the right of dower, either by deed or will (sects. 4 and 5); and where any interest in the land otherwise liable to dower is given to the wife, in order to preserve the right of dower, an intention to that effect must be declared (sect. 9), although no gift to the wife out of personal estate is to defeat the right of dower, unless an intention to do so be declared by the will (sect. 10).

Where a testator devised his real and personal estate to trustees upon trust for sale and conversion and payment of an annuity out of the income of the proceeds to his widow, she was deprived of her right to dower by sect. 9 (*Rowland* v. *Cuthbertson*, 8 Eq. 466; *Lacey* v. *Hill*, 19 Eq. 346; *Re Thomas*, *Thomas* v. *Howell*, 34 Ch. D. 166).

Intestates' Estates Act, 1890.

Under the Intestates Act, 1890, the estate of an intestate having no issue, which does not exceed 500*l.*, belongs to his widow. If it exceeds 500*l.* she has a charge for 500*l.* This right of the widow is in addition to dower (see sect. 4 of the Act); but the amount of the dower will be subject to abatement in respect thereof (*Re Charriere*, *Duret* v. *Charriere*, 1896, 1 Ch. 912). The right may be barred by a provision in a settlement (*Re Hogan*, *Hogan* v. *Hogan*, 1901, 1 Ir. R. 168).

Bequest of personal estate to the widow shall not bar her dower.

10. No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

A bequest of personalty never operated in bar of dower unless an intention to that effect clearly appeared (*Ayres* v. *Willis*, 1 Ves. sen. 230).

Agreement not to bar dower may be enforced.

11. Provided always, and be it further enacted, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them.

In purchasing an estate free from dower by force of this act, it should be ascertained that the vendor has not bound himself by agreement not to bar his wife's dower (Sugd. V. & P. 548, pl. 24, 11th ed.).

Legacies in bar of dower still entitled to preference.

12. Nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

Preference of

When a general legacy is given in consideration of a debt owing to

the legatee, or of his relinquishing any right or interest, it will be entitled to a preference of payment on the other general legacies (see 1 Rop. on Leg. 372, 2nd ed.; Wms. on Executors, 9th ed., 1218; 1 Fonbl. on Eq. 372). Upon this principle, when a legacy is given to a wife in lieu or satisfaction of dower, she is not, in case the assets should prove deficient, to abate in proportion to the other legatees (*Burridge* v. *Bradyl*, 1 P. Wms. 127; *Blower* v. *Morrett*, 2 Ves. sen. 420; *Davenhill* v. *Fletcher*, Ambl. 244). It seems that the principle of these cases applies only where at the death of the testator the widow is entitled to dower (*Heath* v. *Dendy*, 1 Russ. 545; *Acey* v. *Simpson*, 5 Beav. 35; *Roper* v. *Roper*, 3 Ch. D. 714). A widow, dowable out of her husband's lands, having elected to take an annuity given by his will in lieu of dower, was held to be entitled to priority over the other legacies (*Stahlschmidt* v. *Lett*, 1 Sm. & G. 421; see, however, *Re Greenwood, Greenwood* v. *Greenwood*, 1892, 2 Ch. 295). A legacy to a wife in lieu of dower carries interest only for one year from the death (*Re Bignold, Bignold* v. *Bignold*, 45 Ch. D. 496).

3 & 4 Will. 4, c. 105, s. 12. legacies in lieu of dower.

13. No widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris.

Certain dowers abolished.

An account of this species of dower, which had long become obsolete, will be found in Litt. ss. 38, 39, 40; Co. Litt. 34 a; 2 Bl. Comm. 132, 133.

14. This act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower.

Act not to take effect before the 1st January, 1834.

See *Fry* v. *Noble* (20 Beav. 598; 7 D. M. & G. 687); and *Clarke* v. *Franklin* (4 K. & J. 266).

TENANT BY THE CURTESY.

Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case the husband shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England (Litt. ss. 35, 52; 2 Bl. Comm. 126). And it seems that a husband may become tenant by the curtesy to an estate which his wife has inherited (Williams, Real Prop., App. E. 572, 14th ed.). A husband may be tenant by the curtesy to money which is to be considered as land (*Cunningham* v. *Moody*, 1 Ves. sen. 174). A husband is still entitled to curtesy in real estate as to which his wife, married since 1882, has died intestate (*Hope* v. *Hope*, 1892, 2 Ch. 336).

Four circumstances are requisite for enabling the husband to be tenant by the curtesy:—1st. A legal marriage; but if the marriage be *voidable* only, the husband will be tenant by the curtesy, unless the marriage be actually avoided during the lives of *both* parties (*Hicks* v. *Harris*, Carth. 271; 2 Salk. 548; 4 Mod. 182; see 2 Ves. sen. 245; 7 Rep. 43 b). Requisites of a tenancy by the curtesy.

2nd. The wife must have a seisin in deed of *corporeal* hereditaments

Tenant by the curtesy.

(Co. Litt. 29 a), either before or after issue born (*Id.* 30 a). The receipt of rent reserved on a lease for years, amounts to an actual seisin (*De Grey* v. *Richardson*, 3 Atk. 469); but the husband cannot acquire such a seisin of an estate let on a lease for life before marriage as will entitle him to be tenant by the curtesy, unless the lease determine during the coverture (Co. Litt. 29 a, 32 a). A husband will not be tenant by the curtesy of an estate tail of which the wife was not seised during the coverture (Co. Litt. 29 a). Therefore, where a wife by an ante-nuptial settlement conveyed land of which she was tenant in tail to her husband during her life, he took no estate by the curtesy (*Doe* v. *Rivers*, 7 T. R. 276). But where a father devised land to a daughter, a married woman, who predeceased him, her husband was held entitled to an estate by the curtesy, by virtue of sect. 33 of the Wills Act, 1837 (*Eagar* v. *Furnivall*, 17 Ch. D. 115). Where a wife's real estate did not fall into possession till after the husband's bankruptcy and discharge, it was held that, though there had been issue of the marriage, the husband had not at the time of his bankruptcy any such contingent interest in the estate, as tenant by the curtesy, as would pass to his assignees (*Gibbins* v. *Eyden*, 7 Eq. 371).

As to *incorporeal* hereditaments, a seisin in law is sufficient (Co. Litt. 29 a, and notes by Harg.).

Where there is a devise in fee simple, with an executory devise over, the husband's right to curtesy attaches on the first estate, and is not defeated by its determination. As where there was a devise to trustees in fee, in trust for A. and her heirs, with a devise over, in case she died under the age of twenty-one, and without leaving issue. A. had a child which died, and then herself died under twenty-one; when it was held that her husband was entitled to be tenant by the curtesy (*Buckworth* v. *Thirkel*, 10 Moore, 235, n.; 2 Bing. 447; 3 Bos. & P. 652, n.; 4 Doug. 323; see 2 Sim. 251; 2 Rop. on Husband and Wife, Jac. ed. Addenda, No. 2; Butl. Co. Litt. 241 a, n. (4); *Boothby* v. *Vernon*, 9 Mod. 147). But where an estate was devised to A. and her heirs, but if she died, leaving issue, then to such issue and their heirs, and A. died, leaving issue, her husband was not entitled to be tenant by the curtesy, because the estate of the wife had determined on her death leaving issue, by which the children took as purchasers by force of the gift, and not by descent from her (*Barker* v. *Barker*, 2 Sim. 249).

An estate by the curtesy must arise out of an inheritance, and no such estate can issue out of an estate *pur autre vie* (*Stead* v. *Platt*, 18 Beav. 54).

If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger (*Jones* v. *Davies*, 7 H. & N. 507; 31 L. J. Ex. 116).

As to the effect of the wife's election on the husband's estate by the curtesy, see *Griggs* v. *Gibson* (1 Eq. 685).

3rd. The wife must have issue born alive in her lifetime, and capable of inheriting the estate (Co. Litt. 29 b; 8 Rep. 34 b; Dyer, 25 b; see *Jones* v. *Ricketts*, 31 L. J. Ch. 753; 10 W. R. 576).

4th. The last circumstance required to consummate the right of the husband is the death of the wife (Co. Litt. 20 a).

Copyholds.

Copyholds are not subject to curtesy, except by custom (4 Rep. 22 a, 30 b; *Paulter* v. *Cornhill*, Cro. Eliz. 361), to which resort must be had for determining what portion of the lands of a feme copyholder a husband will take. It is generally an estate for the life of the husband, if there be issue, as at common law; but in gavelkind lands, a moiety only, so long as he continues unmarried, whether there be issue or not (Co. Litt. 30 a, 111 a; 2 Sid. 153; Rob. on Gav. by Wilson, pp. 177—204; Scriven on Cop. 74, 7th ed.; Shelford on Copyholds, pp. 72—74).

Equitable estates.

Equity follows the law in the quality of estates, and therefore a husband will become tenant by the curtesy of an equitable estate of inheritance

Tenant by the curtesy.

of the wife, and this notwithstanding a direction to pay the rents to her separate use (*Morgan* v. *Morgan*, 5 Madd. 408; *Hearle* v. *Greenbank*, 3 Atk. 715; *Pitt* v. *Jackson*, 2 Br. C. C. 51; *Follett* v. *Tyrer*, 14 Sim. 125). So where there was a devise of freeholds to trustees upon trust to stand possessed thereof unto and to the use of a married woman, her heirs and assigns for ever, for her separate use (*Appleton* v. *Rowley*, 8 Eq. 139; *contra*, *Moore* v. *Webster*, 3 Eq. 267). But a disposition by a wife of her separate property, either by deed or will prevents an estate by the curtesy (*Cooper* v. *Macdonald*, 7 Ch. Div. 288).

Where an equitable estate in fee descended on a married woman, the court, by virtue of her equity to a settlement, settled the estate on her during her life, but held that the possible estate, by the curtesy of her husband, could not be interfered with (*Smith* v. *Matthews*, 3 D. F. & J. 139).

Adverse possession, commenced before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust, who retains possession until after the death of the wife, will prevent any title by the curtesy (*Parker* v. *Carter*, 4 Hare, 400).

The husband may be excluded in equity by an express declaration, that, upon the death of the wife, the inheritance shall descend to the heir of the wife, and that the husband shall not be tenant by the curtesy (*Bennett* v. *Davis*, 2 P. Wms. 316); although a *partial* exclusion from the enjoyment of the property will not have that effect (5 Madd. 412).

Powers of tenant by the curtesy.

By the Fines and Recoveries Act, 1833, s. 22 (*ante*, p. 283), an estate by the curtesy qualifies a person to be protector of a settlement. As to the statutory powers of leasing and sale, given to a tenant by the curtesy, see S. E. Act, 1877, sect. 46; S. L. Act, 1882, sect. 58, sub-s. 1 (viii.), *post*.

THE INHERITANCE ACT, 1833.

3 & 4 Will. IV. c. 106.

An Act for the Amendment of the Law of Inheritance.

[29th August, 1833.]

§ 1. *Interpretation*...374.
§ 2. *Root of Descent*...377.
§ 3. *Effect of Devise to Heir, or Limitation to Grantor*...379.
§ 4. *Effect of Limitation to Heirs as Purchasers*...382.
§ 5. *Brothers and Sisters*...382.
§ 6. *Lineal Ancestors*...382.
§§ 7 *and* 8. *Male Line Preferred*...383.
§ 9. *Half Blood*...384.
§ 10. *Attainted Blood*...385.
§ 11. *Commencement of Act*...386.

3 & 4 Will. 4, c. 106, s. 1.

Meaning of words in the act.

"Land."

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows (that is to say), the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency;

"The purchaser."

and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as

other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

3 & 4 Will. 4, c. 106, s. 1.

"Descent."

"Descendants."

"Persons last entitled."

"Assurance."

Number and gender.

The leading objects of this act are:— The objects of the act.

1st. To alter the root of descent by tracing the descent from the person last entitled, unless it be proved that he took by descent (sect. 2).

2nd. To declare that the heir of a testator taking under his will shall be considered as taking as *devisee*, and that, under a limitation to a grantor or his heirs, such person shall be considered as a *purchaser* (sects. 3 and 4).

3rd. To declare that brothers and sisters shall not inherit immediately from each other, but that every descent from them shall be traced through the parent (sect. 5).

4th. To enable the lineal ancestor to inherit from his issue in preference to collateral relations. Thus, on failure of lineal descendants of the last owner, inquiry is to be made for the father, and not for the brother or sister, nephew or niece; for the grandfather, and not for the uncle, aunt, or cousin, ascending in the first instance to the immediate parent, and then again descending to his issue, and in a course of transmission from him; and so, as to every more remote lineal ancestor and his issue, in each degree. But preference is given to the male ancestral line throughout (sects. 6, 7, 8).

5th. To make the half-blood capable of inheriting next after any relation in the same degree of the whole blood and his issue (sect. 9).

6th. To allow descents to be traced through persons who have been attainted (sect. 10).

Report of R. P. Commissioners.

The report of the Commissioners of Real Property will explain the general object of the alterations made by this act; and for further information on the important subject of the law of descents, the reader is referred to 2 Bl. Comm. 200, 240; Bl. on the Law of Descents; Watkins and H. Chitty on Descents; Bac. Abr. and Com. Dig. Descents; Hale's Hist. C. L. 206—248.

State of the law of descents before 3 & 4 W. 4, c. 106.

"The rules which govern the transmission of freehold estates of inheritance at common law, on the decease of an absolute proprietor, in the absence of express disposition by him, are (for the most part) well understood, and appear to be well suited to the habits and feelings of the people.

"By these rules an estate descends to the eldest or only son, or his descendants, if he should be dead, leaving issue, and next to the second and other sons according to priority of birth, and their descendants; in default of sons and their descendants, it descends to daughters in equal shares, if more than one, and to the descendants of any deceased daughters,

3 & 4 Will. 4, c. 106, s. 1.

such descendants taking the share which would have gone to the parent if living.

"When there is no lineal descendant, the estate goes to the eldest or only brother of the whole blood, that is, who was born of the same father and mother as the deceased proprietor, and to his descendants, if he should be dead, leaving issue, and to the other brothers in succession, and their descendants. If there be no brother or descendants of a brother, the sisters of the whole blood succeed in equal shares, and the descendants of deceased sisters, such descendants taking their parent's share as before.

"In case of the failure of brothers and sisters and their descendants, it becomes necessary to inquire whether the deceased proprietor took the estate himself by inheritance, or whether he acquired it immediately by a deed or will, or, in technical language, was a purchaser.

"In the former case, the heir is to be sought in the family from which the estate descended to the deceased proprietor, that is, either on the father's side or on the mother's side, as it happened; in the latter case the law gives the preference to the relations on the paternal side, but if there be none such, then it directs the inheritance to go to the relations on the maternal side.

Exclusion of the ascending line.

"Here occurs a rule, drawn from feudal principles, which is at variance with ordinary feelings and notions, and has been long considered unjust; every lineal ancestor of the deceased proprietor, whether near or remote, is excluded from immediately inheriting. An estate may pass to the younger brother of the father, and upon his death it may pass to the father as his heir; but rather than go at once to the father or the mother of the deceased proprietor, the law directs it to escheat, that is, to fall, as for want of an heir, to the lord of whom the land was holden, that is, in most cases, to the crown. [By the 6th section of the Inheritance Act, 1833, *post*, the lineal ancestors are admitted.]

"In default, however, of lineal and immediate collateral heirs and their descendants, the inheritance is to be traced through the nearest ancestor, that is, the father, unless it be a maternal inheritance, and if it be a maternal inheritance, the mother, and it will pass to his or her eldest brother of the whole blood or his descendants, and the other brothers in succession and their descendants: and if none such, to sisters of the whole blood and their descendants in equal shares as before. In failure of this line, the next more remote ancestor on the same side is made the stock in the same manner, and then the next more remote, and so on; the rule being still observed, that the paternal line has the preference in ascending from the first purchaser, and that up to the first purchaser the inheritance must be traced back through the line of ancestors by which it descended.

Preference of the paternal line.

"If heirs in the pure male line ascending from the first purchaser should fail, then, in compliance with a rule above stated, a female ancestor, or some ancestor of a female ancestor, is to be made the stock; and first, it is a rule that such female ancestor is to be taken on the paternal side, if any such can be found; and therefore the brother of the paternal grandmother (the father's mother) is preferred to the brother of the mother of the deceased proprietor, he having been the first purchaser.

"Here sometimes, though rarely, occurs a point about which a difference of opinion has existed for a long series of years.

Question with respect to female stocks on the paternal side.

"According to some authorities, when a female stock on the paternal side is to be introduced, proximity of blood is to have the preference, and consequently collateral relations of the paternal grandmother are to be preferred to collateral relations of the paternal great grandmother. According to other authorities (and this is the doctrine maintained by Mr. Justice *Blackstone* in his Commentaries), the pedigree is still to be traced up as far as possible on the paternal side through males, and the female ancestor of the remotest male ancestor is to be preferred as a stock to the female ancestor of a less remote male ancestor, the paternal great grandmother to the paternal grandmother.

"On failure of relations on the paternal side of the first purchaser, the maternal line is let in, that is, the mother of the first purchaser is considered as the stock, and her ancestors, first on the paternal and then on the maternal side, as before. It is to be observed, that on failure of heirs of the last proprietor on the side af the first purchaser, the estate does not pass to the heirs of the last proprietor on the other side, but escheats as before, so that an estate descended to the deceased proprietor from his mother can never pass to his collateral relations on the father's side. 3 & 4 Will. 4, c. 106, s. 1. Heirs must be of the blood of the first purchaser.

"It has been laid down, in the above statement, that collateral relations, in order to be let in to inherit, must be of the whole blood of the person from or through whom they are to derive their claim. Exclusion of the half-blood.

"Thus a brother of the deceased proprietor by the same father, but a different mother, cannot inherit to the deceased proprietor, whether he took by purchase or descent. The estate will rather escheat, and the same is the case with an uncle, half-brother of the father, and so on. This rule, like that which excludes the lineal ancestor, has long been felt to rest on no sound principle, and to be hard in its operation."

Equitable estates are subject to the same rules of descent as *legal* (2 P. Wms. 668; 1 Rep. 121 b; 4 Rep. 22; 2 Eden, 258; 1 Sand. Uses, 217, 3rd ed.; *Trash* v. *Wood*, 4 M. & C. 324). Equitable estates.

2. In every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purpose of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same. Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof (Law of Property Amendment Act, 1859, s. 19). 22 & 23 Vict. c. 35, s. 19.

The last preceding section shall be read as part of the 3 & 4 Will. 4, c. 106 (*Ib.* s. 20).

The law before this act was as follows:—On the death of A. entitled to a fee simple interest in land which he had acquired by purchase (that is, by conveyance or devise—see for an example of a purchaser acquiring by devise, *Doe* v. *Thomas*, 3 M. & Gr. 815) descent was traced from him whether he had obtained actual seisin or not. But where A. had himself acquired the land by descent, the rule was that in the case of corporeal hereditaments in possession, descent was traced from him if he had obtained actual seisin: otherwise it was traced from the next preceding ancestor who had obtained seisin: if none, from the last purchaser. In the case of corporeal hereditaments held for an estate in remainder or reversion, and also in the case of incorporeal hereditaments, acts of ownership were treated as equivalent to actual seisin so as to constitute A. the Law before act.

3 & 4 Will. 4, c. 106, s. 2.

stock of descent (Tud. L. C. Conv. 4th ed. 179; 1 R. P. Report, 15; 1 Hayes, Conv. 5th ed. 312).

Effect of this section in the case of purchase from an heir.

A vendor making title as heir is not bound to produce affirmative evidence is his possession that the ancestor from whom he traces descent took as purchaser, but may rely on the statutory presumption contained in this section until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase (*Dorling* v. *Claydon*, 1 H. & M. 402). Where an action to try the validity of a will was compromised on the terms that the rights of the plaintiff to certain lands should be the same as if there had been an intestacy, it was held that she took that land by descent, not by purchase (*Blake* v. *Hynes*, 11 L. R. Ir. 284).

Estates in remainder or reversion, or by executory devise.

The descent under the present act of an estate in remainder or reversion, or by executory devise, is analogous to the descent of an estate taken by descent from a purchasing ancestor (*Ingilby* v. *Amcotts*, 21 Beav. 585).

For the purpose of estoppel against a tenant the heir of the landlord may be his privy in blood though the heirship is ascertained under this section by tracing descent from an ancestor of the landlord (*Weeks* v. *Birch*, 69 L. T. 759).

Whole share of coparcener dying intestate, leaving a son, descends on the son.

Where a coparcener dies intestate leaving a son, the whole of her share descends on her son (*Cooper* v. *France*, 19 L. J. Ch. 315); and the same principle applies in the case of her leaving more remote descendants (*Paterson* v. *Mills*, 19 L. J. Ch. 310; *Re Matson, James* v. *Dickinson*, 1897, 2 Ch. 509). Where land was limited to the "right heirs" of A., who were females, they took as joint tenants and not coparceners, and there was no right of representation (*Berens* v. *Fellowes*, 56 L. T. 391; 35 W. R. 350; *Re Baker, Pursey* v. *Holloway*, 79 L. T. 343). See *Owens* v. *Gibbons*, 1902, 1 Ch. 636. See the previous discussions of descent among coparceners in 5 Jur. 641, 763; 23 Law Mag. 279; 1 Hayes's Convey. 314, 5th ed; 1 Jarm. & Byth. Convey. by Sweet, 139, 140; 10 Jur. 71—75, 112, 132, 160, 173.

Customary descents.

The rule as to tracing the descent from the purchaser applies where there is a customary descent (sect. 1, *ante*). If the custom is found applicable by reason of the parties being within the requisite degree of consanguinity, the customary mode of descent is to be applied, and the descent traced according to the directions of the act. If the parties are not within the requisite degree, the directions of the act are to be followed, the descent being traced according to common law (*per Crompton*, J.; *Muggleton* v. *Barnett*, 2 H. & N. 653; *Re Smart, Smart* v. *Smart*, 18 Ch. D. 165; see Williams, Real Prop. App. A.).

Lands of gavelkind tenure, chiefly found in Kent, descend to all sons in equal shares, and in default of sons to all daughters (Robinson on Gavelkind, 5th ed. p. 44), and the custom extends to collaterals (*Ib.* p. 92; see *Crump* v. *Norwood*, 7 Taunt. 362). Lands of borough English tenure descend to the youngest son (Robins. Gavelkind, 236). In the case of the descent of lands of gavelkind or borough English tenure, the *jus representationis* attaches to the custom (*Hook* v. *Hook*, 1 H. & M. 43; *Clements* v. *Scudamore*, 1 P. Wms. 65). In the case of other customary descents, however, where the express terms of the custom are silent, the descent will be in accordance with the common law (*Rider* v. *Wood*, 1 K. & J. 644; *Re Smart, Smart* v. *Smart*, 18 Ch. D. 165; see *Locke* v. *Colman*, 1 My. & Cr. 423).

When the custom was that copyholds for the first descent after a surrender descend to the eldest son, and if no surrender to the youngest, it was held that the word "descent" was not used in its strict legal sense, but meant "a single step in the scale of genealogy" (*Bickley* v. *Bickley*, 4 Eq. 216). See further, Scriven, p. 167 *et seq.*, 7th ed.

Right of posthumous heir.

Although lands have actually descended in the first instance to the person who was heir of the party last seised at the time of his decease, yet, if a nearer heir is afterwards born, property will shift to the nearest heir who subsequently comes into being (see *Rider* v. *Wood*, 1 K. & J. 644; Cru. Dig. Descent, Ch. III. s. 14). A posthumous heir is entitled to the

rents of a descended estate only from the date of his birth, and the qualified heir is entitled to the rents which accrue before the birth of the posthumous heir, whether actually received before that time or not (*Richards* v. *Richards*, Johns. 754; see *Re Mowlen*, 18 Eq. 9; see, however, *Goodale* v. *Gawthorne*, 2 Sm. & Giff. 375). 3 & 4 Will. 4, c. 106, s. 2.

For the law before Law of Prop. Amdt. Act, 1859, see *Doe* v. *Blackburn* (1 Mood. & Rob. 547, *Parke*, B.).

3. That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent (*a*); and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof (*b*). Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

This section of the act is in direct contravention of two old-established rules of law, and renders it necessary to bear in mind the distinction between *descent* and *purchase*, the two modes of acquiring property. A title by *descent* is vested in a man by the single operation of law, and by *purchase* by his own act or agreement (Co. Litt. 18 b; 2 Bl. Comm. 200, 201). The latter is thus defined by Littleton, s. 12: "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors or cousins, but by his own deed." Lord *Coke* states that a purchaser is a law term, and imports any estate which is *not* cast upon a man by act of law, (as descent or escheat,) but which he takes or accepts by conveyance for money or other consideration, *vel aliâ quâvis fortunâ*, or freely by gift (Co. Litt. 18 a). The difference between the acquisition of an estate by descent and by purchase consists principally in two points: 1st. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2nd. An estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent (Cruise's Dig., tit. 30, s. 4). Descent and purchase.

(*a*) It was a positive rule of law, that a man could not make his right heirs take by purchase, either by conveyance at common law, or by a limitation to uses, or by devise (*Counden and Clerk's case*, Hob. 30; *Pybus* v. *Mitford*, 1 Ventr. 372; Co. Litt. 22 b). The same rule applied to equitable as legal estates (Watk. Desc. 169), and to copyholds as to freeholds (*Roe* d. *Noden* v. *Griffith*, 4 Burr. 1952; *Thrustout* v. *Cunningham*, 2 Bl. R. 1048; Fearne, 68). Therefore, if a person devised his lands to his heir at law in fee, it was inoperative, and the heir took by descent, as his better title (*Reading* v. *Royston*, 1 Salk. 242; *S. P.*, 2 Leon. 11; Dyer, 124 a; Plowd. 545; 2 Ves. & B. 190; *Foxwell* v. *Van Grutten*, 1897, A. C. 688); and this notwithstanding the will imposed some pecuniary charges on the estate (*Clarke* v. *Smith*, Com. 72; *Allen* v. *Heber*, 1 Bl. R. 22; *Emerson* v. *Inchbird*, 1 Ld. Raym. 728; *Plunket* v. *Penson*, 2 Atk. 292; *Hedger* v. *Rowe*, 3 Lev. 127; see Wms. Saund. 8 d; *Chaplin* v. *Leroux*, 5 M. & S. 14). So under a devise to one for life, or in tail, with remainder to the right heirs of the testator, immediately upon his death the heir took the reversion by descent, and not under the will (Hob. 30; 10 Rep. 41; Devise to heir. Law before this act.

3 & 4 Will. 4, c. 106, s. 3.

Ventr. 372; *O'Keefe* v. *Jones*, 13 Ves. 413). So under a devise to the heir at law in fee, with an executory devise over in case he did not attain the age of twenty-one years, the heir took by descent, and not by purchase (*Doe* v. *Timins*, 1 B. & Ald. 530; see 1 Jarman on Wills, 5th ed., 74; *Langley* v. *Sneyd*, 7 Moore, 165; *Manbridge* v. *Plummer*, 2 M. & K. 93). The rule did not apply in the case of money directed to be laid out in the purchase of land (*Robinson* v. *Knight*, 2 Eden, 155). And where a different estate was devised than would have descended to the heir, the disposition by will prevailed (*Scott* v. *Scott*, Amb. 383; *Wood* v. *Skelton*, 6 Sim. 183; see *Buchanan* v. *Harrison*, 1 J. & H. 662). As where the estate was devised to the heir in tail (Plowd. 545). So where a man having issue two daughters, who were his heirs, devised to them and their heirs, they took under the will, for by law they would have taken as coparceners, but by the will the estate was given to them as joint tenants (Cro. Eliz. 431; Com. R. 123; 2 Ld. Raym. 829; *Swaine* v. *Burton*, 15 Ves. 371).

Effect of this section upon devise to heir.

Under this section an heir to whom lands are devised by the ancestor takes them as devisee to all purposes; and therefore the pecuniary legatees are not entitled to have the assets marshalled as against him (*Strickland* v. *Strickland*, 10 Sim. 374). And as between him and the devisees of other parts of the testator's estates, the estates devised to the former are not to be applied in payment of the debts in priority to the estates devised to the latter (*Biederman* v. *Seymour*, 3 Beav. 368).

It does not seem certain whether this section applies to the case of a devise of copyholds to an heir who disclaims all interest under the will, and enters as heir of the testator (*Bickley* v. *Bickley*, 4 Eq. 216).

Devise to "right heirs."

It has been held that the section applies to a devise to "right heirs" (*Owen* v. *Gibbons*, 1902, 1 Ch. 636). So where a testator devised lands to his own right heirs who were females, they took as joint tenants and not as coparceners (*Re Baker, Pursey* v. *Holloway*, 79 L. T. 343; see *Swaine* v. *Burton*, 15 Ves. 371; *Berens* v. *Fellowes*, 56 L. T. 391; *Owen* v. *Gibbons*, *sup.*).

Construction of devises to "heir."

Under a devise of customary lands to the testator's heir, his heir-at-law took, and not his customary heir (*Thorp* v. *Owen*, 2 Sm. & G. 90; *Polly* v. *Polly*, 31 Beav. 363; *Garland* v. *Beverley*, 9 Ch. D. 213; see *Sladen* v. *Sladen*, 2 J. & H. 369).

A devise of the whole fee simple in the testator's residuary real estate to trustees, in trust to convey to such person as should answer the description of the testator's heir-at-law, broke the descent of real estate which had descended to the testator *ex parte maternâ*, and the trustees were bound to convey to the common law heir (*Davis* v. *Kirk*, 2 K. & J. 391; compare the grant in *Heywood* v. *Heywood*, 34 Beav. 317).

Assurance to heirs. Law before act.

(*b*) In order to understand this section of the act, it is necessary to observe that when a person has an interest in lands and grants a portion of that interest, or, in other terms, a less estate than he has in himself, the possession of these lands will, on the determination of the granted interest or estate, return or revert to the grantor (Com. Dig. Estate (B. 10, 11, 12, 31); 2 Bl. Com. 175; Co. Litt. 22 b; Plowd. 151; Watk. on Conv. 120). An estate in *reversion* is therefore the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted by him (Co. Litt. 22), or the returning of the land to the grantor or his heirs after the grant is over (*Ib.* 142). A reversion is never created by deed or writing, but arises from construction of law, whereas a remainder can only be limited by deed or some other assurance. It was a rule before this act that a grantor could not enable his heir general to take a remainder as purchaser, under a limitation to his *heirs*; but where the limitation is to the right heirs of the grantor, the use so limited was construed to be the old use, and was to be executed in him as the *reversion in fee*, and not as a remainder (1 Rep. 129 b, 130; *Godolphin* v. *Abingdon*, 2 Atk. 57). As where A. granted land to B. with remainder to his own heirs, he remained, under the old law, seised of the reversion as part of his former estate, which descended as if no such grant had been made (*Wills* v. *Palmer*, Bl. R. 687; 5 Burr. 2615; *Read* v. *Morpeth*, Cro.

Eliz. 321; Moore, 284; *Bingham's case*, 2 Rep. 91; *Cholmondeley* v. *Clinton*, 2 Mer. 173; 2 B. & Ald. 625; 2 Jac. & W. 1; 4 Bligh, N. S. 1; *Lock* v. *Southwood*, 1 M. & C. 411). 3 & 4 Will. 4, c. 106, s 3.

Under such a grant A. now, by virtue of the present section, takes himself as purchaser. "In fact A. takes under his own assurance as if the estate were to him and his heirs of the gift of a stranger. And where he creates a particular estate, limiting the expectant fee to himself and his heirs, or without naming himself as an object to his heirs, he takes the fee. for the purposes of descent at least, not as a reversioner, but as a remainderman" (Hayes, Conv. 5th ed. 317). Effect of section on assurance to heirs.

Where a lady seised in fee *ex parte maternâ*, by a settlement in 1860 limited the land (ultimately) to the person who would on her decease have become entitled "in case she had died intestate and without having been married," her heir *ex parte maternâ* took, the section not applying (*Heywood* v. *Heywood*, 34 Beav. 317).

If, before this act, a man, seised as heir on his mother's side, made a feoffment in fee to the use of himself and his heirs, the use, being a thing in confidence, would have followed the nature of the lands, and would have descended to the heir on the part of the mother (Co. Litt. 13 a; *Godbold* v. *Freestone*, 3 Lev. 406; *Nanson* v. *Barnes*, 7 Eq. 250; *Heywood* v. *Heywood*, 34 Beav. 317); and it was the same if the assurance had been by fine and recovery (*Abbot* v. *Burton*, Salk. 590; see *Stringer* v. *New*, 9 Mod. 363). But the rule held only where the feoffor or settlor took by descent, and not by purchase (*Martin* v. *Strachan*, Str. 1179, Nolan's ed.; 1 Wils. 66; 6 Br. P. C. 319; 5 Term Rep. 104). As to copyholds, see *Roe* v. *Baldwin* (5 Term Rep. 104). A deed of partition between parceners did not break the descent (Com. Dig. Parcener, C. 15); nor a deed of partition between one parcener and a purchaser from another (*Doe* v. *Dixon*, 5 Ad. & Ell. 834). Cases before the act as to alteration of line of descent.

If a tenant in tail by purchase, with the reversion in fee *ex parte maternâ*, levied a fine, the land descended to his maternal heirs (*Symonds* v. *Cudmore*, Salk. 338; 1 Show. 370); for the tenant in tail, by levying a fine, acquired a base fee, which merged in the reversion, of which the tenant was seised *ex parte maternâ*, and descended in the same line. Where a man had an *equitable* estate *ex parte paternâ* or *ex parte maternâ*, and afterwards, by descent or otherwise, acquired the *legal* estate, the equitable estate merged in the legal, and the descent was according to the legal title (*Goodright* v. *Wells*, Dougl. 771, 2nd ed.; *Wade* v. *Paget*, 1 Br. C. C. 363; *Selby* v. *Alston*, 3 Ves. 339; *Lyster* v. *Mahony*, 1 Drury & Warren, 243; *Re Douglas*, *Wood* v. *Douglas*, 28 Ch. D. 327; and see *Goodright* v. *Searle*, 2 Wils. 29; *Goodtitle* v. *White*, 1 New Rep. 383; 15 East, 174; 3 Prest. Conv. 325, 340). But where an infant died seised of an equitable estate which had descended *ex parte maternâ*, the descent was not broken, although a conveyance of the legal estate (which the infant was incapable of calling for) might have broken it (*Langley* v. *Sneyd*, 1 Sim. & Stu. 45).

Where a settlor entitled *ex parte maternâ* limited lands (by an ultimate limitation in a settlement), to the right heirs of her mother, whose heir-at-law she then was, the estate descended on her intestacy to her own heir *ex parte maternâ* (*Moore* v. *Simpkin*, 31 Ch. D. 95).

In connection with limitations to heirs reference should be made to the well-known rule, called the rule in *Shelley's case* (1 Rep. 93; see *Parker* v. *Clarke*, 3 Sm. & G. 161, 165). By this rule it was established, that where the ancestor, by any gift or conveyance, takes an estate for life, and in the same conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not of purchase. Where the subsequent limitation to the heirs follows immediately the estate for life, it then becomes executed in the ancestor, forming, by its union with the estate for life, one estate of inheritance in possession; but where such limitation is mediate and another estate intervenes, it is then a remainder vested in the ancestor who takes the freehold, not to be executed until after the Limitation to heirs in an assurance. Rule in *Shelley's case*.

3 & 4 Will. 4, c. 106, s. 3.

determination of the preceding mesne estate (1 B. & C. 243). For the decisions on this rule, see Tudor's L. C. Conv. 4th ed. 388; Fearne, Cont. Rem. 10th ed. pp. 28—201; *Foxwell* v. *Van Grutten*, 1897, A. C. 658; *Re Youman*, 1901, 1 Ch. 720.

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

4. When any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

Before this act, under a limitation to special heirs of a person, to whom no estate was given, the descent would have been the same as if the estate had descended from him (see Fearne, Cont. Rem. 80). Thus, a limitation to the heirs male of the body of B. (where no estate is in or given to B. himself), not only gives such heir an estate in tail male, but such an estate tail as will, on failure of his issue male, go in succession to the other heirs male of the body of B., in the same course as if the estate tail had descended from B. himself (*Mandeville's case*, Co. Litt. 26; see *Vernon* v. *Wright*, 2 Drew. 439; *Southcot* v. *Stowell*, 1 Mod. 226, 237; 2 Mod. 207, 211; *Wills* v. *Palmer*, 5 Burr. 2615; *Wrightson* v. *Macauley*, 14 M. & W. 214; *Winter* v. *Perrott*, 9 Cl. & Fin. 606). But where the limitation was to the heirs general of a person, the rule in *Mandeville's case* did not apply (*Moore* v. *Simkin*, 31 Ch. D. 95).

The above section lays down a rule of descent applicable as well to limitations to heirs general as to limitations to heirs special.

A gift to the heirs of a person to whom no estate is given is a gift to them as *personæ designatæ*, and they take as joint tenants (*Berens* v. *Fellowes*, 56 L. T. 391; 35 W. R. 350).

Brothers, &c., shall trace descent through their parent.

5. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

Before this act the descent between brothers and sisters was considered as *immediate*; and in making out their title *to each other*, the common father need not have been named, though living, but the descent between them was exactly the same as if he had been dead (Watk. Desc. 111, n.; H. Chitty on Desc. 64, 354; *Collingwood* v. *Pace*, 1 Ventr. 413; Bridg. by Bann. 410). So under the old law, where A. had been attainted of treason, the descendants of one of A.'s children could inherit property from the descendants of another notwithstanding A.'s attainder (*Kynnaird* v. *Leslie*, L. R. 1 C. P. 389). As to the doctrine of *possessio fratris*, see note to sect. 9, *post*, p. 384.

Lineal ancestor may be heir in preference to

6. Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his

heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

3 & 4 Will. 4, c. 106. s. 6. collateral persons claiming through him.

Old rule excluding the ascending line.

It was an old maxim of law that an inheritance might lineally descend but not ascend (3 Rep. 40a). The parent, therefore, could never take immediately by descent from the child, but the land would rather have escheated (*Cowper* v. *Cowper*, 2 P. Wms. 666). Yet a father or mother before this act might have inherited as *cousin* to their child; as where a son died seised in fee of land without issue, brother, or sister, but leaving two cousins his heirs-at-law, one of whom was his own mother (*Eastwood* v. *Vincke*, 2 P. Wms. 613). So an uncle might have had land as heir though the father was alive (Litt. s. 3); but if in that case the uncle acquired actual seisin and died without issue, the father might have had the land as heir to the uncle (Crig. de Jur. Feud. 234; Wright's Ten. 182, n. (z)). So the father might have taken by *purchase* as the nearest of blood to his son, as if a lease were made to the son for life with remainder to his next of blood in fee (Co. Litt. 10 b; 3 Rep. 40 a).

By the present section lineal ancestors are admitted (see Real Property Report, *ante*, p. 376).

Where a son, legitimate in Scotland by the subsequent marriage of his parents, died intestate as to lands in England of which he was seised in fee and without issue, the father did not inherit under this section (*Re Don*, 4 Drew. 194). Compare the rule laid down in *Doe* v. *Vardill*, 7 Cl. & F. 895, that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit land in England. And see *Re Grey, Stamford* v. *Grey*, 1892, 3 Ch. 88; and *Shaw* v. *Gould*, L. R. 3 H. L. 55.

The male line to be preferred.

7. And be it further enacted and declared, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

The true meaning of the section is that where, after due and sufficient investigation, there is no reasonable possibility of ascertaining that there are descendants from the paternal ancestors, then the descendants of the maternal ancestors must be sought for (*Greaves* v. *Greenwood*, 2 Ex. Div. 297). As to what is sufficient evidence of the extinction of superior lines of descent, see *Ib.*; *Lyell* v. *Kennedy* (18 Q. B. Div. 811); *Rawlinson* v. *Miller* (1 Ch. D. 52); *Jeakes* v. *White* (6 Exch. 880); and the note, *ante*, p. 155.

The mother of more remote male ancestor to be preferred to the

8. And be it further enacted and declared, that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her

3 & 4 Will. 4, c. 106, s. 8.

mother of the less remote male ancestor.

descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants.

This statute has declared the law to be in accordance with the position laid down by Blackstone (2 Comm. 238; *Davies* v. *Lowndes*, 5 Bing. N. C. 169). It was decided, that where a person seised of an estate *ex parte maternâ* died without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor could inherit, however nearly related to the *propositus ex parte maternâ* (*Hawkins* v. *Shewen*, 1 Sim. & Stu. 257; see Hale's Hist. C. L. by Runn. 2nd vol. 120). As to what is sufficient evidence of the extinction of a superior line of descent, see *Jeakes* v. *White* (6 Exch. 880), and the cases quoted under sect. 7.

Half blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

9. Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be the next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

Exceptions to the rule excluding the half blood.

The old rule of law which excluded the half blood from taking by descent, was subject to some exceptions and qualifications, to which it will be proper to advert. As the descent from the parent to daughters was *immediate*, daughters by different venters might have inherited together as one heir to their common parent, although they could not inherit to each other (Harg. Co. Litt. 14 a, n. (5)). And the daughters by several husbands succeed in the same manner to the inheritance of their mother (see Watk. on Desc. 159, n. (b); H. Chitty on Desc. 78, 79). So, also, in the case of *estates tail*, the half blood coming within the description of the entail might inherit as effectually as the whole blood, for they do not claim as heirs of the person last seised, but of the original donee (Plowd. 57; 3 Rep. 42; *Goodtitle* v. *Newman*, 3 Wils. 526). In *titles of honour*, also, half blood is no impediment to the descent; but a title can only be transmitted to those who are descended from the first person ennobled, or the person who is made the stock of descent (Co. Litt. 15 b; 3 Rep. 42 a; Cruise's Dig. tit. 26, c. 3, ss. 8—11).

A brother or sister of the half blood is entitled to share the personal estate of an intestate equally with one of the whole blood, inasmuch as they are both equally near of kin to the intestate (1 Jac. 2, c. 17, s. 7; *Jessop* v. *Watson*, 1 M. & K. 665; *Burnett* v. *Mann*, 1 Ves. sen. 156).

Seisin of ancestor.

Before the above act, a man in order to qualify himself to take by descent, must have shown that he was heir of the person last seised of the actual freehold and inheritance (Co. Litt. 11 b, 15 d; 3 Bos. & P. 648;

Effect of rule

Jenkins v. *Pritchard*, 2 Wils. 45). Thus if A. died leaving a son and

daughter by one venter, and a son by the first venter became actually seised and dies, his sister was heir to him; but if he died without having acquired the seisin, the son by the second venter would have taken as immediate heir of his father, to the exclusion of the sister (Co. Litt. 15; Sir W. Jones, 561; Co. Litt. 15 a; 3 Wils. 521; 7 T. R. 398, 399; *Id.* 213; *Bushby* v. *Dixon*, 3 B. & C. 304; 3 T. R. 211; Jenk. 242; *Goodtitle* v. *Newman*, 3 Wils. 516; *Doe* v. *Keen*, 7 T. R. 386; *Cunningham* v. *Moody*, 1 Ves. sen. 174; *Buchanan* v. *Harrison*, 1 J. & H. 662; *Doe* v. *Hutton*, 3 Bos. & P. 643; *Goodtitle* v. *White*, 15 East, 174; 2 Bos. & P. N. R. 388; Harg. Co. Litt. 14 a, n. 6).

3 & 4 Will. 4, c. 106, s. 9. requiring seisin of ancestor upon descent to half blood. Rule of *possessio fratris*.

The descent of descendible freeholds to heirs was governed by the same rules as prevailed in cases of estates of inheritance (*Gravenor* v. *Brooke*, Poph. 32; *Long* v. *Myles*, Fox & Smith, Ir. Rep. 1; *Pierson* v. *Shore*, 1 Atk. 480). And the rule of *possessio fratris* was applicable to copyholds (4 Rep. 21).

Descendible freeholds.

10. That when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four.

After the death of a person attainted, his descendants may inherit.

Persons attainted of high treason or felony were incapable of inheriting lands or of transmitting them by descent to their posterity (Co. Litt. 8 a; Cro. Car. 566). Another consequence of such an attainder was the corruption and extinction of all hereditary blood in the person attainted, by which he was rendered not only incapable of himself inheriting or of transmitting his own property by heirship, but he also obstructed the descent of lands to his posterity, in all cases where they were obliged to derive their title through him from any remote ancestor (11 Rep. 1 b; Co. Litt. 391 b; see Yorke's Law of Forfeiture, 72, 4th ed.; 2 Blac. Com. 251; 4 *Ib.* 388; Bl. Considerations on the Law of Forfeiture for High Treason; Bac. Abr. Forfeiture; Burn's J. Forfeiture). But as between two sons of an attainted father, there was nothing to hinder one brother from inheriting to the other (1 Ventr. 413; Yorke's Law of Forfeiture, 83, 4th ed.; *Kynniard* v. *Leslie*, L. R. 1 C. P. 389).

The effect of attainder.

Freeholds of inheritance, which at the time of the death of a *felo de se* belonged to him, did not escheat to the Crown, but passed to his heir-at-law (*Norris* v. *Chambers*, 29 Beav. 258; 3 Co. Inst. 55; 2 Bl. Com. 386; 2 Bac. Abr. tit. Felo de se; 4 Vin. Abr. 268, tit. Blood, corrupted, A. pl. 2; *Haley* v. *Petit*, Plowd. 253, 261; 7 Jur. N. S. 689). In the case of a fee tail, notwithstanding the forfeiture of lands entailed by an attainder, yet the blood of the attainted person was not corrupted so as to affect the issue in tail, for they claimed *per formam doni* (*Dowtie's case*, 3 Rep. 9 b; Yorke's Law of Forfeiture, 81, 82; Br. Descent, pl. 1; Bro. Forfeiture, pl. 37; *Mantell* v. *Mantell*, Cro. Eliz. 28; *Sheffield* v. *Ratcliffe*, Godb. 305; Hob. 347).

If a copyholder was attainted of treason or felony, his copyhold was immediately forfeited to the lord (Hawk. P. C. b. 2, c. 49, s. 7). But by the custom of some manors, the son might inherit from his father, notwithstanding the attainder of the latter (1 Watk. on Cop. 326; Scriven, 181).

By the Forfeiture Act, 1870, s. 1, it is enacted that, from and after the 4th July, 1870, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or

Statutes as to attainder. 33 & 34 Vict. c. 23.

3 & 4 Will. 4, c. 106, s. 10.

corruption of blood or any forfeiture or escheat. But nothing in the act is to affect the law of forfeiture consequent upon outlawry (see also 54 Geo. 3, c. 145; Hansard, Parl. Debates, vol. 27, pp. 527—538; Trustee Act, 1893, s. 48, *post*).

Act not to extend to any descent before January, 1834.

11. This act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four.

Limitations made before 1st January, 1834, to the heirs of a person then living, shall take effect as if this act had not been made.

12. Where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four.

PAYMENT OF DEBTS OUT OF REAL ESTATES.

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I.—THE DEBTS RECOVERY ACT, 1830.

11 GEO. IV. & 1 WILL. IV. c. 47.

An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estates. [16th July, 1830.]

11 Geo. 4 & 1 Will. 4, c. 47, s. 1.

WHEREAS an act was passed in the third and fourth years of King William and Queen Mary, intituled "An Act for the Relief of Creditors against fraudulent Devises," which was made perpetual by an act passed in the sixth and seventh years of King William the Third, intituled "An Act for continuing several Laws therein mentioned:" and whereas an act was passed by the Parliament of Ireland, in the fourth year of Queen Anne, intituled "An Act for Relief of Creditors against fraudulent Devises:" and whereas an act was passed in the forty-seventh year of his late Majesty King George the Third, intituled "An Act for more effectually securing the Payment of Debts of Traders:" and whereas it is expedient that the provisions of the said recited acts should be enlarged, and that the said recited acts should be repealed, in order that all the provisions relating to this matter should be consolidated in one act; be it therefore enacted, that the said several recited acts shall be and the same are hereby repealed, but so as not to affect any of the provisions and remedies of the said acts, or any of them, to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments or other real estate of any person or persons who died before the passing of this act.

3 & 4 Will. & M. c. 14.
6 & 7 Will. 3, c. 14.
4 Anne, c. 5 (I).
47 Geo. 3, c. 74.
Recited acts repealed.

By the common law, freehold lands of inheritance which descended to the heir were assets for the payment of the ancestor's debts by specialty,

Old rule as to liability of lands to debts.

11 Geo. 4 & 1 Will. 4, c. 47, s. 1.

as by bond or covenant in which the heirs were named (1 Str. 665; 4 East, 492). But the ancestor, by disposing of the land by will, could deprive his creditors of that means of payment, as the devisee was neither at law (4 East, 491; 7 East, 135; 2 Atk. 292, 432; 2 Anstr. 515), nor in equity (2 Atk. 432), liable to the payment of the testator's debts in respect of the land devised. The heir-at-law also to whom the land descended might have defeated the creditor of his ancestor by aliening the land before suit by the creditors (1 P. Wms. 777), although in equity he appears to have been responsible for the value of the land sold (*Id.* 777, 431; see 1 Fonbl. Eq. 283). To obviate those mischiefs the statute 3 & 4 Will. & Mary, c. 14 (made perpetual by 6 & 7 Will. 3, c. 14, and extended to Ireland by 4 Anne, c. 5), was passed. And after that statute the course was to sue the heir, as being the person bound by and named in the specialty, and the devisee, because he had the land (*Re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 619). The statute 3 & 4 Will. & Mary was repealed and re-enacted by the above act with additional provisions to supply some omissions in the former statute. For the old law as to proceedings against the heir upon the bond of his ancestor, as to alienation of assets by the heir, and the statutes of fraudulent devises, see further the notes to *Jeffreson* v. *Morton* (2 Wms. Saund. 12, ed. 1871).

Fraudulent conveyances.

It was not necessary under 3 & 4 Will. & Mary, c. 14, as it is under the act 13 Eliz. c. 5, against fraudulent conveyances, that the devise should have been made with the intent to delay, hinder, or defraud creditors (*Coope* v. *Cresswell*, 2 Eq. 106). Under 13 Eliz. c. 5, fraudulent conveyances may be set aside by creditors after the death of the debtor (*Lush* v. *Wilkinson*, 5 Ves. 384). The action should be brought by the plaintiff on behalf of himself and all other unsatisfied creditors of the deceased (*French* v. *French*, 6 D. M. & G. 95; *Richardson* v. *Smallwood*, Jac. 552). And it seems that the plaintiff need not have obtained judgment for his debt (*Reese River Co.* v. *Atwell*, 7 Eq. 347). See the forms of order, Seton, 6th ed., 2345.

For remedying frauds committed on creditors by wills.

2. And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having by bonds, covenants or other specialties, bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, that all wills and testamentary limitations, dispositions or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements or hereditaments, or any rent, profit, term or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion or remainder, or have power to dispose of (*a*) the same by his, her or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs,

successors, executors, administrators and assigns, and every of them with whom the person or persons making any such wills or testaments, limitations, dispositions or appointments, shall have entered into any bond, covenant or other specialty, binding his, her, or their heirs) to be fraudulent and clearly, absolutely and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

11 Geo. 4 & 1 Will. 4, c. 47, s. 2.

(*a*) The words "power to dispose of" were held to include leasehold estates *pur autre vie*, and therefore, that a devise of them was void against creditors (*Westfaling* v. *Westfaling*, 3 Atk. 460, 465). Sect. 2 of 3 & 4 Will. & Mary, c. 14, applied to devises of every description of estate legal or equitable. And by sect. 3, the devisee of an equitable estate seems to be made liable to an action of debt by the creditors of the devisor (*Coope* v. *Cresswell*, 2 Ch. 121).

Under sect. 59 of Conv. Act, 1881 (*post*), obligations under seal executed since 31st December, 1881, operate in the absence of a contrary intention to bind heirs and real estate, although not so expressed.

3. And, for the means that such creditors may be enabled to recover upon such bonds, covenants and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt or covenant (*b*) upon the said bonds, covenants and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, *or the devisee or devisees of such first-mentioned devisee or devisees* (*c*) jointly, by virtue of this act (*d*); and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended (*e*).

Enabling creditors to recover upon bonds, &c.

(*b*) By stat. 3 & 4 W. & M. c. 14, s. 3, the remedy was confined to actions of *debt*; and it was decided that an action of *covenant* would not lie against a devisee to recover damages for a breach of covenant entered into by the devisor (*Wilson* v. *Knubley*, 7 East, 128). It has been held however that damages recovered in an action of covenant, brought in respect of breaches of covenant, happening after death of the testator, were a debt payable out of his real estate under a charge of debts in his will (*Morse* v. *Tucker*, 5 Hare, 79). The statute 3 & 4 W. & M. c. 14, only applied where debt in the ordinary sense of the word existed between the parties in the life-time of both (*Farley* v. *Briant*, 3 Ad. & El. 839). Liquidated damages for breach of covenant occurring after the covenantor's death, where the liability during his life was contingent, were not such a debt (*Ib.*; see *Morse* v. *Tucker*, 5 Hare, 83). But money due under an absolute covenant for the payment of sums certain, was such a debt even though not accruing until after the covenantor's death (*Jenkins* v. *Briant*, 6 Sim. 603). So, also, where a testator had covenanted in his son's marriage settlement for the payment of 3,000*l.* during his life, or three months after his decease (*Coope* v. *Cresswell*, 2 Ch. 112).

3 & 4 W. & M. c. 14, confined to actions of debt.

Debts within 3 & 4 W. & M. c. 14.

(*c*) The remedy is here extended to the devisees of devisees (*Westfaling* v. *Westfaling*, 3 Atk. 460).

(*d*) Equity followed the rule of law; and therefore, in a bill by a specialty creditor against a devisee under the 3 & 4 W. & M. c. 14, it was decided, that the heir at law (if any) of the testator was a necessary party

11 Geo. 4 & 1 Will. 4, c. 47, s. 3.

Application of assets as between heir and devisee.

(*Gawler* v. *Wade*, 1 P. Wms. 99; *Warren* v. *Stawell*, 2 Atk. 125). In arranging the funds in equity between the heir and devisee, it is settled that assets descended to the heir must be applied to pay debts before lands can be charged which are specifically devised (*Chaplin* v. *Chaplin*, 3 P. Wms. 367; *Powis* v. *Corbet*, 3 Atk. 556). See, further, as to the order in which assets are applied in payment of debts, the note to the Admon. of Estates Act, 1833, *post*, p. 402.

(*e*) See *Price* v. *Evans*, 4 Sim. 514.

The right of action under the above section was not taken away by the Administration of Estates Act, 1833 (*Re Illidge, Davidson* v. *Illidge*, 27 Ch. D. 482). Consider now the effect of the Land Transfer Act, 1897 (*post*, p. 417).

If there is no heir at law, actions may be maintained against the devisee.

4. If in any case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this act relief is so given shall and may have and maintain his, her and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid.

Formerly a devisee could not be sued without the heir (*Hunting* v. *Sheldrake*, 9 M. & W. 256. See *Gawler* v. *Wade*, 1 P. Wms. 100).

Not to affect limitations for just debts or portions for children.

5. Provided always, and be it further enacted, that where there hath been or shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, according to or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them shall be in full force, and the same manors, messuages, lands, tenements and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her and their heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise or disposition was made, and by his, her and their trustee or trustees, his, her and their heirs, executors, administrators and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid and satisfied, anything in this act contained to the contrary notwithstanding.

Provisions for payment of debts within this section.

The uniform rule is, that an effectual provision by will for payment of creditors is not fraudulent within the statute; and it makes no difference whether the land be devised to trustees to sell, or descend to the heir charged with debts (*Matthews* v. *Jones*, 2 Anstr. 515; *Bailey* v. *Ekins*, 7 Ves. 323; *Bath* v. *Bradford*, 2 Ves. sen. 590; *Plunket* v. *Penson*, 2 Atk. 292; *Shiphard* v. *Lutwidge*, 8 Ves. 26; *Kidney* v. *Coussmaker*, 12 Ves. 154). But if the devise for payment of debts does not provide for it in a practicable manner, the case will not be taken out of the statute (*Hughes* v. *Doulben*, 2 Cox, 170; 2 Br. C. C. 614). A devisee of all the devisor's lands in trust to sell and pay all the testator's debts could not be sued under the stat. 3 & 4 W. & M. c. 14 (*Gott* v. *Atkinson*, Willes, 521; *Soames* v. *Robinson*, 1 M. & K. 500; see *Barker* v. *May*, 9 B. & C. 489). As to the

effect of a devise for payment of debts by rents and profits, see *Boodle* v. *Blundell*, 19 Ves. 528. A direction in a will to pay simple contract before specialty creditors was held not to be void, as it was within the exception in the Statute of Fraudulent Devises (*Millar* v. *Horton*, Coop. C. C. 45); but a devise not for the payment of debts generally would not be within the exception (3 Barnard, 304). Though the Statute of Fraudulent Devises prevented a devise for payment of legacies from disappointing creditors by specialty, it did not prevent a devise for payment of debts generally from letting in creditors by simple contract to the prejudice of creditors by specialty (*Kidney* v. *Coussmaker*, 12 Ves. 154; 2 Atk. 104).

11 Geo. 4 & 1 Will. 4, c. 47, s. 5.

Heir-at-law to be answerable for debts, although he may sell estate before action brought.

6. In all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors, in regard to any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir-at-law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said lands, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution.

Under the L. T. Act, 1897, the real estate of a person dying after 1897 is made available for payment of his debts without the necessity for proceedings; such real estate vesting in the personal representative (see *post*, p. 417). The following note relates to the law independent of that act.

Specialty debts no charge on the land.

Debts by specialty in which the heirs are bound constitute no lien or charge upon the land, either in the hands of a debtor or of his heir (*Richardson* v. *Horton*, 7 Beav. 112; *Morley* v. *Morley*, 5 D. M. & G. 610). By taking proper proceedings the specialty creditors may obtain payment out of the descended or devised estates in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated (*Richardson* v. *Horton*, *sup.*; *Re Hedgeley*, *Small* v. *Hedgeley*, 34 Ch. D. 384, where the devisee aliened by her marriage settlement, and her separate estate was subsequently made liable).

Extent of liability of heir to debts.

An heir taking lands by descent is liable for his ancestor's debts no further than the value of the land descended; therefore if the heir pay his ancestor's debts to the value of the land descended, he may hold the land discharged from the other debts of the ancestor (*Buckley* v. *Nightingale*, 1 Str. 655; *Horn* v. *Horn*, 2 Sim. & S. 448; see 8 Sim. 259). But a plea by an heir to an action on his ancestor's bond, that he claims to retain a certain sum for money laid out in *repairing* the premises descended, cannot be supported (*Shetelworth* v. *Neville*, 1 T. R. 454), although it may be otherwise if the repairs were *necessary* (*Ib.*; see *Hill* v. *Maurice*, 1 De G. & Sm. 214). The heir-at-law is entitled to the rents until judgment is given against him (1 T. R. 457). In this respect the effect of the Administration of Estates Act, 1833 (*post*, p. 399), is different.

Bonâ fide alienation.

Bankruptcy is not such an alienation as will defeat creditors under this section (*Ex p. Morton*, 5 Ves. 449). The alienation must be one which carries the beneficial interest, and accordingly, when the devisee was a

11 Geo. 4 & 1 Will. 4, c. 47, s. 6.

trustee, a conveyance to new trustees was not within this section (*Coope* v. *Cresswell*, 2 Ch. 112); nor, at law, was the mortgage by an equitable tenant for life of his life interest (*Ib.*); nor was a covenant in marriage articles to settle descended lands (*Pimm* v. *Insall*, 1 M. & G. 449; compare *Re Mouat*, 1899, 1 Ch. 834). But an actual settlement by the devisee on marriage is such an alienation (*Spackman* v. *Timbrell*, 8 Sim. 253; *Re Hedgeley, Small* v. *Hedgeley*, 34 Ch. D. 379); and so is an equitable deposit with memorandum (*British Mutual Co.* v. *Smart*, 10 Ch. 567; disapproving *Carter* v. *Sanders*, 2 Drew. 248).

Where an action of debt is brought against the heir, he may plead riens per descent.

7. Provided always, and be it further enacted, that where any action of debt or covenant upon any specialty is brought against the heir, he may plead riens per descent at the time of the original writ brought or the bill filed against him, anything herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or nihil dicit, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended.

In an action against an heir or devisee (see Com. Dig. Pleader (2 E)), the defendant may not only plead any matter which might have been pleaded by the ancestor or devisor, but may also deny the character in which he is sued; or admitting it, may plead that he has *nothing by descent* or by *devise*, either generally (*Ib.*) or specially; viz., that he has nothing but a reversion after an estate for life or years (Com. Dig. Pleader (2 E 3)), or that he has paid debts of an equal or superior degree, to the amount of the assets descended or devised; or that he *retains* the assets to satisfy his own debt of equal or superior degree, or debts of a superior degree due to a third person (*Ib.*; 1 Chitty on Pleading, 4th ed. 431, 432; 2 *Ib.* 468—470; 3 *Ib.* 973, 974; Selw. N. P. Debt, s. 6; 2 Saund. 7, n. 4). To debt against heirs on the bond of their ancestors, the defendants pleaded *non est factum*, *per fraudem* and *riens per descent*; and the plaintiff replied, that after the death, &c., and before the commencement of the suit, the defendant had lands, &c., by descent, &c.; it was held, that this was a replication under the statute 3 & 4 Will. & Mary, c. 14, s. 6, and that the jury, having found that lands descended, ought to have assessed the value of those lands (*Brown* v. *Shuker*, 1 Cr. & Jer. 583).

For forms of statement of claim, defence, and replication in proceedings under this statute, see Bullen & Leake, 4th ed. vol. 1, p. 194; vol. 2, p. 205.

Devisees to be liable the same as heirs-at-law.

8. Provided always, and be it further enacted, that all and every the devisee and devisees, made liable by this act, shall be liable and chargeable in the same manner as the heir-at-law by force of this act, notwithstanding the lands, tenements or hereditaments to him or them devised shall be aliened before the action brought.

11 Geo. 4 & 1 Will. 4, c. 47, s. 9.

Traders' estates shall be assets to be administered in courts of equity.

9. From and after the passing of this act, where any person being, at the time of his death, a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, devisee or devisees of such debtor, and the devisee or devisees of such first-mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty, in which the heirs were bound: provided always, that in the administration of assets by courts of equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands.

This section of the act corresponds *verbatim* with the statute 47 Geo. 3, sess. 2, c. 74. In the construction of that act it was held, that a party to come within it must have been a trader at his death (*Keene* v. *Riley*, 3 Mer. 436; *Hitchon* v. *Bennett*, 4 Mad. 180). See further as to this section, the note to Administration of Estates Act, 1833, *post*, p. 399.

In actions by or against infant, the parol shall not demur.

10. From and after the passing of this act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of this act be carried on or prosecuted by or against any infant, where according to law, the parol did not demur.

Demurrer of parol.

Where an infant heir was sued by the specialty creditor of his ancestor, he might as a dilatory plea plead his non-age in stay of the creditor's action and claim to make the parol demur, that is, that the proceedings might be stayed, until he was of full age (see Gilbert's Hist. Com. Pl. 54, 56; 2 Bl. Com. 300; 2 Inst. 257, 291). The plea might be pleaded in equity as well as at law (*Chaplin* v. *Chaplin*, 3 P. W. 368; *Lechmere* v. *Brasier*, 2 Jac. & W. 290; *Scarth* v. *Cotton*, Jac. 635, n.). It was said by Lord *Cottenham* that the parol demurred in equity in those cases only in which it would have demurred at law (*Price* v. *Carver*, 3 M. & C. 162). In equity, however, the privilege seems to have been extended to an infant devisee (*Powell* v. *Robins*, 7 Ves. 211), but not at law (*Pluskett* v. *Beeby*, 4 East, 485). By the above section the demurrer of the parol has been abolished in all cases, both at law and in equity.

11 Geo. 4 & 1 Will. 4, c. 47, s. 10.

Day to show cause.

In addition to and distinct from the demurrer of the parol (see *Price* v. *Carver*, 3 M. & C. 162), courts of equity adopted a further rule for the protection of infants, by which the infant was entitled, after attaining his majority, to a day to show cause against the decree. This rule was adopted in all cases of foreclosure and partition and in all cases in which a conveyance was required from an infant, except those cases in which the parol would demur at law (*Price* v. *Carver*, 3 M. & C. 162; *Walsh* v. *Trevanion*, 16 Sim. 178). This rule was not affected by the above section (*Ib.*), but in consequence of the power given by sect. 11, the provision giving an infant a day to show cause was omitted in decrees in equity by which, for the payment of debts, estates were directed to be sold (*Scholefield* v. *Heafield*, 7 Sim. 669; *Mahon* v. *Dawson*, 2 Dr. & W. 286) or mortgaged (*Holme* v. *Williams*, 8 Sim. 557). And it seems now that in all cases where there is a judgment against an infant for an immediate conveyance, the Trustee Act, 1893, s. 31 (*post*), applies, and it is not necessary to insert in the decree the direction giving the infant a day to show cause after he shall have attained twenty-one (*Mellor* v. *Porter*, 25 Ch. D. 161; see *Bowra* v. *Wright*, 4 D. J. & S. 265).

Foreclosure of equitable mortgage.

In the case, however, of foreclosure of an equitable mortgage when there is no decree for sale, the decree must still be for the infant to convey at twenty-one, with a direction giving him a day to show cause (*Price* v. *Carver*, 3 M. & C. 163; *Scholefield* v. *Heafield*, 7 Sim. 669; *Mellor* v. *Porter*, 25 Ch. D. 158); but not where the infant is entitled only as trustee (*Foster* v. *Parker*, 8 Ch. D. 147). See the forms of foreclosure judgments, Seton, 6th ed., 980. Where there is a decree for sale no day will be given (*Scholefield* v. *Heafield*, *sup.*; *Clinton* v. *Bernard*, Dru. 287). And the court may order a sale when it is for the benefit of the infant (*Davis* v. *Dowding*, 2 Keen, 245).

Foreclosure of legal mortgage.

Besides cases where a conveyance was required from an infant, a day to show cause was given in cases of foreclosure of a legal mortgage (*Williamson* v. *Gordon*, 19 Ves. 114); and this is still the rule (*Newbury* v. *Marten*, 15 Jur. 166; *Gray* v. *Bell*, 46 L. T. 521; 30 W. R. 606; see *Mellor* v. *Porter*, 25 Ch. D. 161). But where the value of the property was clearly less than the amount due to the mortgagee, and it was for the benefit of the infant, on the plaintiff paying the infant's costs a decree absolute was made, no day to show cause being given (*Croxon* v. *Lever*, 12 W. R. 237; *Bennett* v. *Harfoot*, 19 W. R. 428; *Wolverhampton, &c. Co.* v. *George*, 24 Ch. D. 707).

Where in a foreclosure action a day to show cause has been given, the infant on attaining twenty-one cannot travel into the account, or redeem, but only show error in the decree (*Mallack* v. *Galton*, 3 P. Wms. 352; *Williamson* v. *Gordon*, 19 Ves. 114; *Keleall* v. *Kelsall*, 2 M. & K. 409).

Infants to make conveyances under order of the court.

11. Where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons,

being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years. **11 Geo. 4 & 1 Will. 4, c. 47, s. 11.**

Orders may still be made under sects. 11 and 12 of this act, see the forms, Seton, 3rd ed. 826; but these provisions were practically superseded by the Trustee Act, 1850, s. 29, and the Trustee Act, 1852. s. 1; see now, Trustee Act, 1893, s. 30 (*post*). See *Wood* v. *Beetlestone* (1 K. & J. 213). The usual practice is for the decree or order directing the sale or mortgage to declare that the infant heir, devisee, or tenant for life, is a trustee within the meaning of the Trustee Act, and then to obtain a vesting order (Daniell, Ch. Pr. 7th ed. 867, n. (*r*)). See the notes to the Trustee Act, 1893, s. 30 (*post*). Before the Trustee Act, 1850, an infant refusing to convey in pursuance of an order under sect. 11, was declared a trustee within 1 Will. 4, c. 60 (*Thomas* v. *Gwynne*, 9 Beav. 275). Under Jud. Act, 1884, s. 14, the court has now power to nominate a person to execute an instrument in place of a refusing party. As to sales by the court, see generally R. S. C. Ord. 51, r. 1.

With regard to the operation of sects. 11 and 12, the decisions were conflicting as to whether the court could direct a mortgage as well as a sale (*Holme* v. *Williams*, 8 Sim. 557; *Smethurst* v. *Longworth*, 7 L. J. Ch. 18); but by the Debts Recovery Act, 1839 (*post*, p. 396), the sections were extended so as to include a mortgage.

Under sect. 11 an infant devisee in tail may be ordered to convey (*Penny* v. *Pretor*, 9 Sim. 135); and the conveyance must be made by the proper assurance which by law is now required for a tenant in tail (*Radcliffe* v. *Eccles*, 1 Keen, 130). In a creditor's suit, after a decree for sale of the estate, an infant heir was ordered to join in the conveyance to the purchaser under sect. 11 (*Brook* v. *Smith*, 2 R. & M. 73). A conveyance by an infant under this section passes only such interest as the infant, if of full age, might pass (*Heming* v. *Archer*, 8 Beav. 294). Orders under this section will be found, Seton, 3rd ed. 825 (see further the note to sect. 12).

12. Where any lands, tenements, or hereditaments, hath been or shall be devised in settlement by any person or persons, whose estate under this act, or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the court by whom such decree shall be made, to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple, or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment, or other assurance, shall be as effectual as if the person who shall make and execute the same were seised or possessed of the fee simple or other whole estate so to be sold. **Persons having a life interest may convey the fee, if the estate is ordered to be sold.**

The above section applied to copyholds (*Branch* v. *Browne*, 2 De G. & Sm. 299). A testator devised real estates to trustees to pay debts, and **Section applies to copyholds.**

11 Geo. 4 & 1 Will. 4, c. 47, s. 12.

Conveyances under this section.

to convey the real estate, subject to such debts, to his son upon marriage in strict settlement. The trustees conveyed to the son for life, with remainder in strict settlement: it was held that the son could convey the legal estate under this section (*Cheese* v. *Cheese*, 15 L. J. Ch. 28; see *Walker* v. *Aston*, 14 Sim. 87). This section does not apply to a case where an estate is devised to a trustee during the life of the *cestui que trust*, with remainder over, and by the disclaimer of the trustee the legal estate descended on the heir (*Heming* v. *Archer*, 7 Beav. 515; 8 Beav. 294). An estate by the disclaimer of a trustee was vested in the heir *pur autre vie*, with legal remainder to the children of A. (who was living) as tenants in common. It was held, that no effective conveyance could be made under the act until the class of children had been determined, by the death of A. (*Heming* v. *Archer*, 9 Beav. 366). The case of the devisee for life, or owner of the limited estate, or first executory devisee being an infant, is provided for by the Debts Recovery Act, 1839 (*infra*); and the case of the fee being vested, subject to an executory devise, in the heir by descent, or otherwise than by devise, is provided for by the Debts Recovery Act, 1848 (*post*, p. 397). The lunatic tenant for life of estates, decreed in a creditor's suit to be sold for payment of debts, was a trustee for the purchaser within the meaning of 1 Will. 4, c. 60, s. 18 (*Re Milfield*, 2 Phill. 254).

Not to repeal act 33 Geo. 2 (I.) relating to debts due to bankers.

13. Nothing in this act shall extend or be deemed or construed to extend to repeal or alter an act made by the parliament of Ireland, in the thirty-third year of the reign of King George (*o*) the First, intituled "An Act for the better securing the Payment of Bankers' Notes, and for providing a more effectual Remedy for the Security and Payment of the Debts due by Bankers" (*p*)).

(*o*) The following words are here omitted by mistake: "the Second, intituled 'An Act for repealing an Act passed in this Kingdom in the eighth Year of the Reign of King George.'"

(*p*) By the third section of the Irish act, 33 Geo. 2, c. 14, all dispositions after 10th May, 1760, by bankers of real or leasehold estates, or any interest therein, to or for any children or grandchildren of any banker, are void against creditors, though for valuable consideration, and though not creditors at the time. As to the act 33 Geo. 2, c. 14, see *Copland* v. *Davies* (L. R. 5 H. L. 358).

II.—The Debts Recovery Act, 1839.

2 & 3 Vict. c. 60.

2 & 3 Vict. c. 60.

The Debts Recovery Act, 1839, after reciting the 11th and 12th sections of the Debts Recovery Act, 1830 (*ante*, pp. 394, 395), and that doubts were entertained whether the above sections authorized courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, or of lands, tenements or hereditaments so devised in settlement as aforesaid, and also to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as

aforesaid, is an infant, enacts, "that the said hereinbefore recited provisions of the said act shall extend and the same are hereby extended to authorize courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, and also of lands, tenements or hereditaments so devised in settlement as aforesaid, and to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant."

2 & 3 Vict. c. 60.

Recited provisions of 11 Geo. 4 & 1 Will. 4, c. 47, extended to authorize mortgages as well as sales of estates.

A mortgage under this section was directed in *National Bank* v. *Gourley* (17 L. R. Ir. 357). But the court has no jurisdiction under these statutes to extend the sum to be raised by way of mortgage so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mortgage, and where a mortgage is much more beneficial to the infant than a sale would be (*Hill* v. *Maurice*, 1 De G. & S. 214; see *Farmstone* v. *Gaunt*, 1 Coll. 577). For forms of orders under the act, see Seton, 3rd ed. 826.

2. When any sale or mortgage shall be made in pursuance of the said recited act or this act, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature and descend or devolve in the same manner as the estate, or the lands, tenements or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes as such estate or such lands, tenements or hereditaments would have belonged and been subject and applicable to in case no such sale or mortgage had been made.

Surplus of money arising from such sale or mortgage to descend in the same manner as the estates so sold or mortgaged would have done.

III.—The Debts Recovery Act, 1848.

11 & 12 Vict. c. 87.

The Debts Recovery Act, 1848, after reciting the 12th section of the Debts Recovery Act, 1830, "And that such provision did not extend to the case of lands, tenements or hereditaments of a deceased debtor which are by descent or otherwise than by devise vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and that it was expedient that the said provision of the said act should be extended to such case:" enacted, that in cases in other respects falling within the said thereinbefore recited provisions of the said act the same act shall extend and is hereby extended to any case in which any lands, tenements or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-

11 & 12 Vict. c. 87.

Recited provision to extend to lands, &c. of a deceased debtor, in certain cases.

11 & 12 Vict. c. 87.

heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender or otherwise assure the fee simple or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age.

IV.—The Administration of Estates Act, 1833.

3 & 4 Will. IV. c. 104.

An Act to render Freehold and Copyhold Estates Assets for the Payment of Simple and Contract Debts.* [29th August, 1833.]

* *Sic.*

3 & 4 Will. 4, c. 104.

Whereas it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: be it therefore enacted, that from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.

Freehold and copyhold estates in all cases to be assets for the payment of simple contract or specialty debts.

3 & 4 Will. 4, c. 104.

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(1) Operation of Administration of Estates Act, 1833.

In the case of a person dying after 1897, his "real estate" vests in his personal representative, by whom the same is applicable in payment of his debts (see Land Transfer Act, 1897, sects. 1 and 2, and the notes thereto, p. 417, *post*). "Real estate" includes real estate appointed under a general testamentary power, but not copyholds (sect. 1). The L. T. Act, 1897, however, does not apply to the administration of the estates of persons dying before 1898; or in the case of a person dying after 1897, to the payment of his debts out of copyholds.

The Admon. of Estates Act, 1833, applies where the testator has not charged his land with, or devised it subject to, the payment of his debts. As to what constitutes such a charge, see *post*, p. 411.

At the time of the passing of the Administration of Estates Act, 1833, lands devised or charged for payment of debts were equitable assets, but lands not so charged were not available at all for payment of debts, except that freehold lands were liable to debts by specialty where the heirs were bound, and were also liable to debts of all descriptions owing from traders (Debts Recovery Act, 1830, s. 9; see *Re Illidge, Davidson* v. *Illidge*, 27 Ch. Div. 480, 483). The Administration of Estates Act, 1833, extended to the freeholds of all persons the provisions of the Debts Recovery Act, 1830, as to the freeholds of traders, and also subjected copyholds to a similar liability (see as to copyholds the note, *post*, p. 410). To enforce this statutory liability it is necessary to apply to a court of equity (*Ball* v. *Harris*, 4 M. & C. 268). It should also be remembered that specialties executed after 1881 bind heirs, though not so expressed (Conv. Act, 1881, s. 59, *post*); and seem accordingly to bring the holders within the words of the Debts Recovery Act, 1830, s. 3 (*ante*, p. 389); the right of action under which section was not taken away by the Admon. of Estates Act, 1833 (*Re Illidge*, 27 Ch. Div. 482). Consider now the effect of the Land Transfer Act, 1897 (*post*, p. 417).

Lands applicable as assets under this act.

The substance of the Administration of Estates Act, 1833, is that the land itself was made assets (*Bowles* v. *Hyatt*, 38 Ch. D. 619); and the remedies given against the heir and devisee did not control the larger effect of the previous words, which made the land assets generally (*Downes* v. *Morris*, 3 Hare, 399). Accordingly, where a person died without heirs, it was held that as against the lord claiming by escheat the lands of the deceased were assets for payment of his debts (*Evans* v. *Brown*, 5 Beav. 114; *Hughes* v. *Wells*, 9 Hare, 749). Under this act freehold estates over which a testator has a general power of appointment, and which he appoints by will, were available for payment of his debts (*Fleming* v. *Buchanan*, 3 D. M. & G. 976). So also were all rents arising from the real estate of a deceased person after his death, whether received by his heir (*Re Illidge, Davidson* v. *Illidge*, 27 Ch. Div. 478), or by a person appointed a trustee of his will after his death (*Bowles* v. *Hyatt*, 38 Ch. D. 621), the creditor being entitled to an account (*Ib.*; see Seton, 1429, 6th ed.). So an equity of redemption of freeholds was assets (*Foster* v. *Handley*, 1 Sim. N. S. 200; *Beale* v. *Symonds*, 16 Beav. 406), or copyholds (*Burrell* v. *Smith*, 9 Eq. 443), and

Rents.

Equity of redemption.

3 & 4 Will. 4, c. 104.

consequently a mortgagee might tack his simple contract debt as against the heir or devisee (*Rolfe* v. *Chester*, 20 Beav. 610; *Thomas* v. *Thomas*, 22 Beav. 341). The act did not affect a widow's right to dower or freebench, which still had priority over mere creditors of the deceased (*Spyer* v. *Hall*, 20 Beav. 621; *Jones* v. *Jones*, 4 K. & J. 361; but see Williams' R. P. 19th ed. 318, n.). Although the effect of the act (subject to the proviso) was to place simple contract and specialty creditors on the same footing, it did not confer on simple contract creditors the benefit of the same Statute of Limitations as related to specialties (*Hollingshead* v. *Webster*, 37 Ch. D. 656).

Dower.

Limitation of actions.

Proviso in act.

Under the proviso (which was said to be anomalous (*Bain* v. *Sadler*, 12 Eq. 573)), creditors by bond, in which the heirs were named, took priority over creditors by specialty in which the heirs were not named (*Richardson* v. *Jenkins*, 1 Drew. 477). Also over simple contract creditors in the case of an equity of redemption of freeholds (*Foster* v. *Handley*, 1 Sim. N. S. 200; better reported, 15 Jur. 73) or of copyholds (*Burrell* v. *Smith*, 9 Eq. 443). In the case, however, of debtors dying after 1869, specialty and simple contract creditors were to be treated as standing in equal degree and paid accordingly (Administration of Estates Act, 1869, *post*, p. 407). In the case of persons dying insolvent on or after the 1st November, 1875, the bankruptcy rules as to the respective rights of secured and unsecured creditors apply (Jud. Act, 1875, s. 10).

Effect of act in making debts a general charge.

It was held under this act that the rights of simple contract creditors of an ancestor, as against the descended estates, were not defeated by judgments entered up against the heir for his personal debts before suit (*Kinderley* v. *Jervis*, 22 Beav. 1). With regard, however, to purchasers from an heir or devisee, it was decided that it was not the object, nor was it the operation, of the Admon. of Estates Act, 1833, to make the simple contract debts of a deceased person in the nature of mortgages or specific charges on his real estate. They were constituted a general charge upon such real estate; but not so that a *bonâ fide* purchaser from the heir or devisee was bound to see to the application of the purchase-money, as he would be in the case of a particular mortgage on any portion of the lands (*Kinderley* v. *Jervis*, 22 Beav. 1; *Price* v. *Price*, 35 Ch. D. 305; compare the effect of an alienation by an heir or devisee under Debts Recovery Act, 1830, s. 6, *ante*, p. 391). And the same rule applies even where the purchaser has notice of the debt (*Jones* v. *Noyes*, 4 Jur. N. S. 1033; 7 W. R. 21). It was said by *Kay*, J., that the statute made debts rather an inchoate than an actual charge; the creditor had no actual charge until decree (*Price* v. *Price*, 35 Ch. D. 305). Where a devisee, before creditor's bill filed, effected an equitable charge, such charge had priority over the statutory charge in favour of the creditors (*British Mutual Co.* v. *Smart*, 10 Ch. 567; compare *Ex p. Baine*, 1 Mont. D. & G. 492, under Debts Recovery Act, 1830, s. 9). But where a creditor commenced an action against the devisee, sufficiently indicating the real estate sought to be charged, and registered the action as a *lis pendens*, the plaintiff after such registration had priority over a purchaser or mortgagee from the devisee (*Price* v. *Price*, 35 Ch. D. 305). In one case where a creditor commenced proceedings before the completion of a purchase from the heir, an injunction was granted restraining the purchaser from paying the purchase-money to the heir (*Greenly* v. *Lowes*, 3 Br. C. C. 217).

(2) Action to administer real assets.

To enforce the liability created by the statute a creditor had to take proceedings in equity (*Ball* v. *Harris*, 4 M. & C. 268), which took the form of an action to administer real assets. Before the Land Transfer Act, 1897, the following rules were laid down as to parties to these actions.

Parties.

Persons having prior incumbrances on freehold and copyhold estates of which a trader, who died intestate, was seised at the time of his death, were not, under 47 Geo. 3, c. 74, proper parties to a bill for payment of his debts out of his real estates (*Parker* v. *Fuller*, 1 R. & M. 656). The legal personal representative was a necessary party to an action for the administration of real and personal estate (*Rowsell* v. *Morris*, 17 Eq. 20); an executor *de son tort* and the trustees of the real estate were not sufficient (*Ib.*) nor an administrator *ad litem* (*Dowdeswell* v. *Dowdeswell*, 9 Ch.

Div. 294). But the charge of debts arising under Admon. of Estates Act, 1833, did not render an executor a necessary party to an action by beneficiaries for the sale of a testator's realty and distribution of the proceeds (*Curtis* v. *Fulbrook*, 8 Hare, 25). In an action by a creditor to obtain payment out of his debtor's real estate (not devised on trust for sale), the devisee or heir, as well as the executor, was a necessary party (Dan. Ch. Pr. 209, 7th ed.; see *Willson* v. *Leonard*, 3 Beav. 373; *Morse* v. *Tucker*, 5 Hare, 79; *Harvey* v. *Wilde*, 14 Eq. 438). After 3 & 4 Will. & M. c. 14, the course was to sue the heir as being the person bound by and named in the specialty, and the devisee because he had the land (*Bowles* v. *Hyatt*, 38 Ch. D. 619). Under Administration of Estates Act, 1833, the heir-at-law was not a necessary party as well as the devisee (*Bridges* v. *Hinxman*, 16 Sim. 71; overruling *Brown* v. *Weatherby*, 10 Sim. 125; see *Weeks* v. *Evans*, 7 Sim. 546). Nor was the heir a necessary party in respect of Indian realty (*Story* v. *Fry*, 1 Y. & C. C. 603). And it was not necessary to establish the will against the testator's heir (*Goodchild* v. *Terrett*, 5 Beav. 398). In a creditor's suit, seeking the application of real estate in payment of debts, both the heir-at-law and devisees of the debtors being parties, and the will not being admitted by the heir, the court would neither dismiss the bill against the heir, nor direct an issue *devisavit vel non* at his request, as the creditors had a title paramount to that of the heir or devisees (*Spickernell* v. *Hotham*, 9 Hare, 73). Notwithstanding the provisions in Admon. of Estates Act, 1833, as to heirs and devisees being liable to suits, &c., proceedings under the act to make land available for debts could, if necessary, be brought against the lord claiming by escheat (*Evans* v. *Brown*, 5 Beav. 114), or against a person appointed as trustee of the deceased's will after his death (*Bowles* v. *Hyatt*, 38 Ch. D. 619). It was not necessary that the plaintiff should be a creditor (*Dinning* v. *Henderson*, 2 Coll. 330). The heir and the next of kin might sue (*Price* v. *Price*, 15 Sim. 484; *Rodney* v. *Rodney*, 16 Sim. 307). Before the Judicature Acts it was held that a legal personal representative could not alone commence the suit (*Catley* v. *Sampson*, 33 Beav. 551; *Tubby* v. *Tubby*, 2 Coll. 136). A creditor could not have a decree for the administration of real estate not devised on trust for sale, unless he sued on behalf of all creditors (*Ponsford* v. *Hartley*, 2 J. & H. 736; *Worraker* v. *Pryer*, 2 Ch. D. 109; *Re Royle*, *Fryer* v. *Royle*, 5 Ch. D. 540; *Re Vincent*, *Parham* v. *Vincent*, 1877, W. N. 249). It was necessary to express this either in the writ or in the title of the statement of claim (*Re Tottenham*, 1896, 1 Ch. 628; see R. S. C. Ord. 55, rr. 3, 4).

3 & 4 Will. 4, c. 104.

The old rule as to the devisee or heir being (as well as the personal representative) a necessary party to an action to administer real assets was given effect to in the forms of indorsements on writs contained in the Appendices to the R. S. C. (see Ord. 3, r. 3, Appendix A. Part 3, Sect. 1). These forms have not been altered. It would seem, however, that since the Land Transfer Act, 1897, it is not necessary that the heir or devisee should be a party to a creditor's action to administer freehold assets. But the old rule remains as regards copyhold assets (Land Transfer Act, 1897, s. 1, sub-s. 4, *post*, p. 417).

Effect of Land Transfer Act, 1897.

Under R. S. C. Ord. 51, r. 1, the court has power in any cause or matter relating to real estate to order a sale; that is, a sale for the purposes of the action (*Re Robinson*, *Pickard* v. *Wheater*, 31 Ch. D. 247; compare the similar power in 15 & 16 Vict. c. 86, s. 55, now repealed, which was intended to apply to administration suits; *London & County Co.* v. *Dover*, 11 Ch. D. 204). And the ordinary form of creditor's decree for the administration of realty and personalty directs sale of the realty, "in case the personal estate shall be insufficient for payment of debts and funeral expenses" (Seton, 6th ed. 1391; see further Seton, 1426 *et seq.*).

Orders for sale.

(3) Legal and equitable assets.

In connection with the Administration of Estates Act, 1833, mention should be made of the distinction between legal and equitable assets. After that act all the debts of the deceased were payable out of all his assets, whether legal or equitable. Legal assets were described as the

3 & 4 Will. 4, c. 104.

assets with which a court of law would charge an executor in an action brought against him by a creditor; and included all assets which, *virtute officii*, he could recover, whether in a court of law or of equity (*Cook* v. *Gregson*, 3 Drew. 549; *A.-G.* v. *Brunning*, 8 H. L. C. 258). Equitable assets were described as the assets which could only be made available for payment of debts through a court of equity (*Cook* v. *Gregson*, *sup.*). Before the Land Transfer Act, 1897, they included (1) land charged or devised for payment of debts (*Silk* v. *Prime*, 1 Bro. C. C. 138), including the proceeds of sale thereof (*Bain* v. *Sadler*, 12 Eq. 570; see *Newton* v. *Bennet*, 1 Bro. C. C. 135); (2) land which could only be reached by the Administration of Estates Act, 1833; (3) personal estate over which the deceased had a general power of testamentary appointment, which he had exercised (*Re Power*, *Acworth* v. *Stone*, 1901, 2 Ch. 665; *Pardo* v. *Bingham*, 6 Eq. 485); and (4) separate estate to which, before the M. W. P. Act, 1870, a married woman was entitled (*Anon.*, 8 Ves. 258), and also earnings which, by that act, were made separate estate (*Re Poole*, *Thompson* v. *Bennett*, 6 Ch. D. 739). Under the M. W. P. Act, 1882, the separate estate of a married woman, including property appointed by will under a general power (sect. 4), appears to have been made legal assets (see sect. 1, sub-sect. 2, and sect. 23, *ante*, pp. 342, 359). Since the Land Transfer Act, 1897, the real estate of a person dying after 1897 (including real estate appointed under a general testamentary power, but not including copyholds) vests in his personal representative (L. T. Act, 1897, s. 1, *post*, p. 417), and seems also to be legal assets. The principal distinctions between these two classes of assets are: (1) out of legal assets an executor has a right of retainer for his own debt (see *post*, p. 408), but not out of equitable assets; (2) debts are payable in the order of priority given *post*, p. 406, out of legal assets, but *pari passu* out of equitable assets (Seton, 6th ed. 1423).

Lands are equitable assets under this act.

As mentioned above, real estate which could only be reached by the Administration of Estates Act, 1833, was held to be equitable assets (*Re Illidge*, *Davidson* v. *Illidge*, 27 Ch. Div. 484; *Walters* v. *Walters*, 18 Ch. D. 182). Thus, in the administration of assets under that act, it was held that creditors by specialty, in which the heirs were not bound, were not entitled to any priority over simple contract creditors (*Cummins* v. *Cummins*, 3 J. & Lat. 64); and an executor had no right of retainer (*Walters* v. *Walters*, *sup.*; *Dring* v. *Greetham*, 23 L. J. Ch. 156).

(4) Order in which assets are applied in payment of debts.

The Land Transfer Act, 1897 (see sect. 2 (3), *post*, p. 421), has not altered the old rule as to the order in which assets are applicable to the payment of debts. The order is as follows:—

(1.) The general personal estate not disposed of in the way of specific bequests, unless it be exempted from its primary liability by express words or necessary implication (*Ancaster* v. *Mayer*, 1 White & Tudor, L. C. Eq., 7th ed. 1). It was held that such general personal estate included personal estate subject to a general power exercised by virtue of sect. 27 (*post*, p. 467) of the Wills Act, 1837 (*Re Hartley*, *Williams* v. *Jones*, 1900, 1 Ch. 152; but see *Fleming* v. *Buchanan*, 3 D. M. G. 979). As to personal estate disposed in the way of general pecuniary legacies, see *Re Bate* (43 Ch. D. 600), and other cases quoted under No. 5. A lapsed share of residuary personalty contributes rateably with the other shares (*Trethewy* v. *Helyar*, 4 Ch. D. 53; *Fenton* v. *Wills*, 7 Ch. D. 33; not following *Gowan* v. *Broughton*, 19 Eq. 77). As to a specific part of the residue affected by a secret trust, see *Re Maddock*, *Llewellyn* v. *Washington*, 1902, W. N. 102.

(2.) Real estate devised or ordered to be sold for payment of debts, not simply charged (*Harmood* v. *Oglander*, 8 Ves. 124; *Philips* v. *Parry*, 22 Beav. 279).

(3.) Real estate descended (*Milnes* v. *Slater*, 8 Ves. 295; see *Stead* v. *Hardaker*, 15 Eq. 175; *Hurst* v. *Hurst*, 28 Ch. D. 159); and as to real estate escheated, see *Evans* v. *Brown*, 5 Beav. 114; *Downe* v. *Morris*, 3 Hare, 398.

4.) Real estate simply charged with debts (*Irvin* v. *Ironmonger*, 2 R. & M.

531; see the cases quoted under No. 6). A lapsed share contributes as if the devisee had survived (*Ryves* v. *Ryves*, 11 Eq. 539). 3 & 4 Will. 4, c. 104.

(5.) Personal estate disposed of in the way of general pecuniary legacies (*Clifton* v. *Burt*, 1 P. W. 680; *Farquharson* v. *Floyer*, 3 Ch. D. 109; *Re Stokes, Parsons* v. *Miller*, 67 L. T. 223; *Re Salt, Brothwood* v. *Keeling*, 1895, 2 Ch. 203; *contra*, *Re Bate*, 43 Ch. D. 600; see *Re Butler, Le Bas* v. *Herbert*, 1894, 3 Ch. 250). Pecuniary legacies charged on residuary real estate do not contribute to debts till after No. 6 (*Re Bawden, National Provincial Bank* v. *Cresswell*, 1894, 1 Ch. 693). As to priority between devisees and pecuniary legatees as regards the payment of mortgage debts where the Real Estate Charges Acts (*post*) are excluded, see *Re Smith, S.* v. *S.*, 1899, 1 Ch. 365.

(6.) Real estate specifically devised, or comprised in a residuary devise, and personal estate specifically bequeathed, each contributing rateably (*Eddels* v. *Johnson*, 1 Giff. 22; *Hensman* v. *Fryer*, 3 Ch. 420; *Lancefield* v. *Iggulden*, 10 Ch. 136). The rule was applied in paying costs of administration (*Jackson* v. *Pease*, 19 Eq. 96). Real estate charged with legacies contributes according to its full value as if not so charged (*Re Saunders-Davies*, 34 Ch. D. 482; *Re Bawden*, *sup.*).

(7.) Real or personal estate expressly appointed under a general power vested in the testator (*Fleming* v. *Buchanan*, 3 D. M. & G. 976; see *Re Hartley, Williams* v. *Jones*, 1900, 1 Ch. 152).

See, further, as to the order of application of assets, 2 Jarm. Wills, 5th ed., 1430; Seton, 6th ed. 1672. As to mortgage debts, which are now primarily payable out of the mortgaged lands, unless a contrary intention appears by will or deed, see the Real Estate Charges Act, 1854, *post*, p. 426; and as to incumbered personalty, see *post*, p. 429.

As to the application in payment of debts of real estate in a foreign country, see *Harrison* v. *Harrison*, 8 Ch. 342.

Property appointed by married woman.

With regard to married women, in cases not within the M. W. P. Act, 1882 (see sect. 4, *ante*, p. 348), it was held that property appointed under a general power was assets for payment of the married women's debts, whether the power was a power to appoint by deed or will (*London Chartered Bank* v. *Lempriere*, L. R. 4 P. C. 572; *Mayd* v. *Field*, 3 Ch. D. 587), or by will only (*Godfrey* v. *Harben*, 13 Ch. D. 216; *Hodges* v. *Hodges*, 20 Ch. D. 749). The decision, however, in *Godfrey* v. *Harben*, was observed upon in *Pike* v. *Fitzgibbon* (17 Ch. Div. 466). And *Kay*, J., expressed his opinion that in cases not within the M. W. P. Act, 1882, whether the power of appointment was by deed or will, or by will only, an appointment by will did not make the property appointed liable to engagements entered into with a married woman on the credit of her separate estate (*Re Roper, Roper* v. *Doncaster*, 39 Ch. D. 491). As to cases within the M. W. P. Act, 1882, see sect. 4 and the note thereto, *ante*, p. 348. And as to the application in payment of a married woman's ante-nuptial debts of property appointed by her under a general testamentary power, see *Re Parkin, Hill* v. *Schwartz*, 1892, 3 Ch. 510.

(5) Marshalling assets between legatees.

If the above-mentioned order has been disturbed by any creditor, equity will marshal the assets so as to set right the disturbance. Thus, if the general personal estate out of which pecuniary legacies are to be paid has been exhausted by any creditor, the legatee will be entitled to be repaid out of lands devised for payment of debts, and out of lands descended (Wms. Real Assets, 112; *Rickard* v. *Barrett*, 3 K. & J. 289; see *Foster* v. *Cook*, 3 Br. C. C. 347); and out of lands charged with debts (*Ib.*; *Re Stokes, Parsons* v. *Miller*, 67 L. T. 223; *Re Salt, Brothwood* v. *Keeling*, 1895, 2 Ch. 203). But (inasmuch as a residuary devise remains specific notwithstanding the Wills Act (*Hensman* v. *Fryer*, 3 Ch. 420)) a pecuniary legatee cannot call upon a residuary devisee to contribute to the payment of debts (*Collins* v. *Lewis*, 8 Eq. 708; *Dugdale* v. *Dugdale*, 14 Eq. 234); unless the legacy is charged on the residuary real estate (*Re Bawden*, *sup.*). Where a debt is charged by way of mortgage on specifically devised real

3 & 4 Will. 4, c. 104.

estate and the testator excludes the Real Estate Charges Acts (*post*), and the mortgagee obtains payment out of the personal estate, a pecuniary legatee can stand in the shoes of the mortgagee as against the real estate and has priority over the devisee (*Re Smith, S.* v. *S.*, 1899, 1 Ch. 371). When a testator agreed to purchase land and devised it, and after his death the purchase-money was paid out of his general personal estate, a pecuniary legatee was entitled to stand in the place of the vendor against the land (*Lilford* v. *Powys Keck*, 1 Eq. 347). Generally speaking, if specific or residuary devisees or specific legatees are called on to pay debts, they have a right to have the whole of the testator's other property marshalled in their favour, so as to throw the debts as far as possible on the other assets which are primarily liable. And on failure of the other assets, any one of such devisees or legatees who may have paid the whole of the debts, will have a right to contribution from the others (Wms. Real Assets, 113; *Hensman* v. *Fryer*, 3 Ch. 430; followed on the question of the specific character of a residuary devise in *Lancefield* v. *Iggulden* (10 Ch. 136); but not followed on the question of the right of pecuniary legatees to contribution (*Dugdale* v. *Dugdale*, 14 Eq. 234; *Farquharson* v. *Floyer*, 3 Ch. D. 109)).

(6) Marshalling assets between creditors.

As regards the old doctrine of marshalling between creditors, according to the law existing before the Administration of Estates Act, 1833, simple contract creditors in some cases acquired a right against the real estate by marshalling (*Kidney* v. *Coussmaker*, 12 Ves. 154). The principle of marshalling was, that a person who had two funds to which he might resort for the payment of a debt, should not by his choice disappoint another who had only one, but the latter should stand in the place of the former (*Trimmer* v. *Bayne*, 9 Ves. 209; see *Aldrich* v. *Cooper*, 8 Ves. 391). Thus where, before the Admon. of Estates Act, 1833, creditors holding specialties binding the heir exhausted the personal estate, equity allowed simple contract creditors to stand in their place against the real estate (*Cradock* v. *Piper*, 15 Sim. 301). The Administration of Estates Act, 1833, however, which rendered freeholds and copyholds liable to simple contract debts, obviated the necessity of the court resorting to the doctrine of marshalling for enforcing their payment (see notes to *Aldrich* v. *Cooper*, 1 L. C. Eq. p. 36, 7th ed.). And the Administration of Estates Act, 1869 (*post*, p. 407) rendered marshalling between creditors still less important. There does not appear to be any authority for holding that the right to marshal assets will be exercised in favour of a simple contract creditor, whose immediate right against the real estate is barred by the Statute of Limitations (*Fordham* v. *Wallis*, 10 Hare, 230; see *Busby* v. *Seymour*, 1 J. & Lat. 527).

(7) Debts of a deceased person.

Simple contract debts.

In view of the distinction (as regards payment out of real estate) between the specialty and simple contract debts before the Administration of Estates Act, 1833, that act expressly referred to each of these classes of debts. Debts by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed, but by oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise (2 Bl. Comm. 465). A foreign judgment constitutes but a simple contract debt (*Wilson* v. *Dunsany*, 18 Beav. 293). So the right to indemnity of a surety for a specialty debt, who has not paid (*Ferguson* v. *Gibson*, 14 Eq. 379; *Re Illidge, Davidson* v. *Illidge*, 27 Ch. Div. 482). So damages awarded in an arbitration for breach of an agreement to lease a mine (*Talbot* v. *Shrewsbury*, 16 Eq. 26).

Payments on behalf of lunatics.

In the case of necessaries supplied to a lunatic, the law implies an obligation on the part of the lunatic, under which the amount of such necessaries may become payable as a simple contract debt out of his real or personal assets (*Re Rhodes, Rhodes* v. *Rhodes*, 44 Ch. Div. 94; *Wentworth* v. *Tubb*, 1 Y. & Coll. C. C. 171; see *Re Watson, Stamford Union* v. *Bartlett*, 1899, 1 Ch. 72; *Re Taylor, Edmonton Union* v. *Deeley*, 1901, 1 Ch. 480; *Manby* v. *Scott*, 1 Sid. 112; *Baxter* v. *Earl Portsmouth*, 7 D. & R. 614; 5 B. & C. 170; *Brown* v. *Joddrell*, 3 C. & P. 30; M. & M. 105; *Dane* v.

Kirkwall, 8 C. & P. 679; see Pope on Lunacy, 257, 2nd ed.). And a trustee will be allowed such payments in account (*Nelson* v. *Duncombe*, 9 Beav. 211). Necessaries include costs of proceedings in lunacy (*Stedman* v. *Hart*, Kay, 607; *Jones* v. *Noyes*, 7 W. R. 21; *Williams* v. *Wentworth*, 5 Beav. 325). **3 & 4 Will. 4, c. 104.**

A trustee, who has committed a breach of trust by misapplying the trust fund, is considered only as a simple contract debtor to his *cestui que trust* (*Vernon* v. *Vawdry*, 2 Atk. 119; *Cox* v. *Bateman*, 2 Ves. sen. 19; see *Perry* v. *Phelips*, 4 Ves. 116). But an acknowledgment by a trustee under his hand and seal, that he alone had received the whole trust money for the purposes of the trust (*Gifford* v. *Manley*, Cas. temp. Talbot, 109; see Kay, 725), or any general words amounting to a covenant on his part, will make him a debtor by specialty (*Montford* v. *Cadogan*, 19 Ves. 638; *Wood* v. *Hardisty*, 2 Coll. 542). And the words "covenant or agree," are not necessary in a trust deed to constitute a specialty contract: a declaration by the trustee that he will stand possessed on certain trusts, &c., is sufficient (*Richardson* v. *Jenkins*, 1 Drew. 477). A trustee, however, under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it (*Richardson* v. *Jenkins*, 1 Drew. 477). And even where the trustee has executed the deed, the court will not raise a covenant without necessity (*Adey* v. *Arnold*, 2 D. M. & G. 437). In every case the question is: Was it intended that the trustee should give a covenant for payment of the money? (*Isaacson* v. *Harwood*, 3 Ch. 228). The mere assignment of the trust property will not create a specialty debt (*Adey* v. *Arnold*, 2 D. M. & G. 432; *Wynch* v. *Grant*, 2 Drew. 312); nor a recital of an agreement to become trustee (*Wynch* v. *Grant*, *ubi sup.*); nor a declaration by the trustee that he accepts the office (*Holland* v. *Holland*, 4 Ch. 449). **Debts in connection with trusts.**

As to specialty debts, see generally the note to sect. 3 of the Civil Procedure Act, 1833, *ante*, p. 217. To make a debt a specialty it must be enforceable at law. There is no specialty in equity (*Holland* v. *Holland*, 4 Ch. 455). Specialty debts have been held to have been created by a covenant in a marriage settlement to settle money (*Eyre* v. *Monro*, 3 K. & J. 305); by a covenant to execute a lease (*Kidd* v. *Boone*, 12 Eq. 89); and by a covenant for further assurance (*Re Dickson*, *ib.* 154). In general, an acknowledgment of a debt by an instrument under seal will amount to a covenant to pay and creates a specialty (*Saunders* v. *Milsome*, 2 Eq. 573), but not where the acknowledgment is made for a collateral purpose (*Jackson* v. *N. E. R.*, 7 Ch. D. 573, 583; *Isaacson* v. *Harwood*, 3 Ch. 225; *Marryat* v. *Marryat*, 28 Beav. 224). All moneys payable in pursuance of the regulations of a company formed under Companies Act, 1862, by a member to the company are specialty debts (Cos. Act, 1862, s. 16); and where a company is being wound up, the liability of a contributory to pay calls is a specialty (sect. 75; *Buck* v. *Robson*, 10 Eq. 629), even where the company is not registered under that act (*Re Muggeridge*, *Muggeridge* v. *Sharp*, 10 Eq. 443). **Specialty debts.**

The Administration of Estates Act, 1833, charged the real estate not only with debts of every description actually due from a deceased person at his death, but also with all liabilities resulting out of obligations entered into during his life (*Hamer's Devisees' Case*, 2 D. M. & G. 366). **Debts, &c. payable under 3 & 4 Will. 4, c. 104.**

The costs of probate litigation could not, before the Land Transfer Act, 1897 (*post*, pp. 421, 422), be paid out of real estate (*Charter* v. *Charter*, 3 Ch. D. 218; *Re Price*, *Williams* v. *Jenkins*, 31 Ch. D. 485; *Re Shaw*, *Bridges* v. *Shaw*, 1894, 3 Ch. 615). But the Land Transfer Act, 1897, has altered the rule (*Re Prince*, *Godwin* v. *Prince*, 1898, 2 Ch. 228). The costs of a creditor's administration action were, according to the old rule, paid out of the same funds and in the same order as debts (see *Wilson* v. *Heaton*, 11 Beav. 492). According, however, to the modern rule (laid down by the C. A. in a legatee's administration action), the general costs of an action to administer real and personal estate are borne by the personal estate; but the costs exclusively occasioned by the administration of the real estate are thrown upon the real estate (*Patching* v. *Barnett*, 45 L. T. 296; *Re Middleton*, *Thompson* v. *Harris*, 19 Ch. Div. 552). This has not been altered by the L. T. Act, 1897 (*Re Jones*, *Elgood* v. *Kinderley*, 1902 1 Ch. 92). **Costs.**

3 & 4 Will. 4, c. 104.

In the administration of equitable assets all creditors are paid *pari passu* without regard to legal priority (Wms. Exors. 9th ed. 1546; see *Pardo* v. *Bingham*, 6 Eq. 485; *Re Poole, Thompson* v. *Bennett*, 6 Ch. D. 739).

(8) Order in which debts are paid.

In the administration of legal assets the debts of persons dying since 1869 are paid in the following order:—

(1.) Debts due to the Crown on record or specialty. See as to the priority of the Crown in winding up proceedings, *Re Henley* (9 Ch. Div. 469); *Re Oriental Bank* (28 Ch. D. 643). And a surety to the Crown who has paid the debt is entitled to the Crown's priority (*Re Churchill, Manisty* v. *Churchill*, 39 Ch. D. 174).

(2.) Debts to which particular statutes give priority, such as debts for poor-rates due from overseers (Poor Relief Act, 1743, s. 3; *Fisher* v. *Shirley*, 1879, W. N. p. 108); debts due from their officers to an unincorporated building society (*Moors* v. *Marriott*, 7 Ch. D. 543), or to a friendly society (Friendly Societies Act, 1896, s. 35; see *Ex parte Edmonds*, 46 L. T. 240); or to a savings-bank (Trustee Savings Banks Act, 1863, s. 14; *Jones* v. *Williams*, 36 Ch. D. 573); certain debts from officers or soldiers dying while subject to military law (Regimental Debts Act, 1893, s. 2). When an insolvent estate is being administered in the Chancery Division, the priority as to rates and wages given by the Preferential Payments in Bankruptcy Act, 1888, applies (*Re Heywood, Parkington* v. *Heywood*, 1897, 2 Ch. 593).

(3.) Judgments in courts of record, and decrees in courts of equity against the deceased. After the Law of Property Amendment Act, 1860, it was held that to enjoy this priority the judgment must be registered (*Re Turner, Turner* v. *Waller*, 12 W. R. 337; 33 L. J. Ch. 232; *Kemp* v. *Waddingham*, L. R. 1 Q. B. 355; *Van Gheluive* v. *Nerinckx*, 21 Ch. D. 189). *Quære* whether since the Land Charges Act, 1900, s. 2 (3) and s. 5, registration is now necessary, those sections having altered the law as to the registration of judgments (see *Fuller* v. *Redman* (No. 1, 26 Beav. 600) and *post*, p. 512). A foreign judgment is only a simple contract debt (*Wilson* v. *Dunsany*, 18 Beav. 293). As to a surety for the deceased who has paid off a judgment recovered during his life for the debt, see *Re M'Myn, Lightbown* v. *M'Myn* (33 Ch. D. 575).

(4.) Judgments against legal personal representatives for debts of deceased whether specialty or simple contract (*Williams* v. *Williams*, 15 Eq. 270; see however as to judgments for simple contract debt, *Re Bentinck, B.* v. *B.*, 1897, 1 Ch. 673), and whether the judgment be registered or not. The rule before Administration of Estates Act, 1869, that registration was unnecessary (*Jennings* v. *Rigby*, 33 Beav. 198), was not altered by that act (*Williams* v. *Williams*, 15 Eq. 270). A balance order for payment of a call is not such a judgment (*International Co.* v. *Hawes*, 29 Ch. D. 934). Where a general decree for administration was made on the same day as the judgment, the judgment creditor had no priority (*Parker* v. *Ringham*, 33 Beav. 535). So where a like decree was made after order *nisi* to sign judgment, but before judgment actually signed (*Hanson* v. *Stubbs*, 8 Ch. D. 154). Judgments against representatives are payable according to their dates (*Dollond* v. *Johnson*, 2 Sm. & G. 301).

(5.) Recognizances and statutes.

(6.) Specialty and simple contract debts, which now stand in equal degree (Administration of Estates Act, 1869, *post*, p. 407), including arrears of rent (*Re Hastings, Sherriff* v. *Hastings*, 6 Ch. D. 610). Simple contract debts due to the Crown have priority over simple contract debts due to a subject (Wms. Exors., 9th ed., 875). In a case of insolvency which occurred since the last-mentioned act, the assets were apportioned rateably between the simple contract creditors (one of whom was the Crown) and the specialty creditor, and the Crown's debt was paid in priority

out of the assets apportioned to the former class (*Re Bentinck, B.* v. *B.*, 1897, 1 Ch. 673). 3 & 4 Will. 4, c. 104.

(7.) Debts due from an incumbent's estate for dilapidations (*Bryan* v. *Clay*, 22 L. J. Q. B. 23). As regards equitable assets these debts rank *pari passu* with simple contract debts (*Bissett* v. *Burgess*, 23 Beav. 278).

(8.) Voluntary bonds (*Markwell* v. *Markwell*, 34 Beav. 18; see *Re Whitaker*, 42 Ch. Div. 119). But if assigned for value they are specialties (*Payne* v. *Mortimer*, 4 De G. & J. 447).

In the case of persons dying after 1869, it is now enacted, that no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding. But this provision is not to prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt (Administration of Estates Act, 1869, s. 1). 32 & 33 Vict. c. 46.

The last-mentioned act gave simple contract creditors who obtained judgment against the debtor's executor a right to be paid in priority to specialty creditors (*Re Williams, W.* v. *W.*, 15 Eq. 270). But it did not give an executor the right to prefer a simple contract creditor to specialty creditors (*Re Hankey, Cunliffe-Smith* v. *Hankey*, 1899, 1 Ch. 541; *contra*, *Re Ormond*, 58 L. T. 24); or the right to retain a simple contract debt as against specialty creditors (*Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones, Calver* v. *Laxton*, 31 Ch. D. 440; *Re Briggs, Earp* v. *Briggs*, 1894, W. N. 162). Nor does the act (which does not affect the Crown) give a simple contract Crown debt priority over specialty debts due to subjects (*Re Bentinck, B.* v. *B.*, 1897, 1 Ch. 673).

It has been further enacted that in the administration by the court of the assets of any person who may die after the 1st November, 1875 (see *Sherwin* v. *Selkirk*, 12 Ch. D. 73), and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt (Jud. Act, 1875, s. 10). Jud. Act, 1875, s. 10.

It is settled that this section does not render applicable to the administration in Chancery of the assets of a deceased person the rules in Bankruptcy which increase a bankrupt's assets, *e.g.*, the reputed ownership clause, the fraudulent preference clause, and the sections which defeat certain settlements and executions. Those assets must be ascertained by applying the general laws of property and not the special rules applicable only to cases of bankruptcy (*Re Leng, Tarn* v. *Emerson*, 1895, 1 Ch. 655). But the section imports the Bankruptcy Rules "as to debts and liabilities provable;" including the general rule as to the payment of debts *pari passu* (*Re Leng, Tarn* v. *Emerson*, 1895, 1 Ch. 656), *e.g.*, voluntary creditors and creditors for value (*Re Whitaker, Whitaker* v. *Palmer*, 1901, 1 Ch. 9); and including the rules prescribed by the Preferential Payments in Bankruptcy Act, 1888 (*Re Heywood, Partington* v. *Heywood*, 1897, 2 Ch. 593); and the rule postponing a widow's claim for money lent to the deceased for the purposes of his trade (*Re Leng, Tarn* v. *Emerson, sup.*). The section does not interfere with an executor's right of retainer (*Lee* v. *Nuttall*, 12 Ch. D. 61; *Re May, Crawford* v. *May*, 45 Ch. D. 499). See further as to this section the notes thereto in the Annual Practice.

The Bankruptcy Act, 1883, s. 125, gives power to transfer the administration of an insolvent estate to bankruptcy, see Bankruptcy Act, 1890, ss. 21, 29. As to the general effect of the section, see *Re Williams, Jones* Bankruptcy Act, 1883, s. 125.

3 & 4 Will. 4, c. 104.

v. *Williams* (36 Ch. D. 573); *Watkins* v. *Barnard* (1897, 2 Q. B. 521); *Hasluck* v. *Clark* (1899, 1 Q. B. 699).

The power to make an order is discretionary (*Higgs* v. *Weaver*, 29 Ch. D. 236). As to an executor's right of retainer being exercisable after such an order, see *Re Rhoades* (1899, 2 Q. B. 347).

Executor may prefer creditors.

Before judgment in an administration action an executor or administrator may prefer one creditor to another of equal degree (*Vane* v. *Rigden*, 5 Ch. 669; *Maltby* v. *Russell*, 2 Sim. & Stu. 227; see *Re Hankey, Cunliffe-Smith* v. *Hankey*, 1899, 1 Ch. 541; *Re Oremond*, 58 L. T. 24); even though the debt be barred by statute (*Stahlschmidt* v. *Lett*, 1 Sm. & G. 415); and even though the representative have notice of the commencement of an administration action (*European Society* v. *Radcliffe*, 7 Ch. D. 733). In the last-mentioned case it was said by *Jessel*, M. R., that to prevent preferential payments a creditor commencing an administration action should, on issuing a writ, apply for a receiver; but this was disapproved by the Court of Appeal in *Phillips* v. *Jones* (28 Sol. J. 360). And it has been held that a receiver will not be appointed except where a case is shown of assets being wasted (*Harris* v. *Harris*, 56 L. T. 507; *Re Wells, Moloney* v. *Brooke*, 45 Ch. D. 575).

(9) Retainer by executor.

Origin of doctrine.

An executor's right of retaining out of a testator's assets a debt owing to himself by the testator was the exercise by the executor in his own favour of the right of preference (*Talbot* v. *Frere*, 9 Ch. D. 571; see *Re Hankey*, 1899, 1 Ch. 543). It was a right against legal assets, and "was given for this reason. When the creditor was also executor he could not sue himself. Any other creditor by suing the executor might get priority by judgment obtained; and the executor not being able to sue himself was allowed, as against other creditors, to retain" (*Re Illidge, Davidson* v. *Illidge*, 27 Ch. Div. 481; see *Re Baker, Nicholls* v. *Baker*, 44 Ch. Div. 273).

By whom right exercisable.

The right might be exercised by the executor of an executor if the right was claimed during the lifetime of the latter (*Wilson* v. *Coxwell*, 23 Ch. D. 764), but only out of assets which came to the hands of the latter or were paid into court in his lifetime (*Re Compton, Norton* v. *Compton*, 30 Ch. D. 15). The right might also formerly be exercised by an administrator (*Re May, Crawford* v. *May*, 45 Ch. D. 499). But see now the form of administration bond (Practice Note, 1899, W. N. 262; see *Davies* v. *Parry*, 1899, 1 Ch. 602; *Re Belham, Richardes* v. *Yates*, 1901, 2 Ch. 52).

Against whom.

An executor's retainer is not affected by Administration of Estates Act, 1869, s. 1 (*Crowder* v. *Stewart*, 16 Ch. D. 368); but can be exercised only as against creditors in equal degree (*Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones, Calver* v. *Laxton*, 31 Ch. D. 440; *Re Briggs, Earp* v. *Briggs*, 1894, W. N. 162; *Re Oremond*, 58 L. T. 24; see *Talbot* v. *Frere*, 9 Ch. D. 568; *Re Allen, Adcock* v. *Evans*, 1896, 2 Ch. 345; *Laver* v. *Botham*, 1895, 1 Q. B. 59). But a retainer made without notice of a debt of higher degree will be good (*Re Fludyer, Wingfield* v. *Erskine*, 1898, 2 Ch. 562).

Out of what property.

An executor cannot retain out of equitable assets (*Re Poole, Thompson* v. *Bennett*, 6 Ch. D. 739; *Walters* v. *Walters*, 18 Ch. D. 182). So real estate made assets under Administration of Estates Act, 1833, being equitable assets, an executor had no right of retainer out of it (*Walters* v. *Walters*, 18 Ch. D. 182; *Davidson* v. *Illidge*, 27 Ch. Div. 478). Real estate being now legal assets under the Land Transfer Act, 1897 (*post*, p. 418), it would seem that the right of retainer would apply. An executor cannot retain out of assets got in by a receiver (*Re Jones, Calver* v. *Laxton*, 31 Ch. D. 440); but where the executor had paid a debt out of assets in his hands under an order of court made "without prejudice to any question of retainer," he was allowed to retain out of assets subsequently got in by the receiver (*Re Lance, Sharp* v. *Rebbeck*, 1900, W. N. 29); and he may retain out of assets got in by himself and handed over to a receiver (*Re Harrison, Latimer* v. *Harrison*, 32 Ch. D. 395; *Re Giles, Jones* v. *Pennefather*, 1896, 1 Ch. 956); and also (where the estate is being administered in bankruptcy) out of assets got in by himself and paid over to the trustee in ignorance of the right (*Re Rhoades*, 1899, 2 Q. B. 347). He can also

retain out of assets paid into court by him either actually or in substance (*Richmond* v. *White*, 12 Ch. Div. 361; *Re Giles, sup.*; *Re Langley, Johnson* v. *Langley*, 68 L. J. Ch. 361); but he cannot retain out of a fund transferred from the credit of another suit to the credit of the administration action (*Pulman* v. *Meadows*, 1901, 1 Ch. 233). The court has refused to pay funds out of court to an executor to enable him to retain his debt (*Trevor* v. *Hutchins*, 1896, 1 Ch. 844). When the executor's debt exceeds the value of the assets he may retain the assets in specie (*Re Gilbert*, 1898, 1 Q. B. 282). 3 & 4 Will. 4, c. 104.

An executor can retain in respect of a debt due to himself jointly with others (*Crowder* v. *Stewart*, 16 Ch. D. 368; *Re Hubback, International Co.* v. *Hawes*, 29 Ch. Div. 935; *Re Bolton*, 1892, W. N. 114), or due to himself as trustee (*International Co.* v. *Hawes, sup.*); and in such a case is bound to retain if the *c. q. t.* require it (*Sander* v. *Heathfield*, 19 Eq. 21); but he cannot retain a debt to which he is entitled as *c. q. t.*, the right to sue for which is vested in trustees (*Re Dunning*, 54 L. J. Ch. 900; *Re Hayward, Tweedie* v. *Hayward*, 1901, 1 Ch. 221; overruling *Loomes* v. *Stotherd*, 1 S. & S. 461). A person to whom administration is granted *durante minoritate*, or to the use of a lunatic, may retain for their benefit (*Franks* v. *Cooper*, 4 Ves. 763); but where the grant was made to the manager of a bank who were creditors (but not expressed to be made for the use of the bank), he could not retain the bank's debt (*Re Richards, Lawson* v. *Hervey*, 1901, 2 Ch. 399). The right may be exercised in respect of the right of indemnity as surety for the testator (*Re Giles, Jones* v. *Pennefather*, 1896, 1 Ch. 956), or in respect of claims for damages for breach of pecuniary contracts (*Re Compton, Norton* v. *Compton*, 30 Ch. D. 15; see *Re Allen, Adcock* v. *Evans*, 1896, 2 Ch. 345). In the case of a debt payable in the form of an annuity where the estate was insolvent, an administratrix was allowed to retain arrears, but not the value of her future annuity (*Re Beeman, Fowler* v. *James*, 1896, 1 Ch. 48). The right can be exercised by an administratrix in respect of moneys advanced out of her separate estate to her deceased husband for his business (*Re May, Crawford* v. *May*, 45 Ch. D. 499). An executor may retain a debt notwithstanding that the amount has not been ascertained (*Morris* v. *Morris*, 10 Ch. 68); and in respect of a debt barred by the Statute of Limitations (*Beswick* v. *Orpen*, 16 Ch. Div. 207; see *Re Rownson, Field* v. *White*, 29 Ch. Div. 359), but not one barred by the Statute of Frauds (*Re Rownson, sup.*). In respect of what debts.

The right need not be asserted before occasion arises (*Re Rhoades*, 1899, 2 Q. B. 347). It may be exercised after a decree in an administration action (*Re Barrett, Whitaker* v. *Barrett*, 43 Ch. D. 70; *Davies* v. *Parry*, 1899, 1 Ch. 602), and after certificate under an administration decree (*Re Giles, Jones* v. *Pennefather*, 1896, 1 Ch. 956). The right is not waived by the executor commencing an administration action on behalf of himself and all other creditors, and submitting to account (*Ex p. Campbell, Campbell* v. *Campbell*, 16 Ch. D. 198). The court will not interfere with the retainer by appointing a receiver (*Re Wells, Molony* v. *Brooke*, 45 Ch. D. 569). The right of retainer is not affected by the Jud. Act, 1875, s. 10 (*ante*, p. 407); nor (so far as regards assets got in by the executor) by the transfer of the administration to bankruptcy under sect. 125 of the Bankruptcy Act, 1883 (*Re Rhoades*, 1899, 2 Q. B. 347). Effect of proceedings on right.

It was said before the Land Transfer Act, 1897, that an heir-at-law or devisee, where the estate was not charged with debts, might retain a debt to which he was entitled by specialty in which the heirs were bound, but not a simple contract debt (*Re Illidge, Davidson* v. *Illidge*, 27 Ch. Div. 478). Consider now the effect of the L. T. Act, 1897 (*post*, p. 417). By heir-at-law.

As regards the application in payment of the debts of a person domiciled in one country of assets belonging to him situate in another, it has been laid down that the proper order and priority of distribution of assets is always a matter for the *lex fori*, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution (*Thurburn* v. *Steward*, L. R. 3 P. C. 513; see *Re Doetsch, Matheson* v. *Ludwig*, 1896, 2 Ch. 836). Personal assets for the purpose of (10 Administration of assets in one country where owner domiciled in another.

3 & 4 Will. 4, c. 104.

administration as distinguished from distribution among successors are governed by the law, not of their owner's domicil, but of their locality (*Blackwood* v. *Reg.*, 8 App. Cas. 93; *Commissioners of Stamps* v. *Hope*, 1891, A. C. 476; *Henty* v. *Reg.*, 1896, App. Cas. 567, overruling on this point *Wilson* v. *Dunsany*, 18 Beav. 293). Compare in the case of real assets *Harrison* v. *Harrison*, 8 Ch. 342; *Re Hewit, Lawson* v. *Duncan*, 1891, 3 Ch. 568. In the case of a debt contracted abroad by a domiciled Englishman, the *lex loci contractus* does not entitle the creditor to prior payment out of equitable assets administered here (*Pardo* v. *Bingham*, 6 Eq. 485). An executor who has taken out probate in one country must not remit assets situate there to another country, in order to give a priority which would not exist in the first country (*Cook* v. *Gregson*, 2 Drew. 286; see *Re Klæbe, Kannreuther* v. *Geiselbrecht*, 28 Ch. D. 179). In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors (*Re Klæbe, Kannreuther* v. *Geiselbrecht*, 28 Ch. D. 175).

(11) **Copyholds heretofore not liable to debts.**

Copyholds were not within the statute 3 & 4 Will. & Mary, c. 14, nor the 47 Geo. 3, sess. 2, c. 74, nor the Debts Recovery Act, 1830, and consequently before this act were not liable to specialty debts, or debts of traders. Before this act, copyhold estates were not liable, either at law or in equity, to the debts of a testator any further than he charged them (*Aldrich* v. *Cooper*, 8 Ves. 393). But where a testator having both freehold and copyhold estates, charged all *his real estates* with the payment of his debts, if he had surrendered the copyhold to the use of his will, the freehold and copyhold would have been applied rateably; but if he had not surrendered the copyhold, it would not have been applied until the freehold was exhausted (*Growcock* v. *Smith*, 2 Cox, 397; *Coombes* v. *Gibson*, 1 Br. C. C. 273; *Kentish* v. *Kentish*, 2 Br. C. C. 257). But equity would, before the statute 55 Geo. 3, c. 192, supply a surrender to the use of a will where a manifest intent to charge copyholds with debts appeared in the will (*Drake* v. *Robinson*, 1 P. Wms. 443; *Bateman* v. *Bateman*, 1 Atk. 421). As to copyholds being charged by a will, see *Noel* v. *Weston* (2 Ves. & Bea. 269); *Godolphin* v. *Penneck* (2 Ves. Sen. 271); *Doe* v. *Ludlam* (7 Bing. 275); *Ronalds* v. *Feltham* (T. & R. 418). Where one party had a charge on freehold and copyhold estate, and another party on the freehold estate only, it was held, that the latter was entitled to require that the former should be satisfied out of the copyhold estate so far as it would extend (*Tidd* v. *Lister*, 10 Hare, 157).

Formerly copyholds were not liable to an extent (Park. R. 195; *Drury* v. *Man*, 1 Atk. 96); and neither the Crown nor the subject was allowed to take copyhold tenements held in fee or for lives in execution (*Aldrich* v. *Cooper*, 8 Ves. 394); yet it was said that leases for years of copyhold tenements, granted by virtue of a licence from the lord, might be taken in execution, that being a common law interest (3 Prest. Abstr. 351). Sect. 11 of the Judgments Act, 1838, rendered copyholds liable to be taken in execution. Before that act they could not be taken in execution upon a judgment (*Cannon* v. *Pack*, Vin. Abr. Copyhold (O. e), pl. 6; 2 Eq. Cas. Abr. 226, pl. 6); nor be seized upon an outlawry, because it would have been prejudicial to the lord of the manor (*R.* v. *Budd*, Park. R. 190). But it seems that they may be sequestered (*Dunkley* v. *Scribnor*, 2 Madd. 443; *Carmarthen* v. *Hawson*, 3 Swanst. 294); although the sequestration will not be revived against the heir of the party who was sequestered (*Whitehead* v. *Harrison*, 1 Barn. K. B. 431); and they are within the rules as to marshalling assets (*Aldrich* v. *Cooper*, 8 Ves. 388; 2 Pow. on Mort. 263, n.). But a trust of copyholds, which descended according to the rules of the common law, was assets in the hands of the heir of the *cestui que trust*, as the customary descent is in that case broken (*Kelly* v. *Kelly*, 2 Eq. Cas. Abr. 509, pl. 4).

V.—The Law of Property Amendment Act, 1859.

22 & 23 Vict. c. 35, ss. 14—18, and 23.

[13th August, 1859.]

22 & 23 Vict. c. 35, s. 14.

Devisee in trust may raise money by sale, notwithstanding want of express power in the will.

14. Where by any will which shall come into operation after the passing of this act the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

The other sections of this act will be found under different heads in this work (see *ante*, p. 377, and *post*).

Having regard to the provisions of the Land Transfer Act, 1897 (*post*), it will not be necessary in the case of persons dying after 1897 to have recourse to these sections, except in case of copyholds (see L. T. Act, 1897, s. 1 (4), *post*, p. 417).

(1) *What amounts to a Charge of Debts or Legacies on Real Estate* ...411.

(2) *Effect of Charge of Debts before the Act*...413.

(3) *Cases under the Act*...414.

(4) *Effect of Lapse of Time on Executor's Power*...414.

(5) *Power to Mortgage*...414.

(1) Charge of debts on real estate.

On the question, what amounts to a charge of debts upon real estate, a mere authority to trustees to pay claims on the estate is not such a charge (*Re Head's Trustees*, 45 Ch. D. 310). A general direction, however, in a will to pay debts, charges them ordinarily on all the testator's real estate (*Graves* v. *Graves*, 8 Sim. 55; *Cook* v. *Dawson*, 29 B. 126; *Corser* v. *Cartwright*, L. R. 7 H. L. 735; *Re Adams and Perry*, 1899, 1 Ch. 554); unless a contrary intention appears in the will (*Thomas* v. *Britnell*, 2 Ves. Sen. 313; see *Re Butler*, *Le Bas* v. *Herbert*, 1894, 3 Ch. 258). Such contrary intention may appear (1) by reason of there being a specific charge of debts on part of the real estate (*Palmer* v. *Graves*, 1 Keen, 545; *Corser* v. *Cartwright*, *sup.*), in which case the words must be clear (*Taylor* v. *Taylor*, 6 Sim. 246; *Jones* v. *Williams*, 1 Coll. 156; see *Wrigley* v. *Sykes*, 21 Beav. 337; *Marshall* v. *Gingell*, 21 Ch. D. 790); or (2) by reason of the direction being a direction to executors to pay, in which case the presumed intention is that the debts are to be paid only out of the property which passes to the executors as such (*Wasse* v. *Heslington*, 3 M. & K. 495; *Bailey* v. *Bailey*, 12 Ch. D. 272). Where, however, in addition to the direction to the executors to pay debts the will contains a devise of real estate to them, such real estate may be

23 & 24 Vict. c. 35, s. 14.

charged, whether under the devise they take beneficially for life or otherwise (*Henvell* v. *Whitaker*, 3 Russ. 343; *Finch* v. *Hattersley*, *ib.* 345), or merely on trust (*Hartland* v. *Murrell*, 27 Beav. 204; *Re Tanqueray-Willaume*, 20 Ch. Div. 465; *Re Brooke*, *Brooke* v. *Brooke*, 1894, 1 Ch. 43; *Re Stokes*, *Parsons* v. *Miller*, 67 L. T. 223; see *De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. D. 568, the will of a married woman in exercise of a power). But it is a question of intention (*Bailey* v. *Bailey*, 12 Ch. D. 272; *Wasse* v. *Heslington*, 3 M. & K. 495). And such real estate will not be charged, either where the executors take unequal benefits (*Harris* v. *Watkins*, Kay, 438; see *Re Tanqueray-Willaume*, 20 Ch. Div. 465), or where the devise is to one executor only (*Warren* v. *Davis*, 2 M. & K. 49; see *Marshall* v. *Gingell*, 21 Ch. D. 790). Real estates made assets by means of such a charge are equitable assets (*Silke* v. *Prime*, 1 Br. C. C. 138; *Shiphard* v. *Lutwidge*, 8 Ves. 26); as to equitable assets, see *ante*, p. 401.

Charge of legacies on real estate.

With regard to legacies, where there is only a general gift of them, they are not charged on the testator's real estate (*Kightley* v. *Kightley*, 2 Ves. Jun. 328). To charge them a clear intention must be shown (*Bench* v. *Biles*, 4 Mad. 188); clearer, it would seem, than in the case of debts (*Kightley* v. *Kightley*, *sup.*). Where there is a direction that the real estate be sold, the proceeds to form part of the personal estate, the realty is charged (*Bright* v. *Larcher*, 3 De G. & J. 148; *Field* v. *Peckett*, 29 B. 568). A direction to the executor to pay legacies would seem to charge real estate devised to him (*Alcock* v. *Sparhawk*, 2 Vern. 228; *Elliot* v. *Handcock*, *ib.* 143; *Cross* v. *Kennington*, 9 Beav. 150); but a direction to executors to realise for the payment of legacies such part of the testator's estate as they thought right, did not charge the real estate (*Re Cameron*, *Nixon* v. *Cameron*, 26 Ch. D. 19). A general charge of legacies on the real estate did not charge specifically devised realty (*Spong* v. *Spong*, 3 Bli. N. S. 84; *Conron* v. *Conron*, 7 H. L. C. 168); except where the legacies were coupled with debts (*Maskell* v. *Farrington*, 3 D. J. & S. 338; see *Mannox* v. *Greener*, 14 Eq. 456); or where the specific devises comprised the whole of the testator's real estate (*Bank of Ireland* v. *McCarthy*, 1898, A. C. 181). Where legacies are charged on the real estate if the personal estate be deficient, see as to the time when the deficiency is to be ascertained, *Richardson* v. *Horton*, 13 Eq. 121, and cases there referred to; *McCarthy* v. *McCartie*, 1897, 1 I. R. 86.

Where a will gives legacies generally, and also gives the residue of the real and personal estate in one mass, the result is to charge the legacies upon the residuary real estate (*Greville* v. *Browne*, 7 H. L. C. 689; *Re Bellis*, 5 Ch. D. 504; *Re Dyson and Fowke*, 1896, 2 Ch. 720; *Re Adams and Perry*, 1899, 1 Ch. 554). The rule applies where the gift is of all real and personal estate "not otherwise disposed of" (*Re Bawden*, *National Provincial Bank of England* v. *Cresswell*, 1894, 1 Ch. 693; see *Re Smith*, *Smith* v. *Smith*, 1899, 1 Ch. 369); and whether the legacies are given before or after the gift of residue (*Elliott* v. *Dearsley*, 16 Ch. D. 327); and is not affected by a direction that debts and legacies are to be paid by the executors (*Re Brooke*, *Brooke* v. *Rooke*, 3 Ch. D. 630). As to its application in the case of property subject to a special power of appointment, see *Gainsford* v. *Dunn* (17 Eq. 405). The rule applies even where the will contains a specific devise of real estate by means of which the word "residue" might have been explained (*Francis* v. *Clemow*. Kay, 435); but in such case the specifically devised estate is not charged (see *Bray* v. *Stephens*, 12 Ch. D. 169). Where, after bequeathing legacies, a testator devised his real estate in B. and the residue of his real and personal estate, the legacies were charged on the real estate in B. as well as the testator's other real estate (*Bray* v. *Stephens*, 12 Ch. D. 162; not following *Castle* v. *Gillett*, 16 Eq. 530). But where, after bequeathing legacies, a testator devised all his real estate and bequeathed the residue of his personal estate, the rule in *Greville* v. *Browne* did not apply (*Wells* v. *Rowe*, 40 L. T. 715; 48 L. J. Ch. 476). When the rule applies the legacies are payable primarily out of the personalty, unless the testator directs payment out of a mixed fund arising from the conversion of the real and personal estates; in which case they are payable rateably out of the realty and personalty (*Re*

Boards, Knight v. *Knight*, 1895, 1 Ch. 499). The rule was not applied to legacies expressly directed to be paid out of personal estate (*Gyett* v. *Williams*, 2 J. & H. 429). 22 & 23 Vict. c. 35, s. 14.

Notwithstanding a charge of legacies on real estate, the general personal estate remains the primary fund for their payment (*Davies* v. *Ashford*, 15 Sim. 46); unless the words of the charge exonerate the personal estate (*Re Needham, Robinson* v. *Needham*, 54 L. J. Ch. 78; *Ion* v. *Ashton*, 28 Beav. 379).

(2) Wills before 1859 containing charge of debts; who took power of sale.

In the case of wills coming into operation before 13th August, 1859, the law is doubtful as to the legal operation of a will creating merely a charge of debts, where no machinery is provided for giving effect to the charge. With regard to such cases, it was laid down that a charge of debts was equivalent to a trust for sale for the payment of them (*Ball* v. *Harris*, 4 M. & C. 267). And that a general charge of debts enabled an executor to sell land and make a good title (*Greetham* v. *Colton*, 34 Beav. 619; and see *Gosling* v. *Carter*, 1 Coll. 650; *Story* v. *Walsh*, 18 Beav. 568; *Wrigley* v. *Sykes*, 21 Beav. 337; *Hodkinson* v. *Quin*, 1 J. & H. 309; *Cook* v. *Dawson*, 29 Beav. 126; *Hamilton* v. *Buckmaster*, 3 Eq. 323; *Colyer* v. *Finch*, 5 H. L. C. 922). No power of sale, however, was ever implied in an administrator with the will annexed (*Re Clay and Tetley*, 16 Ch. Div. 7). *Wood*, V.-C., observed that a testator having charged his real estate with a sum of money, must be taken to have given an implied power to some one to raise the sum required, and that the donee of the power must in each case be ascertained from the whole will (*Eidsforth* v. *Armstead*, 2 K. & J. 333; see *Robinson* v. *Lowater*, 5 D. M. & G. 272; *Gosling* v. *Carter*, 1 Coll. 650). Executor, &c.

Where the land was devised to trustees, it was held that they could sell or mortgage (*Hodkinson* v. *Quin*, 1 J. & H. 303; *Eidsforth* v. *Armstead*, 2 K. & J. 333; *Ball* v. *Harris*, 4 M. & C. 264): certainly with the consent of the executors (*Shaw* v. *Borrer*, 1 Keen, 559); or where the trustee was also executor (*Sabin* v. *Heape*, 27 Beav. 553). But it seems that the executors might also have had a concurrent power of sale (*Hodkinson* v. *Quin*, 1 J. & H. 303). Devise on trust.

Lord *Cranworth* observed that, where the estate was devised beneficially to a person other than the executor, charged with certain payments of debts or legacies, then the money was to be raised through the instrumentality of a sale by the devisee, and that devisee was the person, and the only person, who could make a legal title (*Colyer* v. *Finch*, 5 H. L. C. 922; see *Corser* v. *Cartwright*, 8 Ch. 971). A devisee subject to a general charge of debts, who was also one of the executors, was the only person to sell or mortgage (*Corser* v. *Cartwright*, L. R. 7 H. L. 731). A devisee subject to a general charge of debts and a charge of particular annuities (who was also an executor) could make a good title without the annuitants (*Page* v. *Adams*, 4 Beav. 269; *Elliot* v. *Merryman*, 2 Wh. & Tu. L. C. Eq. 904, 7th ed.; see *Re Tanqueray-Willaume*, 20 Ch. D. 465). Devise beneficially.

For the case where the charge was of a particular legacy, see *Re Rebbeck, Bennett* v. *Rebbeck* (63 L. J. Ch. 596; 71 L. T. 74). Where a testator devised lands for life with contingent remainders over, and charged them with his debts generally, but gave no express power of sale, the executor could sell (*Robinson* v. *Lowater*, 5 D. M. & G. 272; see *Bolton* v. *Stannard*, 6 W. R. 570). Devise for life with remainders over.

Where a testator charged his real estate with the payment of his debts, and the real estate was not devised, but descended to the heir, it was held, at law, that the executor had no legal power of sale (*Doe* v. *Hughes*, 6 Exch. 223); but probably he had an equitable power (*Colyer* v. *Finch*, 5 H. L. C. 922). Heir-at-law.

Where real estate was being sold for payment of debts, and the legal estate was in the heir, who was out of the jurisdiction, and the charge of debts was not clear, the court declared the heir to be a trustee for the purposes of the will, and made a vesting order under the Trustee Act, 1850, s. 9 (*Hooper* v. *Strutton*, 12 W. R. 367).

Where a sole executor, who was devisee of real estate in trust to sell and pay debts, renounced and disclaimed, the heir-at-law who had taken out administration could sell the estate and give valid receipts (*Austin* v. *Martin*, 29 Beav. 523). Disclaimer.

22 & 23 Vict. c. 35, s. 14.

Executor's power of sale, equitable.

In the case of wills before this act, it seems that the implied power of sale which executors took under a charge of debts, was merely an equitable power; and the concurrence of the heir or devisee was necessary to pass the legal estate (Dart, V. & P. 694, 6th ed.).

(3) Wills after 1859. Cases under this act.

In the case of wills coming into operation after the 13th of August, 1859, sect. 14 of this act gives to trustees taking by devise the whole of the testator's interest in real estate charged with debts or legacies, an absolute power to sell or mortgage the same to raise such debts or legacies. Where real estate was devised to trustees upon trust "to pay to or permit and suffer my wife to receive the rents during her life," with other trusts after her death, the legal estate was vested in the widow during her life, the trustees not taking by devise the whole of the testator's interest, and the section did not apply (*Re Adams and Perry*, 1899, 1 Ch. 554). By sect. 18, the case of a beneficial devise in fee is excepted from the operation of the act. In such a case it would seem that, having regard to the then state of the law (see last words of section 18), the beneficial devisee, and not the executor, is the person in whom all power to sell is vested (*Colyer* v. *Finch*, 5 H. L. C. 922; see *Re Wilson, Pennington* v. *Payne*, 54 L. T. 600). By sect. 16, it was apparently intended to give the executor an absolute legal power to sell or mortgage in all cases not falling within sects. 14 and 18 (see *Pennington* v. *Payne*, 54 L. T. 600; *Re Sankey, Sankey* v. *Clarke*, 1889, W. N. 79). Where land was devised in fee beneficially to one of two executors, subject to a particular legacy given in trust to such executors, the case was excluded from sect. 16 by sect. 18, and the concurrence of the particular legatee was required (*Re Rebbeck, Bennett* v. *Rebbeck*, 63 L. J. Ch. 596; 71 L. T. 74). Where land was devised subject to debts and legacies to A. for life with remainder over, B., C., and D., who were appointed executors, had power to mortgage (*Re Wilson, Pennington* v. *Payne*, 54 L. T. 600). It is at present doubtful how far (if at all) the provisions of the S. L. A., 1882, as to the consent of the tenant for life are applicable to sales for the payment of debts (see 2 Dart, V. & P. 700, 6th ed.; Lewin on Trusts, 536, 10th ed.).

(4) Effect of lapse of time upon executor's power of sale.

The power implied under a charge of debts in wills before this act has been held to exist notwithstanding the lapse of a considerable time. Thus, in *Greetham* v. *Colton* (34 Beav. 615), thirteen years; in *Forbes* v. *Peacock* (Phill. 717), twenty-five years; in *Sabin* v. *Heape* (27 Beav. 353), twenty-seven years; and in *Wrigley* v. *Sykes* (21 Beav. 337), thirty-three years, had elapsed between the testator's death and the sale. In a case decided before the Land Transfer Act, 1897, it was laid down by the Court of Appeal that after the lapse of twenty years there was a presumption that the debts had been paid, and that in such case a purchaser from the executor was bound to inquire as to this; but that when the sale was within that period the purchaser was not entitled to make any inquiry (*Re Tanqueray-Willaume*, 20 Ch. Div. 480). It was also held before the Land Transfer Act, 1897, that the last-mentioned rule did not apply to an executor selling leaseholds (*Re Venn and Furze*, 1894, 2 Ch. 101; *Re Whistler*, 35 Ch. D. 561; see *Re Molyneux and White*, 15 L. R. Ir. 383). Since the Land Transfer Act, 1897 (*post*, p. 417), it may be a question whether as regards freeholds affected by that act the rule continues to apply.

(5) Power to mortgage.

A power of sale out and out does not authorize a mortgage (*Stroughill* v. *Anstey*, 1 D. M. & G. 645; *Page* v. *Cooper*, 16 Beav. 400); but a power of sale for raising a particular charge does (*ib.*; see *Walker* v. *Southall*, 56 L. T. 882): so a power of sale to pay debts implies power to mortgage (*Ball* v. *Harris*, 4 M. & C. 267; see *Colyer* v. *Finch*, 5 H. L. C. 905; *Corser* v. *Cartwright*, L. R. 7 H. L. 731). A trust for sale was held not to authorize a mortgage, even where some of the trusts required the raising of money (*Walker* v. *Southall*, 56 L. T. 882; see *Haldenby* v.

Spofforth, 1 Beav. 390). But the trustees could mortgage where they had power to employ capital in carrying on a business (*Re Dimmock, Dimmock* v. *Dimmock*, 52 L. T. 494); or power to make any outlay out of the income or capital of the testator's real and personal estate (*Re Bellinger, Durell* v. *Bellinger*, 1898, 2 Ch. 534). A power to mortgage does not give a power to sell (*Cook* v. *Dawson*, 29 Beav. 128); but it has been held that a power to mortgage authorizes a mortgage with a power of sale (*Bridges* v. *Longman*, 24 Beav. 29; *Cook* v. *Dawson*, 29 Beav. 128; *Re Chawner's Will*, 8 Eq. 569; see *contra*, *Clarke* v. *Royal Panopticon*, 4 Drew. 26). 22 & 23 Vict. c. 35, s. 14.

15. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid. Powers given by last section extended to survivors, devisees, &c.

See the questions which have been raised as to how far the devisee of a trust estate can execute the trust (*Braybrooke* v. *Inskip*, Tudor's L. C., Conv.).

16. If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any), shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this act shall operate only on the estate and interest, where legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate. Executors to have power of raising money, &c. where there is no sufficient devise.

See note to sect. 14, *ante*. Executors took a power of sale under this section (*Re Wilson, Pennington* v. *Payne*, 54 L. T. 600; *Re Sankey, Sankey* v. *Clark*, 1889, W. N. 79); but it confers no power on an administrator with the will annexed (*Re Clay and Tetley*, 16 Ch. Div. 3).

17. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen and sixteen of this act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof. Purchasers, &c. not bound to inquire as to powers.

18. The provisions contained in sections fourteen, fifteen and sixteen shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing Sections 14, 15 and 16 not to affect certain sales, &c., nor to extend

22 & 23 Vict. c. 35, s. 18.

to devises in fee or in tail.

of this act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

See note to sect. 14, *ante; Re Wilson, Pennington* v. *Payne* (54 L. T. 600). See also *Re Rebbeck, Bennett* v. *Rebbeck* (63 L. J. Ch. 596; 71 L. T. 74), where in the case of a beneficial devise subject to a particular legacy the concurrence of the legatee was required.

Not to be bound to see to the application of purchase-money.

23. The *bonâ fide* payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security.

See also Trustee Act, 1893, s. 20, *post*, as to the present law.

Previous law as to purchaser's obligation in case of sale for payment of debts or legacies:

Before these statutes, where a will contained no express trust or charge for payment of debts, a purchaser of the testator's land sold for payment of debts, was not bound to see to the application of the purchase-money, where the land was made assets, either by the Debts Recovery Act, 1830 (see *ante*, p. 391), or by the Administration of Estates Act, 1833 (see *ante*, p. 400).

Where express trust or charge for payment of debts generally;

Where a will contained an express trust or charge for payment of debts generally, a purchaser was not bound to see to the application of the purchase-money (Williams, Real Assets, 51, 62); even where a testator charged the land with a specified debt, and also with his other debts generally (*Robinson* v. *Lowater*, 5 D. M. & G. 272). And the rule had reference to the time of the testator's death, and did not cease to be applicable, though the debts were subsequently paid (*Forbes* v. *Peacock*, 1 Phill. 717; see *Stroughill* v. *Anstey*, 1 D. M. & G. 653). Where a testator charged debts upon his real estate in case of the insufficiency of his personal estate, the executor could give valid receipts for the purchase-money of the real estate without showing the insufficiency (*Greetham* v. *Colton*, 34 Beav. 615; but see *Carlyon* v. *Truscott*, 20 Eq. 348).

For payment of debts and legacies generally;

Where debts and legacies were charged generally, a purchaser was not bound to see to the application of the purchase-money (*Johnson* v. *Kennett*, 3 M. & K. 630; see *Carlyon* v. *Truscott*, 20 Eq. 351). Freehold estate was devised to A., subject to the payment of debts and annuities. A. was held entitled to sell the freehold, although it was admitted that the personalty was sufficient to pay the debts; that they had all been paid since the contract, and that the sale had not been made for the specific purpose of satisfying the debts, these circumstances not varying the rule that the purchaser was not liable to see to the application of the purchase-money (*Page* v. *Adam*, 4 Beav. 269; see *Dowling* v. *Hudson*, 17 Beav. 248; *Jones* v. *Price*, 11 Sim. 557; Sugd. V. & P. 840, 841, 11th ed.). But the rule did not apply where the circumstances of the transaction afforded intrinsic evidence of a breach of trust, and that the mortgage or purchase-money was not to be applied for payment of the debts and legacies (*Watkins* v. *Cheek*, 2 Sim. & Stu. 199; see *Eland* v. *Eland*, 4 M. & C. 420; *Forbes* v. *Peacock*, 1 Phill. 721). The purchaser was bound to see to the application of the purchase-money where the trust was for payment of specified debts (*Binks* v. *Rokeby*, 2 Mad. 238) or of legacies only

For payment of particular debts or of legacies.

(*Johnson* v. *Kennett*, 3 M. & K. 630; *Horn* v. *Horn*, 2 Sim. & Stu. 448), or of a specified legacy (*Re Rebbeck*, *Bennett* v. *Rebbeck*, 63 L. J. Ch. 596). 22 & 23 Vict. c. 35, s. 23.

It is doubtful whether this section is retrospective (see *Bennett* v. *Lytton*, 2 J. & H. 158).

See further as to the liability of a purchaser to see to the application of the purchase-money, *Elliot* v. *Merryman*, 1 White & Tudor's L. C. Eq.; Dart, V. & P. 670 *et seq.*, 6th ed.

VI.—The Land Transfer Act, 1897, ss. 1—5, 24—26.

60 & 61 Vict. c. 65.

An Act to establish a Real Representative and to Amend the Land Transfer Act, 1875. [6th August, 1897.]

Part I.

Establishment of a Real Representative.

1.—(1.) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him. 60 & 61 Vict. c. 65, s. 1. Devolution of legal interest in real estate on death.

(2.) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3.) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4.) The expression "real estate," in this part of this act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(5.) This section applies only in cases of death after the commencement of this act.

Sect. 25 of the L. T. Act, 1897 (*post*, p. 428), fixed 1st January, 1898, as the date on which the act was to come into operation. In the case of a person dying before that date and who had by his will charged his debts on his real estate, the Law of Property Amendment Act, 1859, contained provisions for raising the money, either by trustees to whom the real estate had been devised for the testator's whole interest (sect. 14, *ante*, p. 411), or by the executors (sect. 16, *ante*, p. 415). As to a devisee in fee or tail raising the money in such a case, see sect. 18, *ante*, p. 416. Where such a person's will did not contain a charge, or where he Law as to persons dying before 1898.

60 & 61 Vict. c. 65, s. 1.

died intestate, the real estate could be made available for payment of debts under the Administration of Estates Act, 1833 (see that act and the note thereto, *ante*, p. 398); the proceedings used for the purpose being a creditor's administration action in the Chancery Division, to which the devisee or heir, as well as the executor, was a necessary party (see *ante*, p. 401, and see the forms of indorsement on a creditor's writ, App. A., R. S. C. 1883, Pt. III., s. 1). Such an action might be commenced by originating summons (see R. S. C., Ord. 55, rr. 3, 4, 10 and 10a).

Persons dying after 1897.

Under the present act, the real estate of a person dying after 1897 is made available in all cases for the payment of his debts without the necessity for any proceedings. Sect. 1, sub-sect. 1, vests such real estate (including real estate appointed by will under a general power—sub-sect. 2; but not including copyholds—sub-sect. 4) in the personal representatives. And this real estate is to be administered in the same manner for the payment of debts, &c. as if it were personal estate (sect. 2, sub-sect. 3). For the purpose of such administration the powers, rights, duties, and liabilities of the personal representatives in respect of the personal estate are to apply to the real estate as if the same were a chattel real (see sect. 2, sub-sect. 2). And, subject to such powers, rights, duties, and liabilities, the representatives hold the real estate as trustees for the beneficiaries (sect. 2, sub-sect. 1). To these beneficiaries a transfer may be made by the representatives, either by means of an assent to a devise or by a conveyance, and either subject to a charge or not (sect. 3, sub-sect. 1); and may be ordered after the expiration of one year from the death (sect. 3, sub-sect. 2). The act further contains provisions as to probate and letters of administration (sect. 1, sub-sect. 3, and sect. 2, sub-sect. 4), and also a special power for the representatives to appropriate parts of the residuary estate (sect. 4).

Parties to administration actions.

If it becomes necessary to administer in an action the freehold estate of a person dying since 1897, it would seem that (contrary to the above rule before this act) the heir or devisee is not a necessary party.

Real estate made legal assets.

The real estate referred to in sect. 1 appears to be thereby made "legal assets"—*i.e.*, assets which the representative could *virtute officii* recover in a court of law or equity (*Cook* v. *Gregson*, 3 Drew. 549, *ante*, p. 402).

What real estate vests under the section.

The trust and mortgage estates vested in a deceased person at the time of his death are dealt with by sect. 30, sub-sect. 1, of the Conv. Act, 1881 (*post*), which appears to be still in operation. As regards his beneficial interests it would seem that, notwithstanding the marginal note, the words of the present sub-section include every interest of the deceased (whether legal or equitable) in real estate. Such real estate is to vest in the personal representatives as if it were a "chattel real;" as to the meaning of which, see *ante*, p. 113. At the date of the commencement of this act all interests of the deceased (whether legal or equitable) in chattels real passed to the executor as such (Wms. Exors., 9th ed., p. 601; *Re Culverhouse*, 1896, 2 Ch. 253).

Scotland and Ireland.

According to sect. 26 of the L. T. Act, 1897 (*post*, p. 428) the act is to be construed as one with the L. T. Act, 1875. Sect. 2 of the last-mentioned act provides that such act shall not apply to Scotland or Ireland. It would seem, accordingly, that the provisions as to a real representative do not apply to real estate situate in Scotland or Ireland.

Dower.

The real estate made available for debts by the Administration of Estates Act, 1833 (which only applied where there was no testamentary charge of debts) included, in the words of that act, every estate or interest in real estate of or to which a person died seised or entitled (*ante*, p. 398). In the case of a man who died intestate leaving a widow, it was said that what was claimed by or came to the widow as dower was no part of what the intestate was seised of at his death, and that accordingly the dower had priority over the creditors (*Spyer* v. *Hyatt*, 20 Beav. 623). Under the present act it would seem that in a similar case the widow's dower would be entitled to the same priority.

60 & 61 Vict. c. 65, s. 1.

Real estate appointed.

As regards real estate appointed by the will of the deceased under a general power, this now, under sect. 1, sub-sect. 2, of this act, vests in the representative. Previously such property had been held to fall within the words of the Administration of Estates Act, 1833, above referred to, and to be applicable in payment of debts under that act (*Fleming* v. *Buchanan*, 3 D. M. & G. 980). Under the joint operation of sects. 24 and 27 of the Wills Act, 1837, all general powers vested in a testator immediately before his death are (in the absence of a contrary intention) executed by a general devise (see *post*, p. 470). In the case of a married woman such appointed property was made liable for her debts by M. W. P. Act, 1882, s. 4, *ante*, p. 348. Sect. 27 always applied to the will of a married woman (*Bernard* v. *Minshull*, John. 276); and in the case of a married woman dying since 5th December, 1893, sect. 24 has been rendered applicable by sect. 3 of the M. W. P. Act, 1893, *ante*, p. 361.

Copyholds.

Copyholds in respect of which an admission is necessary are not included in the real estate which vests in the representative (sect. 1, sub-sect. 4); and to these the old law still applies.

Representative.

The expression "personal representative" in sub-sect. 1 means an executor or administrator (sect. 24, sub-sect. 2, *post*, p. 428). It has been held that this section vests a testator's real estate in all the executors appointed by his will, whether they have or have not proved; unless those who have not proved have, by renunciation or otherwise, made it impossible for them to obtain probate; in which last case (*semble*) the real estate may vest exclusively in the executors who have proved (*Re Pawley and London Bank*, 1900, 1 Ch. 64: query as to the effect of a retractation of renunciation, see *Re Stiles*, 1898, P. 12). It was said by North, J., that, until some executor proved, the legal estate remained in the heir (*John* v. *John*, 1898, 2 Ch. 576. As to the vesting of personal estate between the death and grant of administration, see 21 & 22 Vict. c. 95, s. 19).

Where a testator appointed general executors, and also special executors for his property in Australia, the general executors could under this section make a good title to property in England without the concurrence of the special executors (*Re Cohen's Executors*, 1902, 1 Ch. 187).

Married woman executrix.

The case where a married woman is sole executrix or one of several executors requires consideration. In *Re Harkness and Allsopp* (1896, 2 Ch. 358) it was decided that the M. W. P. Act, 1882, does not enable a married woman who is trustee for sale of freeholds to convey to a purchaser, except with the concurrence of her husband and by acknowledged deed. The reasoning of North, J. (especially on sect. 18), leads to the conclusion that as regards the chattels real of a testator (at least so far as conveyance is concerned) the M. W. P. Act 1882 does not affect the case of a married woman who is an executrix; and that the law independent of that act applies. According to that law, while a married woman executrix could not administer without her husband's consent, he could without her concurrence grant chattels real forming part of the estate (*Arnold* v. *Bidgood*, Cro. Jac. 318; *Thrustout* v. *Coppin*, 2 W. Bl. 801; see Wms. Exors. 966, 7th ed.). It will be remembered that, under sect. 77 of the Fines and Recoveries Act, 1833, a married woman can by deed acknowledged in which her husband concurs dispose of any estate which she alone, or she and her husband in her right, may have in lands of any tenure (see *ante*, p. 313). The result seems to be that a conveyance or mortgage of the chattels real of a deceased made by a married woman executrix must be by deed acknowledged in which her husband concurs; and that since the Land Transfer Act, 1897, the same rule will apply to his freeholds.

Estate duty.

As regards the incidence of estate duty, it has been held that, notwithstanding this section, real estate does not "pass to the executor as such" within the meaning of sect. 9, sub-sect. 1, of the Finance Act, 1894, and must bear a rateable part of the duty (*Re Palmer, Palmer* v. *Rose-Innes*, 1900, W. N. 9; *Re Sharman, Wright* v. *Sharman*, 1901, 2 Ch. 280).

60 & 61 Vict. c. 65, s. 1.

Escheat.

As regards escheated land (as to which see *ante*, p. 119), this act does not bind the Crown, which is not named therein (see cases quoted *ante*, p. 119); and accordingly does not affect the legal estate in such land (*Re Hartley*, 1899, P. 40).

Probate, &c.

As to probate and letters of administration in the case of real estate, see note to sect. 2, sub-sect. 4, *post*.

Provisions as to administration.

2.—(1.) Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

In the case of personal estate it was held before this act that an executor was not, strictly speaking, a trustee for legatees (see *Re Barker*, *Buxton* v. *Campbell*, 1892, 2 Ch. 491; *Re Davis*, *Evans* v. *Moore*, 1891, 3 Ch. 124; see *Re Lacy*, *Royal Association* v. *Kydd*, 1899, 2 Ch. 149; *Re Hyatt*, *Bowles* v. *Hyatt*, 38 Ch. D. 617); but an executor might become a trustee by his conduct (see cases quoted *ante*, p. 195). Under this section the representative (subject as therein mentioned) is made a trustee of the real estate for the beneficiaries (see *Re Peel*, *Woodcock* v. *Holdroyd*, 1899, W. N. 208). But as regards costs, where a conflict arose on the construction of a devise between devisees and the heir, and the executors brought them both before the court, the unsuccessful party was ordered to pay costs (*Ib.*). Where land descended to an infant, and the representative disclaimed the trusteeship arising under this section, the Court appointed trustees under sect. 42 of the Conv. Act, 1881, *post*, p. 588 (*Re Cowley*, 1901, 1 Ch. 38).

As regards personal estate, it was held before this act that, subject to the paramount claims of creditors, the next of kin of an intestate had a right to require the specific property forming his personal estate to be transferred to them by the administrator (*Cooper* v. *Cooper*, L. R. 7 H. L. 65, 72).

(2.) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate.

As to the rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, see the note to the R. P. Lim. Act, 1833, sect. 6, *ante*, p. 136.

As regards the costs of administration, the rule of law which obtained at the passing of this act made a deceased person's general personalty the primary fund for this payment (Seton, 6th ed. 1513). See, further, the note to sub-sect. 3 of present section, and the words of the proviso in that sub-section.

60 & 61 Vict. c. 65, s. 2.

The "powers and rights" of representatives in dealing with the chattels real of a deceased person include power for executors (for the purpose of administration and before assenting to a bequest thereof) to sell the chattels real (*Simpson* v. *Gutteridge*, 1 Madd. 609; *Cole* v. *Miles*, 10 Hare, 179), and to mortgage them (*Thorne* v. *Thorne*, 1893, 3 Ch. 196; *Re Morgan, Pillgrem* v. *Pillgrem*, 18 Ch. D. 98). And unless the contrary be shown, executors dealing with purchasers or mortgagees, even more than twenty years after the testator's death, are to be presumed to be acting in discharge of their duties as such (*Re Venn and Furze*, 1894, 2 Ch. 114; *Corser* v. *Cartwright*, L. R. 7 H. L. 736). It would seem that in future dealings with freeholds under the powers of the present act this rule would apply rather than the rule in *Re Tanqueray Willaume* (20 Ch. Div. 480; *ante*, p. 414). Executors cannot give an option of purchase at a future time of leaseholds (*Oceanic Co.* v. *Sutherberry*, 16 Ch. Div. 236); but, if necessary for the due administration of the property, can grant an underlease (*Ib.*). Administrators after a grant have equal power with executors (Wms. Exors. 795, 9th ed.).

Powers, rights and duties of representatives.

One only of several executors could sell chattels real (*Simpson* v. *Gutteridge*; *Cole* v. *Miles*, *supra*). And it seems that one administrator stands on the same ground with one executor (*Jacomb* v. *Harwood*, 2 Ves. sen. 267). This power of a single representative was expressly made applicable in the case of trust and mortgage estates by sect. 30 of the Conv. Act, 1881 (*post*). But the proviso in this sub-section prevents it from applying in the case of real estate vesting in representatives under the present act.

One of several representatives.

As to the powers and rights of a married woman who is a representative, see the note to sect. 1, *ante*, p. 419.

Married woman.

As regards estate duty, the power and duty of the personal representatives is to discharge out of the general personal estate the estate duty payable in respect of the chattels real of the deceased, even where they are specifically bequeathed (*Re Culverhouse, Cook* v. *Culverhouse*, 1896, 2 Ch. 251; see Finance Act, 1894, s. 6, sub-s. 2; *Re Webber, Gribble* v. *Webber*, 1896, 1 Ch. 914). Having regard, however, to sect. 9, sub-sect. 1, of the Finance Act, 1894, the estate duty payable in respect of the freeholds of the deceased is charged on such freeholds (*Re Palmer, Palmer* v. *Rose Innes*, 1900, W. N. 9; see *Re Sharman, Wright* v. *Sharman*, 1901, 2 Ch. 280).

Estate duty.

As to the liability of personal representatives in respect of the chattels real of the deceased, see the note to sect. 27 of the Law of Property Amendment Act, 1859, *post*, p. 532. Their liability in respect of the acts of the deceased generally is dealt with in Wms. Exors. 1593 *et seq.* 9th ed. The representatives may also be liable in respect of their own acts, *e.g.* devastavit. The rule of limitation applicable in such a case is stated *ante*, p. 225. See also, in connection with representative's acts, sects. 24 and 50 of the Trustee Act, 1893, *post*. The last-mentioned liability is dealt with generally in Wms. Exors. 1690, 9th ed.

Liabilities of representatives.

(3.) In the administration of the assets of a person dying after the commencement of this act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

Persons dying before 1898, liability of their personalty to pay—

In the case of a person dying before the commencement of this act, his general personal estate was the primary fund for payment of his debts other than debts charged on land (see *ante*, p. 402); which last-mentioned debts were by the Real Estate Charges Acts (*post*, p. 429 *et seq.*) payable

60 & 61 Vict. c. 65, s. 2.

primarily out of the land charged. Similarly costs and expenses, including the costs of an administration action, were payable primarily out of general personalty (*Trethewy* v. *Helyar*, 4 Ch. D. 53). But where real estate was included in the action, any additional costs were borne by the real estate (*Patching* v. *Barnett*, 45 L. T. 292; *Re Middleton, Thompson* v. *Harris*, 19 Ch. Div. 552). Where real and personal estate were given on trust for conversion, the proceeds formed one fund for this purpose (*Re Price, Williams* v. *Jenkins*, 31 Ch. D. 493). The rule in *Patching* v. *Barnett* and *Re Middleton* (*supra*) has not been altered by the present act (*Re Jones, Elgood* v. *Kinderley*, 1902, 1 Ch. 92). Before this act the costs of probate litigation were not payable out of real estate (*Re Shaw, Bridges* v. *Shaw*, 1894, 3 Ch. 615). But this act has altered the rule (*Re Prince, Godwin* v. *Prince*, 1898, 2 Ch. 228).

debts, costs and expenses.

Proviso.

The order in which, at the date of the passing of this act, real and personal assets were applicable in payment of debts is stated *ante*, p. 402. The words "testamentary expenses" in wills have been held to include the costs of an administration action (*Penny* v. *Penny*, 11 Ch. D. 440; *Sharp* v. *Lush*, 10 Ch. D. 468). They have also been held to include estate duty payable in respect of a testator's personal estate (*Re Treasure, Wild* v. *Stanham*, 1900, 2 Ch. 653; *Re Clemow, Yeo* v. *Clemow, Ib.* 182), but not estate duty payable in respect of a fund appointed by the testator under a general power (*Re Dixon, Penfold* v. *Dixon*, 1902, 1 Ch. 248), or estate duty payable in respect of his real estate (*Re Sharman, Wright* v. *Sharman*, 1901, 2 Ch. 280).

As regards the incidence of estate duty payable in respect of real estate, it has been held that, under sect 9, sub-sect. 1, of the Finance Act, 1894, such duty is charged on and payable out of the real estate itself (*Re Palmer, Palmer* v. *Rose Innes*, 1900, W. N. 9; see also sect. 5, *post*).

The cases relating to the liability of real estate to be charged with legacies are collected *ante*, p. 412.

(4) Where a person dies possessed of real estate, the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

Old rules as to probate of wills of realty; of realty and personalty.

Before this act a will disposing of realty only, but not appointing an executor, could not be proved (*Re Drummond*, 2 Sw. & Tr. 8). Where it appointed an executor, it could (*Re Hornbuckle*, 15 P. D. 151; *Re Jordan*, L. R. 1 P. & M. 555). But the last rule did not apply to the will of a married woman appointing under a power (*Re Tomlinson*, 6 P. D. 209; *Re Barden*, L. R. 1 P. & M. 325), except where by equitable conversion the real estate was personalty (*Re Gunn*, 9 P. D. 242).

In the case of a will dealing with realty and personalty, the court could, under the Court of Probate Act, 1857, grant probate without citing the heir (sect. 63). He was not bound unless cited (*Ib.*); but he was bound if cited even as one of the next of kin (*Beardsley* v. *Beardsley*, 1899, 1 Q. B. 746). Probate was conclusive evidence of a will proved in solemn form (Court of Probate Act, 1857, s. 62). Where not so proved, see sect. 64.

Present rule as to probate and letters of administration in case of real estate.

Under the present act, probate and letters of administration may be granted in respect of real estate only (sect. 1, sub-sect. 3); even, it seems, in the case of the will of a married woman exercising a power (sub-sect. 2).

Sect. 2, sub-sect. 4, deals with letters of administration in the case of real estate. The position of the heir under the act has been said to be

practically that of the next of kin (*Twist* v. *Tye*, 1902, P. 98). By an additional rule and order of the Probate Division dated the 20th of November, 1897, all rules, orders and instructions and the existing practice of the court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897 (L. R. Current Index, 1897, p. lxxxii). Under this rule grants *ad colligendum* may be made applicable to real estate (*Re Roberts*, 1898, P. 152). Where an heir with a clear title applies for administration and there is no personalty, a grant may be made without notice to the next of kin; otherwise they should have notice (*Re Barnett*, 1898, P. 145). Administration was granted to one of the next of kin without citing the heir, who was abroad (*Re Blenkinsop*, 49 W. R. 336). Sub-sect. 4 does not expressly refer to a husband, whose right to administration of his wife's estate is well established; under special circumstances this right was disregarded, and administration was granted to the guardian *ad litem* of the wife's heir (*Re Ardern*, 1898, P. 147; see *Re Roberts*, *sup.*).

60 & 61 Vict. c. 65, s. 2.

Provision for transfer to heir or devisee.

3.—(1) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

(2) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

(4) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the registrar to register the person named in the assent as proprietor of the land.

Cases under the section.

Where executors conveyed freeholds to devisees in trust, "subject to a charge of any money which the personal representatives were liable to pay," and on a subsequent sale by such devisees the purchaser insisted on an indemnity in respect of any claims against the testator's estate of which at the date of the conveyance the executors had no notice; it was held that, having regard to sect. 2, sub-sect. 3, of the L. T. Act, 1897, and

60 & 61 Vict. c. 65, s. 3.

sect. 29 of the Law of Prop. Amt. Act, 1859 (*post*, p. 534), the purchaser was not entitled to the indemnity (*Re Cary and Lott*, 1901, 2 Ch. 463).

The personal representative is entitled to assent to the devise in preference to executing a conveyance (*Re Pix, Plomley* v. *Stileman*, 1901, W. N. 165; where see as to form of assent. See also the instrument of assent, Form 46, Rule 130, Land Transfer Rules, Aug. 1898; L. R. Current Index, 1898, p. xc).

Assent by representatives.

This section, providing for the transfer of freeholds to the heir or devisee by means of an assent or conveyance on the part of the representative, has rendered important the doctrines previously laid down in relation to the assent of the representative to dispositions or devolutions of personal estate.

Thus it was settled that, upon the assent of the executor, the title to leaseholds specifically bequeathed vested absolutely in the legatee without any deed of assignment (*Re Culverhouse, Cook* v. *Culverhouse*, 1896, 2 Ch. 251). It was not essential to the efficacy of an assent to a bequest that it should confer a legal interest or affect the mere legal title (*Trail* v. *Bull*, 1 Coll. 359; see *Doe* v. *Tatchell*, 3 B. & Ad. 675). The question whether there had been an assent or not might involve a matter of law, but was generally a question of fact (*Elliott* v. *Elliott*, 9 M. & W. 27; *Austin* v. *Beddoe*, 41 W. R. 619). An assent might result either from words or from acts; but it was necessary that the words or acts relied on

By words.

should be unambiguous (*Doe* v. *Harris*, 16 M. & W. 517; *Thorne* v. *Thorne*, 1893, 3 Ch. 187). Thus words were held to amount to an assent (*Camden* v. *Turner*, Cowp. 293; *Garrett* v. *Lister*, 1 Lev. 225; *Barnard* v. *Pumfrett*, 5 My. & Cr. 70; *Lampet's case*, 10 Rep. 47A, 52B; see also Comyns, Dig.

By acts.

Administration, c. 6; Bac. Abr. Legacies (L.); Shep. Touchstone, 456). Acts might also amount to an assent. Thus, in the case of bequests of leaseholds, where the representative let the legatee into possession or receipt of the rents (*Austin* v. *Beddoe*, 41 W. R. 619; *Cole* v. *Miles*, 10 Ha. 179; *Spackman* v. *Timbrell*, 8 Sim. 261); and where the representative on behalf of the legatee paid a quit-rent charged on the property (*Doe* v. *Mabberley*, 6 C. & P. 126; see *Young* v. *Holmes*, 1 Str. 70). As to payments by the representative to the legatee on account of the rents, see *Re Charik, Abrahams* v. *Charik*, 1889, W. N. 91; *Thorne* v. *Thorne*, 1893, 3 Ch. 196. Assent resulted from the executrix occupying the leaseholds and maintaining the testator's issue where the gift of the leaseholds was expressly made subject to this right (*Paramour* v. *Yardley*, Plowd. 539, 546). So assent was inferred from payment by the representative of interest on a legacy

Partial assent.

(*Wilson* v. *Rhodes*, 8 Ch. D. 777). But an assent to one article comprised in a bequest was not necessarily an assent to all (*Elliott* v. *Elliott*, 9 M. & W. 23).

Assent to residuary gifts.

The doctrine of assent applied as well to residuary as to specific gifts (*Austin* v. *Beddoe*, 41 W. R. 619); and executors could assent so as to vest in the legatee part of the residue without vesting the whole (*Ib.*; see *Elliott* v. *Elliott*, *sup.*). But where the executor was himself residuary legatee, an assent to take a part of the residue as legatee was an assent to take the whole (*Hinson* v. *Button*, 2 Roll. Rep. 158).

Assent by executor to his own legacy.

It was necessary that the executor should assent to his own legacy. As to the acts which amounted to such an assent, it was said that where an executor who was also specific legatee did an act respecting the subject of the specific bequest which was referable to either character, that did not prove or amount to an assent (*Trail* v. *Bull*, 1 Coll. 360; *Doe* v. *Sturges*, 7 Taunt. 222; see *Young* v. *Holmes*, 1 Str. 70; *Paramour* v. *Yardley*, Plowd. 539; *Garrett* v. *Lister*, 1 Lev. 25). As regards an executor's entry upon leaseholds in which he had an interest under the will, where that interest was absolute his entry amounted to an assent (*Doe* v. *Sturges*, 7 Taunt. 222). But where his interest was not absolute (*e.g.*, for life) a mere entry was not sufficient (*Ib.*; *Doe* v. *Tatchell*, 3 B. & Ad. 680; see also *Pannell* v. *Fenn*, Cro. Eliz. 348; *Cray* v. *Willis*, 2 P. Wms. 531); not even though the legatee entered alone of the executors appointed by will (*Doe* v. *Sturges*, *sup.*). Where leaseholds and the residue were given on trust for the testator's wife (one of the executors) for life, and after her

death legacies were bequeathed, the surplus being given to four persons, one of whom was the wife of A. (another executor), the executors did not by allowing the testator's wife to take possession assent to the bequest of leaseholds (*A.-G.* v. *Potter*, 5 Beav. 164); nor did the execution by A. of a deed of arrangement of the interests of the residuary legatees constitute an assent (*Ib.*). And where a chattel was bequeathed to an executrix for life, her taking possession of it while she knew of unpaid debts was not an assent to the bequest in remainder (*Richards* v. *Browne*, 3 Bing. N. C. 493). But an executor taking possession and disposing of the property by his will was deemed to have assented (*Fenton* v. *Clegg*, 9 Exch. 683). **60 & 61 Vict. c. 65, s. 3.**

Who might assent.

An executor might assent before proving (*Johnson* v. *Warwick*, 17 C. B. 516); and if he subsequently died without proving, the assent was valid if the will was ultimately proved (*Brazier* v. *Hudson*, 8 Sim. 67). One of several executors might without his co-executors assent, even in the case of his own legacy (*Townson* v. *Tickell*, 3 B. & Ald. 40). *Qu.*, however, as to the effect under the L. T. Act, 1897, of an assent by one of several representatives in vesting freeholds in the devisee or heir; see the concluding words of sect. 2, sub-sect. 2. It was said that an administrator *durante minore ætate* could not assent to a legacy, unless there were assets sufficient to pay the debts (*Prince's Case*, 5 Co. 29 a; but see *Re Cope*, *Cope* v. *Cope*, 16 Ch. D. 49).

Married women.

Before the M. W. P. Act, 1882, an executrix who was a married woman could not assent (*Cookes* v. *Bellamy*, 1 Sid. 188). That act contains special provisions as to a married woman being a representative (sects. 18 and 24, *ante*, pp. 356, 359). But it seems doubtful whether she can, otherwise by deed acknowledged and with her husband's concurrence, transfer freeholds to the heir or devisee (see *Re Harkness and Allsopp*, 1896, 2 Ch. 358; *Re Brooke and Fremlin*, 1898, 1 Ch. 647).

Extent of an assent.

An assent to an estate in remainder was an assent to a present estate (Com. Dig. Administration, C. 6). Conversely, if leaseholds were given to A. for life with remainder to B., the assent to A.'s estate also vested that of B. (*Stevenson* v. *Liverpool*, L. R. 10 Q. B. 81). See, however, the exception where the executor was himself tenant for life, *Doe* v. *Sturges* (7 Taunt. 222), and other cases quoted *ante*, p. 424. The rule applied, it seems, to a bequest to A. with an executory gift over to B. (*Adams* v. *Pierce*, 3 P. W. 12; compare *Lampet's Case*, 10 Co. 47 b). In several cases of connected gifts (such as a bequest of leaseholds to A. subject to a charge thereon in favour of B.) an assent to one gift also vested the other (see *Young* v. *Holmes*, 1 Str. 70; *Goffe* v. *Haywood*, 1 Roll. Rep. 247, 368; see Plowd. 521 b).

Effect of an assent:

on the legatee's title;

An assent when given related back to the testator's death (Wentworth, 445, 446, 14th ed.; compare *Sanders's Case*, 5 Co. 12 b). Upon the assent of the executor to a specific legacy, the property in the thing bequeathed vested in the legatee (*Doe* v. *Guy*, 3 East, 120; *Re Culverhouse*, *Cook* v. *Culverhouse*, 1896, 2 Ch. 251; see *Mead* v. *Orrery*, 3 Atk. 238). So the legatee might, after assent, bring action to recover possession of the property even against the executor (*Doe* v. *Guy*, *sup.*; *Williams* v. *Lee*, 3 Atk. 223).

on the executor's position.

Nor could the executor, after assenting to a bequest of leaseholds, claim indemnity out of the general personal estate in respect of the testator's liability under the leases (*Chadbolt* v. *Woodfall*, 2 Coll. 30). Upon assenting to a specific bequest given to them on trust, executors became trustees (*Dix* v. *Burford*, 19 Beav. 409; *Clegg* v. *Rowland*, 3 Eq. 372). But an executor did not by assenting to an absolute legacy make himself a trustee of that legacy (*Re Rowe*, *Jacobs* v. *Hind*, 60 L. T. 599). As to an executor in such a case pleading the Stat. of Lim., see *Re Barker*, *Buxton* v. *Campbell*, 1892, 2 Ch. 491.

Retractation of assent.

In general an assent once given could not be withdrawn (*Noell* v. *Robinson*, 2 Ventr. 358; Wentworth, Off. Ex. 415, 14th ed.; Com. Dig. Admon. C. 8) except under very special circumstances (*Crowe* v. *Menton*, 28 L. R. Ir. 525). But it was said that the executor could probably withdraw his assent in cases where, if the legacy had been paid over, refunding would have been ordered at the instance of the executor (cf. 1 Rop. Leg. 743, 3rd ed.; Wms. Exors. 1232, 9th ed.). It was clear that where a legacy

60 & 61 Vict. c. 65, s. 3.

was paid by executors without notice of a debt which they were subsequently compelled to satisfy, the executors could compel refunding (*Whittaker* v. *Kershaw*, 45 Ch. D. 320).

Legatee's interest before assent.

Before assent a legatee had an inchoate right to a legacy which, if he died, went to his executors (Wentworth, Off. Ex. 69, 14th ed.); and the legatee could assign his legacy before assent (Toller, 311, 7th ed.; cf. *Cooper* v. *Cooper*, L. R. 7 H. L. 65, 66; see, however, Wentworth, Off. Ex. *ubi sup.*).

Appropriation of land in satisfaction of legacy or share in estate.

4.—(1.) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the court, and such valuation and appropriation shall be conclusive save as otherwise directed by the court.

(2.) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3.) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorize the registrar to register the person to whom the property is appropriated as proprietor of the land.

Law apart from section: appropriations independently of express powers;

Previous to this act appropriations in or towards discharge of absolute shares or interests in the estate of a deceased person had been held valid. Thus, where there was no trust for conversion, executors could, without conversion and by agreement with a legatee, appropriate to him specific personal assets, even in a case where the legatee was one of the executors (*Re Richardson, Morgan* v. *Richardson*, 1896, 1 Ch. 512). Similarly, an administrator who was one of the next of kin, could, out of the assets, appropriate to his own share either chattels (*Elliott* v. *Kemp*, 7 M. & W. 313) or choses in action (*Barclay* v. *Owen*, 60 L. T. 220). Further, where there was a trust for conversion, trustees could appropriate specific personal assets to answer either an absolute share or interest (*Re Lepine, Dowsett* v. *Culver*, 1892, 1 Ch. 218; see *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128, 144), or a settled share (*Re Nickels, N.* v. *N.*, 1898, 1 Ch. 630; see *Re Brooks, Coles* v. *Davis*, 76 L. T. 771; *Fraser* v. *Murdoch*, 6 App. Cas. 855). Executors had a similar power as regards a deferred legacy (*Re Waters, Preston* v. *Waters*, 1889, W. N. 39). The principle on which the power of appropriation was based where there was a trust for conver-

sion, was that the particular assets could be sold to the legatees and the purchase-money set off against the legacy (*Re Beverly, Watson* v. *Watson*, 1901, 1 Ch. 681). The doctrine extends to chattels real and real estate, subject to a trust for conversion (*Ib.*). 60 & 61 Vict. c. 65, s. 4.

A valid appropriation could only be made of authorized investments (*Re Waters, Preston* v. *Waters, sup.*); including investments retained under a power (*Re Brooke, Coles* v. *Davis, sup.*); but not necessarily those authorized by the Trustee Act, 1893 (*Re Owthwaite, Owthwaite* v. *Taylor*, 1891, 3 Ch. 494). Where a will directed a sum of money to be invested on mortgage and held on certain trusts, mortgages which belonged to the testator at his death and were properly secured could be appropriated (*Ames* v. *Parkinson*, 7 Beav. 379). An appropriation was not valid where the executrix took part of the intermediate interest (*Cooper* v. *Douglas*, 2 Bro. C. C. 232). After appropriation to answer a particular share, the beneficiary took the appropriated assets for better for worse (*Re Waters, Preston* v. *Waters*, 1889, W. N. 39; see *Ballard* v. *Marsden*, 14 Ch. D. 376; *Re Richardson, Morgan* v. *Richardson*, 1896, 1 Ch. 512). Such assets were liable to provide the costs of litigation in respect of such share (*A.-G.* v. *Lawes*, 8 Ha. 43), but were not applicable in relief of expenses incurred on behalf of other parts of the trust estate (*Fraser* v. *Murdoch*, 6 App. Cas. 873). Appropriated assets could not be retained or impounded to answer the legatee's debt (*Ballard* v. *Marsden*, 14 Ch. D. 374).

It was not, it seems, necessary that an appropriation should be evidenced by deed or writing (*Barclay* v. *Owen*, 60 L. T. 222). The following acts were held to amount to a valid appropriation: — Handing over a mortgage deed to the legatee, no legal transfer being executed (*Re Lepine, Dowsett* v. *Culver*, 1892, 1 Ch. 210); making entries in the trust accounts and paying the income of the appropriated stocks to the legatee (*Re Nickels, Nickels* v. *Nickels*, 1898, 1 Ch. 630; *Fraser* v. *Murdoch*, 6 App. Cas. 855).

The above cases were decided independently of express powers of appropriation. Before the passing of the Land Transfer Act, 1897, it was a common practice to insert such express powers in wills. The act does not take away the above-mentioned power of appropriation, where there is a trust for conversion (*Re Beverly, Watson* v. *Watson*, 1901, 1 Ch. 687). Where there is no such trust, express powers may, since the passing of the act, prove all the more useful, having regard to the doubt which exists as to the effect of the act on any appropriations made after it came into operation, but not effected in accordance with its provisions (*Re Beverly, sup.*). express powers.

Under the section, it will be observed, valuations by the representative of appropriated estates may be made "in accordance with the prescribed provisions"; and beneficiaries (to whom notice of an intended appropriation is required to be given) are to be at liberty to apply to the court "within the prescribed time." Sect. 22, sub-s. 6 (i) of the Land Transfer Act, 1897, provides for the making of general rules for regulating any such matters as are authorized by the act to be prescribed. On the 2nd of August, 1898, general rules were issued, which are given at length, L. R. Current Index, 1898, p. lxiii. On 29 June, 1899, further rules were issued; see L. R. Current Index, 1899, p. cxxiii. To the rules of Aug., 1898, is attached (among other forms) a form of appropriation of land under this section (see Form 47, Rule 130). But no rules have been made dealing either with the question of the valuation of assets, or the time for an application to the court. Until such rules shall have been made, the powers of the section appear to remain in abeyance. Operation of section.

The marginal note to the section (which forms no part of the statute itself, *A.-G.* v. *Gt. Eastern Ry. Co.*, 11 Ch. Div. 461; *Sutton* v. *Sutton*, 22 Ch. D. 511), refers only to appropriation of "land," and the words of sub-ss. 2 and 3 are similarly restricted. It has been held, however, that sub-s. 1 is not confined to real estate (*Re Beverly, Watson* v. *Watson*, 1901, 1 Ch. 687). An appropriation under the section of land by the representative could only be made in the case of a death after 1st January, 1898. But as regards an appropriation of property other than land, the words of sub-s. 1 appear to apply to a death before as well as since the act.

60 & 61 Vict. c. 65, s. 4.

The expression "personal representative" is defined by sect. 24, sub-s. 2, as meaning "executor or administrator." But if the section is to be applied to the case of intestacy, it will be necessary to construe the words "residuary estate" as referring to the surplus of the intestate's assets after payment of his debts.

It should be further noticed that the section does not deal with an appropriation by trustees, or an appropriation to a settled share where unborn persons are or may be interested.

Liability for duty.

5. Nothing in this part of this act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof.

See *Re Palmer, Palmer* v. *Rose-Innes*, 1900, W. N. 9, quoted *ante*, p. 422.

Part IV.

Miscellaneous.

Interpretation.

24.—(1.) All hereditaments, corporeal and incorporeal, shall be deemed land within the meaning of the principal act and this act, except that nothing in this act shall render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface, or to a lease having less than forty years to run or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor, and included in a sale of the manor as such.

(2.) In this act the expression "personal representative" means an executor or administrator.

Commencement of act.

25. This act shall come into operation on the first day of January one thousand eight hundred and ninety-eight.

Short title and construction.

26. This act may be cited as the Land Transfer Act, 1897, and shall be construed as one with the principal act, and that act and this act may be cited together as the Land Transfer Acts, 1875 and 1897.

VII.—The Real Estate Charges Acts, 1854, 1867, and 1877.

The Real Estate Charges Act, 1854.

17 & 18 Vict. c. 113.

An Act to amend the Law relating to the Administration of the Estates of Deceased Persons. [11th August, 1854.]

17 & 18 Vict. c. 113, s. 1.

Whereas it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended: be it enacted as follows:

Heir or devisee of real estate not to

1. When any person shall, after the thirty-first day of December, one thousand eight hundred and fifty-four, die seised

of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and fifty-five.

17 & 18 Vict. c. 113, s. 1.

claim payment of mortgage out of personal assets.

Not to affect rights claimed under any will, &c. before 1st January, 1855.

2. This act shall not extend to Scotland.

Extent of act.

The rule previous to the above act was, that the personal estate of the deceased debtor was the primary fund to pay off a mortgage, unless an intention was shown to throw the debt on the mortgaged estate. The object of the act was to make the mortgaged estate the primary fund, unless an intention can be shown to throw the debt on the personalty (*Goodwin* v. *Lee*, 1 K. & J. 378; *Swainson* v. *Swainson*, 6 D. M. & G. 652). For the previous law as to the exoneration of estates from mortgage debts contracted, or adopted, by the owner, and also as to the acts which amounted to an adoption of a mortgage debt, see further, *Ancaster* v. *Mayer* (1 White & Tudor, L. C. Eq.) The present act does not impose any personal liability on the devisee (*Syer* v. *Gladstone*, 30 Ch. D. 616).

Previous law as to the payment of mortgage debts.

The act does not apply to specific bequests of personal estate (*Re Bourne, Martin* v. *Martin*, 1893, 1 Ch. 191). And in the case of specific bequests of chattels which are subject to charges, a distinction has been taken between charges created by the testator and charges incident to the chattel, such as calls on shares or the rent of leaseholds. In the first case the specific legatee is entitled to have the legacy freed from the charge, in the second case he is not so entitled (*Bothamley* v. *Sherson*, 20 Eq. 316; see *Lewis* v. *Lewis*, 13 Eq. 227). In one case it was held that the legatee of incumbered stock was not entitled to have the incumbrance paid off out of real estate charged with debts (*Re Butler, Le Bas* v. *Herbert*, 1894, 3 Ch. 250). In the case of bequests of shares not fully paid, any call made before the testator's death but remaining unpaid at that time, must be borne by the residuary estate, and calls made after the death by the legatee (*Armstrong* v. *Burnet*, 20 Beav. 424; *Addams* v. *Ferick*, 26 Beav. 384; *Day* v. *Day*, 1 Dr. & Sm. 261). So in bequests of leaseholds, the rent up to the testator's death must be borne by the residuary estate, and after that time by the specific legatee (*Hawkins* v. *Hawkins*, 13 Ch. Div. 470). See *Re Betty, Betty* v. *A.-G.* (1899, 1 Ch. 821); *Re Gjers, Cooper* v. *Gjers* (1899, 2 Ch. 54), and cases there referred to. Compare the case of

Bequests of personal estate.

17 & 18 Vict. c. 113, s. 1.

the specific devise of a reversion, where the testator had entered into covenants in the lease on which the reversion was expectant. The residue bore the burden of such a covenant where it was not incident to the relation of landlord and tenant (*Eccles* v. *Mills*, 1898, A. C. 360); the devisee, where it was so incident (*Mansel* v. *Norton*, 22 Ch. Div. 769). Compare also the case where a testator who had contracted for the erection of buildings on his freehold land died before the completion of the buildings, and the cost fell on the general personal estate (*Re Day, Sprake* v. *Day*, 1898, 2 Ch. 510).

Land, &c. within the act.

The above act was held not to apply to leaseholds (*Solomon* v. *Solomon*, 12 W. R. 540; *Gael* v. *Fenwick*, 22 W. R. 211; *Re Wormsley, Hill* v. *Wormsley*, 4 Ch. D. 665). In the case, however, of persons dying since 31st December, 1877, the act has been rendered applicable to leaseholds by the Real Estate Charges Act, 1877, *post*, p. 434 (*Re Kershaw, Drake* v. *Kershaw*, 37 Ch. D. 674). The act applies to copyholds (*Piper* v. *Piper*, 1 J. & H. 91). Where freeholds were settled by deed upon trusts for conversion, a share in the produce, which was under the terms of the deed taken as personal estate, was not an "interest in land" within the act (*Lewis* v. *Lewis*, 13 Eq. 218; see *Re Bennett, Clarke* v. *White*, 1899, 1 Ch. 316). Where an interest in land is given by a testator, with the option of retaining it in specie, or of having it converted, if the person elect to take without conversion, the act applies; but if he takes it as converted, the act does not apply (13 Eq. 227). The act was held not to apply to the gift by will of an option to purchase land at a fixed price (*Given* v. *Massey*, 31 L. R. Ir. 126).

Where freeholds and leaseholds were settled in the same way, different parts being subject to different charges, the beneficiaries took the aggregate estate, subject to the aggregate burden, the general personal estate being exonerated (*Re Kensington, Longford* v. *Kensington*, 1902, 1 Ch. 203; see *Frewen* v. *Law Society*, 1896, 2 Ch. 511).

Charge by way of mortgage within the acts.

The act only applies where a property is specifically charged (*Dunlop* v. *Dunlop*, 21 Ch. Div. 590; see *Hepworth* v. *Hill*, 30 Beav. 476). It would seem that a banker's general lien is not within the act (*Dunlop* v. *Dunlop, sup.*, 592). A general charge on real estate by a testator, in aid of his personal estate, is not within the act, until the amount has, in the administration of the estate, been accurately defined, and the devisee has expressly taken the estate, subject to such ascertained charge (*Hepworth* v. *Hill*, 30 Beav. 476). An equitable mortgage by deposit and memorandum is within the act (*Pembroke* v. *Friend*, 1 J. & H. 132); even where the memorandum expressed that the deposit was made as collateral security for the repayment of a sum borrowed upon a promissory note (*Coleby* v. *Coleby*, 2 Eq. 803). Even without a memorandum such a mortgage is within the act (*Davis* v. *Davis*, 24 W. R. 962). In Ireland a judgment mortgage is within the act (*Nesbitt* v. *Lawder*, 17 L. R. Ir. 553). In the case of persons dying after 31st December, 1877, see the words in the Real Estate Charges Act, 1877 (*post*, p. 435), "or any other equitable charge." Where land is made a security for a debt by any instrument which gives the creditor an equitable interest in the land, such instrument is within the last-mentioned words (*Re Sharland, Kemp* v. *Rozey*, 74 L. T. 664). The charge under the Judgments Act, 1838, s. 13 (*post*, p. 489), arising by virtue of a delivery in execution under a judgment, is within the same words (*Re Anthony, Anthony* v. *Anthony*, 1892, 1 Ch. 450); but not in the case of land of which the debtor is tenant in tail (*S. C.*, 1893, 3 Ch. 498). A lien for unpaid purchase-money was held not to be a charge by way of mortgage within the act (*Hood* v. *Hood*, 5 W. R. 74; *Barnwell* v. *Ironmonger*, 1 Dr. & Sm. 260; see *Day* v. *Day*, 14 W. R. 261). The word "mortgage" was afterwards extended so as to include a lien for unpaid purchase-money upon lands or hereditaments purchased by a testator (Real Estate Charges Act, 1867, s. 2, *post*, p. 434). But the last-mentioned section did not apply where the purchaser died intestate (*Harding* v. *Harding*, 13 Eq. 493). See now Real Estate Charges Act, 1877, *post*, p. 434. Money payable under a building agreement was held

Vendor's lien.

to be in the nature of unpaid purchase-money, which after the death of the person liable to pay was primarily payable under these acts out of the building land (*Re Kidd, Brooman* v. *Withall*, 1894, 3 Ch. 558). See also *Re Cockroft, Broadbent* v. *Groves* (24 Ch. D. 94). **17 & 18 Vict. c. 113, s. 1.**

The act only applies "as between the different persons claiming through or under the deceased person" (see *Re Anthony, Anthony* v. *Anthony*, 1893, 3 Ch. 501). Accordingly, it did not affect the case where one partner gave a charge on his separate real estate to secure a joint partnership debt, and at the time of his death the joint assets were sufficient to answer the joint debts (*Re Ritson, Ritson* v. *Ritson*, 1899, 1 Ch. 128). It applied, however, where the personal estate went to the Crown for want of next of kin, the Crown taking exonerated from mortgage debts (*Dacre* v. *Patrickson*, 1 Dr. & Sm. 191). **As between persons claiming through deceased.**

A will, executed before 1855, is "a will already made," within the proviso, though republished after 1st January, 1855 (*Rolfe* v. *Perry*, 3 D. J. & S. 481). The proviso was held not to apply to the case of an heir, where the intestate, before 1855, had executed a mortgage, reserving the equity of redemption to himself and his heirs (*Piper* v. *Piper*, 1 J. & H. 91). Nor where the personal estate had been bequeathed by a will made before 1855 (*Power* v. *Power*, 8 Ir. Ch. R. 340). The heir of a testator, taking by descent an estate which had been the subject of a lapsed devise in a will made prior to 1855, was held to take *cum onere*, inasmuch as he was not a person claiming "under or by virtue of a will" within the meaning of the proviso (*Nelson* v. *Page*, 7 Eq. 25). **Proviso in the act.**

With regard to a contrary intention within the act, it was laid down that each case must rest on its own circumstances (*Rolfe* v. *Perry*, 3 D. J. & S. 486). See *Eno* v. *Tatham* (3 D. J. & S. 443), where *Turner*, L. J., disapproved of the dicta of Lord *Campbell* in *Woolstencroft* v. *Woolstencroft* (2 D. F. & J. 350); *Mellish* v. *Vallins* (2 J. & H. 199); *Smith* v. *Smith* (3 Giff. 263). A contrary intention was collected from a will prior to the mortgage, the mortgage itself and a contemporaneous deed (*Re Campbell, Campbell* v. *Campbell*, 1893, 2 Ch. 206). So where A. granted a Scotch estate to his son under the burden of the payment of a mortgage debt, secured upon land belonging to A. in England, and A. died, domiciled in England, having by his will appointed executors, directed payment of his debts, and devised the mortgaged estate to his son; the mortgage debt was held properly payable out of the Scotch estate, and the English land and the general personalty were exonerated therefrom (*Smith* v. *Moreton*, 37 L. J. Ch. 6; 1867, W. N. 251). Regard must be had, in the case of persons dying after 1867, to the Real Estate Charges Act, 1867 (*post*, p. 433), and in the case of persons dying after 31st December, 1877, to the Real Estate Charges Act, 1877 (*post*, p. 434), in determining the question whether an intention has been expressed to exclude the operation of the act. **Contrary intention within the act.**

In the case of persons dying before 1868, the following distinctions were laid down. Where a testator directed his debts to be paid out of some particular fund or property out of which, according to the rule established by the statute, they would not be primarily payable, he was taken to signify an intention to exclude the statutory rule: but when he merely directed his debts to be paid, or to be paid out of his estate generally, he did not signify an intention to exclude that rule (per *Romilly*, M. R., *Brownson* v. *Lawrance*, 6 Eq. 5; see *Maxwell* v. *Hyslop*, 4 Eq. 413). **Cases as to persons dying before 1868.**

The following provisions were held not sufficient to exclude the act. A direction that "all just debts be paid as soon as may be" (*Pembroke* v. *Friend*, 1 J. & H. 132; *Coote* v. *Lowndes*, 10 Eq. 376). A direction that all a testator's just debts should be paid out of his estate (*Brownson* v. *Lawrance*, 6 Eq. 1), or *by his executors* out of his estate (*Woolstencroft* v. *Woolstencroft*, 2 D. F. & J. 347), or out of his personal estate (*Rowson* v. *Harrison*, 31 Beav. 207). **Expressions not excluding the act.**

The following provisions were sufficient to exclude the act. A bequest of all personal estate to trustees with a direction to pay debts, where one **Expressions excluding the act.**

17 & 18 Vict. c. 113, s. 1.

of the trustees was a devisee of the mortgaged property (*Smith* v. *Smith*, 3 Giff. 263). A bequest of a testator's personal estate to trustees upon trust to pay thereout all his debts, funeral and testamentary expenses (*Moore* v. *Moore*, 1 D. J. & S. 602; *Porcher* v. *Wilson*, 12 W. R. 1001). A bequest of personalty, "subject to the payment thereout of all the testator's just debts" (*Mellish* v. *Vallins*, 2 J. & H. 194; *Eno* v. *Tatham*, 3 D. J. & S. 443). A gift of residue of real and personal estate to trustees upon trust for sale, the moneys arising therefrom to be held upon trust in the first place to pay funeral and testamentary expenses, and debts (*Newman* v. *Wilson*, 31 Beav. 33; *Maxwell* v. *Hyslop*, 4 Eq. 407; L. R. 4 H. L. 506; *Stone* v. *Parker*, 1 Dr. & Sm. 212; *Greated* v. *Greated*, 26 Beav. 621). A devise of the mortgaged estate for sale and payment of legacies followed by a devise of residue of real and personal estate with a direction that any mortgages, debts or incumbrances, specifically affecting any parts of the testatrix's residuary real or personal estate, be exclusively borne by and paid out of the premises specifically charged therewith and subject thereto, that all her debts, &c., be paid out of her said residuary real and personal estate (*Allen* v. *Allen*, 30 Beav. 395). See, further, the notes, pp. 433, 434, *post*.

Incidence of debt as between different properties in same mortgage.

As between different portions of an estate comprised in one mortgage which are devised to different persons, the act, in the absence of a contrary intention, applies and compels the devisees to contribute rateably (*Newmarch* v. *Storr*, 9 Ch. Div. 17; which see as to meaning of words "or any other real estate of such person"). It has been also held that as between different freehold estates comprised in the same mortgage, the mortgage debt was borne rateably although one estate was specifically devised, and the other passed under a residuary devise (*Gibbins* v. *Eyden*, 7 Eq. 375; *Sackville* v. *Smyth*, 17 Eq. 153; see *Re Smith, Hannington* v. *True*, 33 Ch. D. 195). Where freeholds and leaseholds were mortgaged together, and the mortgagor died intestate, it was held, as between his heir and administrator, that the freeholds and leaseholds must bear the burden rateably (*Evans* v. *Wyatt*, 31 Beav. 217). And where freeholds and a policy were mortgaged together and the mortgagor's will declared different trusts of real and personal estate, the mortgage debt was borne rateably (*Trestrail* v. *Mason*, 7 Ch. D. 655; *Leonino* v. *Leonino*, 10 Ch. D. 460). An intention, however, may be expressed upon the mortgage documents that one property shall be the primary security (*Bute* v. *Cunynghame*, 2 Russ. 299; see 10 Ch. D. 465). Such an intention was found on the documents in *Lipscombe* v. *Lipscombe* (7 Eq. 501); *De Rochfort* v. *Dawes* (12 Eq. 540). The words "for further and better securing" were sufficient for the purpose (*Stringer* v. *Harper*, 26 Beav. 33); but not the words "collateral security" (*Athill* v. *Athill*, 16 Ch. Div. 211; *Williams* v. *Early*, 16 Ch. D. 214, n.).

Contribution.

As to the apportionment of a mortgage debt between several estates comprised in the same mortgage, see Fisher on Mortgages; Story, Eq. Jur. sects. 484, 1233 b.

Order in which funds are applicable where statutory rule excluded.

As to the order in which funds are to be applied in payment of a mortgage debt, where the statutory rule has been excluded by the expression of a contrary intention, see the observations of M. R., in *Allen* v. *Allen* (30 Beav. 395); and the argument in *Smith* v. *Moreton* (37 L. J. Ch. 6); see also Fisher on Mortgages. It may be the result of a testator's words that a mortgaged estate is to be exonerated only so far as his personalty extends; and that there is no right to go upon the other real estate (*Rodhouse* v. *Mold*, 13 W. R. 854).

Marshalling.

Where the mortgage debts of a testator are (under a direction in his will) primarily payable out of his personal estate, the devisees of a mortgaged estate are not entitled to have the mortgage debt satisfied out of the personal estate until the pecuniary and specific legatees and annuitants are satisfied; the pecuniary legatees and annuitants being entitled to have the assets marshalled, so that any payments in respect of the mortgage debt out of the personal estate would have to be recouped by the mortgaged estate (*Porcher* v. *Wilson*, 14 W. R. 1011; see *Re Smith, S.* v. *S.*, 1899, 1

Ch. 365). And where annuities were charged on lands, out of which a mortgage debt was, under this act, held to be primarily payable, the act did not preclude the right of the annuitants to have the assets marshalled (*Buckley* v. *Buckley*, 19 L. R. Ir. 544). 17 & 18 Vict. c. 113, s. 1.

THE REAL ESTATE CHARGES ACT, 1867.

30 & 31 Vict. c. 69.

30 & 31 Vict. c. 69, s. 1.

Whereas by an act passed in the seventeenth and eighteenth years of her present Majesty it is enacted, among other things, when any person shall, after the thirty-first of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such lands or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof:

And whereas doubts may exist upon the construction of the said act, and it is expedient that such doubts should for the future be removed:

Be it therefore enacted as follows:

In construing wills, general direction for payment of debts out of personalty not to include mortgage debts, unless such intention expressly implied.

1. In the construction of the will of any person who may die after the thirty-first day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

Under this section it was laid down that a direction, to be a declaration of an intention contrary to the rule laid down by the Real Estate Charges Act, 1854, must be a direction applying to mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them (per *Giffard*, V.-C., *Nelson* v. *Page*, 7 Eq. 28). And, in accordance with this principle, the following provisions have been held not sufficient to exclude the act:—A direction to executors or trustees "to pay all my just debts,

Expressions not excluding the act.

30 & 31 Vict. c. 69, s. 1.

funeral and testamentary expenses, out of my personal estate, in exoneration of my real estate" (*Rossiter* v. *Rossiter*, 13 Ch. D. 355; *Buckley* v. *Buckley*, 19 L. R. Ir. 544). A devise and bequest of residue to trustees, on trust, subject to payment thereout of all debts (*Lewis* v. *Lewis*, 13 Eq. 218). A devise of real estate to a wife, "absolutely to do with as she think proper" (*Re Smith, Hannington* v. *True*, 33 Ch. D. 195). A charge on a portion of the real estate, of all just debts (not specifically referring to mortgage debts) in aid of personal estate, and in exoneration of other real estate (*Newmarch* v. *Storr*, 9 Ch. Div. 12). A devise of part of a mortgaged estate specifically, and the remainder as residue, with a charge of debts on residuary real estate in aid of personalty (*Sackville* v. *Smyth*, 17 Eq. 153; see *Re Smith, Hannington* v. *True*, 33 Ch. D. 195). A direction that a specified fund should be applied in payment "of all and every liability which he might have incurred during life or that might remain unpaid at his death" (*Re Hooper, Ashford* v. *Brooks*, 1892, W. N. 151). And where a testator gave certain real estate to his wife during widowhood and gave his residuary real and personal estate to trustees to convert, and pay his debts, including mortgages on the property given to his wife during widowhood, and after her death or second marriage gave the pure personalty to charities and realty to widow absolutely, it was held that the mortgages on the residuary realty must be paid out of the proceeds of such realty (*Elliott* v. *Dearsley*, 16 Ch. Div. 322).

Act excluded.

Where there was a direction to executors to apply the proceeds of certain policies to pay private debts, and a bequest of residue of personal estate, "subject to the payment of my trade debts (which I hereby declare shall be a charge upon my personal estate)," and the title deeds of the real estate had been deposited with a bank as security for a trade account, there was sufficient expression of "contrary intention" to exonerate the real estate from the trade debt (*Re Fleck, Colston* v. *Roberts*, 37 Ch. D. 677). The act was excluded in *Re Nevill, Robinson* v. *Nevill* (62 L. T. 864), and in *Re Campbell, C.* v. *C.* (1893, 2 Ch. 206).

For the previous cases as to a "contrary intention" within the Real Estate Charges Act, 1854, see *ante*, p. 431.

Interpretation of word "mortgage."

2. In the construction of the said act and of this act, the word "mortgage" shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator.

This section did not apply where the purchaser died intestate (*Harding* v. *Harding*, 13 Eq. 493), but did apply where the purchaser devised the land to trustees, but died intestate as to the beneficial interest (*Dowdall* v. *McCartan*, 5 L. R. Ir. 313). See now Real Estate Charges Act, 1877, below.

Extent of act.

3. This act shall not extend to Scotland.

THE REAL ESTATE CHARGES ACT, 1877.

40 & 41 Vict. c. 34.

40 & 41 Vict. c. 34, s. 1.

Be it enacted as follows:

Application of acts in schedule.

1. The acts mentioned in the schedule hereto shall, as to any testator or intestate dying after the thirty-first December, one thousand eight hundred and seventy-seven, be held to extend to a testator or intestate dying seised or possessed of or entitled to

any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate.

40 & 41 Vict. c. 34, s. 1.

See as to this section the notes to Real Estate Charges Acts, 1854 and 1867, *supra*; *Re Anthony, Anthony* v. *Anthony* (1892, 1 Ch. 456). This act has extended the provisions of the former acts to leaseholds (*Drake* v. *Kershaw*, 37 Ch. D. 674); and in the case of a vendor's lien to intestates (*Re Crockcroft, Broadbent* v. *Groves*, 24 Ch. D. 100). It has been observed that the expression of a contrary intention referred to in this act is limited to the case of a testator, the expression "by deed or other document" of such an intention not being mentioned (*Ib.*).

2. This act shall not extend to Scotland.

Act not to extend to Scotland.

SCHEDULE.

17 & 18 Vict. c. 113 ..	An Act to amend the law relating to the administration of the estates of deceased persons.
30 & 31 Vict. c. 69 ..	An Act to explain the operation of the Act 17 & 18 Vict. c. 113.

AMENDMENT OF THE LAW RESPECTING WILLS.

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THE WILLS ACT, 1837.

1 VICT. c. 26.

An Act for the Amendment of the Laws with respect to Wills.

[3rd July, 1837.]

1 Vict. c. 26, s. 1.

Meaning of certain words in this act;

"Will:"

12 Car. 2, c. 24.

14 & 15 Car. 2 (I.).

"Real estate:"

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest)

therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

1 Vict. c. 26, s. 1.

"Personal estate:"

Number:

Gender:

2. An act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards and Primer Seisins, whereby a Man may devise Two Parts of his Land;" and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an act passed in the parliament of Ireland in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, &c., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates *pur autre vie;* and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain

Repeal of the Statutes of Wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5.

10 Car. 1, sess. 2, c. 2 (I.)

Sects. 5, 6, 12, 19, 20, 21 and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 Will. 3, c. 12 (I.).

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10 (I.).

Sect. 9 of 14 Geo. 2, c. 20.

25 Geo. 2, c. 6

1 Vict. c. 26, s. 2. (except as to colonies).

Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie* to which this act does not extend.

25 Geo. 2, c. 11 (I.).

55 Geo. 3, c. 192.

All property may be disposed of by will,

3. (*a*) It shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator (*b*);

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold (*c*), notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made;

estates *pur autre vie;*

and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament;

contingent interests;

and also to all contingent, executory or other future interests in any real or personal estate (*d*), whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will;

rights of entry; and property

and also to all rights of entry for conditions broken, and other

rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

1 Vict. c. 26, s. 3.

acquired after execution of the will.

(*a*) A will of realty is governed by the *lex loci rei sitæ* (1 Jarm. Wills, 1); and this rule applies to leaseholds (*Freke* v. *Carbery*, 16 Eq. 461; *Duncan* v. *Lawson*, 41 Ch. D. 394; *Pepin* v. *Bruyere*, 1902, 1 Ch. 24). In the case of personalty, the law of the country in which the deceased was domiciled at his death not only decides the course of distribution or succession, but regulates the decision as to what constitutes the last will (*Lynch* v. *Paraguay*, L. R. 2 P. & M. 268; *Abd-ul-Messih* v. *Farra*, 13 App. Cas. 437). Foreign personal assets, however, are governed by the law of their own locality for the purpose of legal representation, collection, and administration, as distinguished from distribution among the successors (*Blackwood* v. *The Queen*, 8 App. Cas. 82; *Commr. of Stamps* v. *Hope*, 1891, A. C. 476; see *Re Kloebe, Kannreuther* v. *Geiselbrecht*, 28 Ch. D. 175; *Re Doetsch, Matheson* v. *Ludwig*, 1896, 2 Ch. 836). The provisions of the Wills Act, 1837, apply only to wills of persons having an English domicile (*Croker* v. *Hertford*, 4 Moore, P. C. 339; *Bremer* v. *Freeman*, 10 Moore, P. C. 306; see *Re Martin, Loustalan* v. *Loustalan*, 1900, P. 211); or to wills of domiciled foreigners disposing of real or leasehold property in England (*Pepin* v. *Bruyere*, 1900, 2 Ch. 504; see *De Fogassieras* v. *Duport*, 11 L. R. Ir. 123). But as to the form in which wills of personalty may be executed by British subjects dying after 6th August, 1861, see now the Wills Act, 1861, *post*, p. 479. As to conventions between this country and foreign countries for the purpose of determining the domicile of deceased persons, see the Domicil Act, 1861, *post*, p. 481; and as to domicile generally, see Dicey on Domicile.

Wills of realty governed by the *lex loci rei sitæ*; wills of personalty by the *lex domicilii*.

Aliens may dispose of personalty by will (1 Wms. Exors. 12). Aliens were formerly incapable of devising realty (*Fourdrin* v. *Gowdey*, 3 M. & K. 383). As to aliens claiming under a devise, see *Davies* v. *Lynch* (I. R. 4 C. L. 570). But now real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject (Naturalisation Act, 1870, s. 2). This last section is not retrospective (*Sharp* v. *St. Sauveur*, 7 Ch. 343); and does not confer upon aliens the privileges of the Wills Act, 1861, *post*, p. 479 (*Bloxam* v. *Favre*, 9 P. Div. 130).

Aliens.

As to the power of the sovereign to dispose of personalty by will, see the Crown Private Estate Act, 1800, s. 10; and to devise realty, see the Crown Private Estate Act, 1800, s. 10. See further, *A.-G.* v. *Windsor* (8 H. L. C. 369); *Re Geo.* 3 (3 Sw. & Tr. 199); *Re Best* (1901, P. 333).

The sovereign.

See as to the wills of infants, sect. 7 of this act; of married women, sect. 8; of soldiers and seamen, sects. 11 and 12; of lunatics, *Smith* v. *Tebbitt*, L. R. 1 P. & M. 398; *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; Pope on Lunacy, 2nd ed. 352.

Infants, married women, soldiers and seamen, lunatics.

The effect of probate as regards wills of real estate is dealt with by sects. 61—64 of the Court of Probate Act, 1857; which sections apply exclusively to cases where the whole will (including any codicils) has been executed under and in accordance with the requirements of the Wills Act, 1837 (*Campbell* v. *Lucy*, L. R. 2 P. & M. 209).

Probate of wills of real estate.

If the will be proved in solemn form, probate is conclusive evidence of the validity and contents of the will (sect. 62), and binds the heir even if he has been cited in his character of one of the next of kin (*Beardsley* v. *Beardsley*, 1899, 1 Q. B. 746).

If the probate be in common form it did not (before the Land Transfer Act, 1897) bind the heir, but might in a subsequent action (by a notice

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given under sect. 64 of the above act of 1857) have been made *primâ facie* evidence of the validity and contents of the will (*Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612). The effect, however, of the Land Transfer Act, 1897, s. 2, sub-ss. 2 and 4, should be considered (see *ante*, p. 420).

As to the jurisdiction of the Chancery Division in the matter of probate, see *Pinney* v. *Hunt* (6 Ch. D. 98); *Bradford* v. *Young* (26 Ch. D. 656); and *Priestman* v. *Thomas* (9 P. Div. 210).

Chose in action.

(*b*) It was never intended that this section should make any kind of personalty bequeathable which was not bequeathable before. Therefore a testator cannot bequeath a promissory note, made to him, so as to pass the right to sue on it: such right is in the executor (*Bishop* v. *Curtis*, 18 Q. B. 879).

Devisable interests in land.

A person in possession of land without other title has a devisable interest (*Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Clarke* v. *Clarke*, I. R. 2 C. L. 395). Even before the passing of this act a person who had sold an estate under circumstances which entitled him in equity to have the sale set aside had in the estate an interest of such a nature as to be devisable (*Gresley* v. *Mousley*, 4 De G. & J. 78).

Testator dying without heirs.

A doubt has been suggested whether this act extends to the case of a testator dying without heirs, and whether, therefore, in order to prevent an escheat, three witnesses should not in such a case attest the will as under the old law (Williams, R. P. 56, note (*i*), 19th ed.).

Copyholds—Estate remains in heir till admittance of devisee.

(*c*) The effect of this section in the case of copyholds is to enable a copyholder to devise his estate in every case, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till the admittance of the devisee (*Garland* v. *Mead*, L. R. 6 Q. B. 441). There may, however, be a custom preventing the admission of more than one of several joint devisees (*Howard* v. *Gwynn*, 84 L. T. 505). Where a copyholder devised his estate to trustees, appointing them guardians of his customary heir, who was an infant, and the trustees without disclaiming tendered the infant heir for admittance, and the lord would not admit on account of the devise, the Court of Queen's Bench refused (as a matter of discretion) to grant a mandamus to compel the lord to admit the heir (*R.* v. *Garland*, L. R. 5 Q. B. 269); but subsequently held, that the lord could not seize *quousque* for want of a tenant (*Garland* v. *Mead*, L. R. 6 Q. B. 441). The section enables a testator to devise copyholds free from the widow's right to freebench (*Lacey* v. *Hill*, L. R. 19 Eq. 346).

Contingent and executory interests.

(*d*) Before this act, contingent and executory estates and possibilities accompanied with an interest were devisable (*Selwin* v. *Selwin*, Burr. 1131; *Moore* v. *Hawkins*, 2 Eden's C. C. 342; *Roe* v. *Griffiths*, 1 Bl. Rep. 605; *Roe* v. *Jones*, 1 Hen. Bl. 30; *Jones* v. *Roe*, 3 T. R. 88; *Scawen* v. *Blunt*, 7 Ves. 300). Such an interest, however, was not devisable at law where the person who was to take was not in any degree ascertainable before the contingency happened; as where there was "a devise to two equally, or to the survivor of them, and to be disposed of by her, the survivor, as she might by will devise;" the will of one of such devisees made during their joint lives, although she survived, was held inoperative (*Doe* v. *Tomkinson*, 2 M. & S. 164). As to the exercise by will since the Wills Act, 1837, of a power of appointing an equitable estate given to two persons or the survivor, see *Thomas* v. *Jones* (1 D. J. & S. 63). By this section contingent interests are devisable whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested. A contingent estate in fee under a shifting clause may be devised both under the old and new law (*Ingilby* v. *Amcotts*, 21 Beav. 585).

Possibilities in personal estate could be disposed of by will as well as assigned in equity before this statute and the Real Property Act, 1845 (Fearne, 439; Pollexf. 44; 2 Freem. 250; 9 Mod. 101; 2 P. Wms. 606; 1 P. Wms. 572; 3 P. Wms. 132). But a *spes successionis* is not a title to property by English law (*Re Parsons, Stockley* v. *Parsons*, 45 Ch. D. 51).

Rights of entry.

The possibility of reverter on failure of a fee simple conditional is a "right of entry" within this section (*Pemberton* v. *Barnes*, 1899, 1 Ch. 544).

See further as to what property may be devised or bequeathed, 1 Jarm. Wills, 48 *et seq.*, 5th ed.

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As to the fees and fines payable by devisees of customary and copyhold estates.

4. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

See the Copyhold Act, 1894, ss. 84, 85, as to admissions. The cases as to the admittance of devisees of copyholds and the fines payable are collected in Fisher's Digest, 1848—1855. As to the fines on admission payable by trustees of copyholds, see Lewin on Trusts, p. 252, 10th ed. (*Bence* v. *Gilpin*, L. R. 3 Ex. 76; *Bristow* v. *Booth*, L. R. 5 C. P. 80; *Everingham* v. *Ivatt*, L. R. 7 Q. B. 683).

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

5. When any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the

1 Vict. c. 26, s. 5.

will of such real estate it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, &c. when such estates are not now devisable as he would have been from the heir in case of descent.

Estates *pur autre vie.*

6. If no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

Estates *pur autre vie.*

An estate *pur autre vie* may arise on a conveyance to A. for the life of B., or again where a tenant for his own life grants over his estate (Co. Litt. 41 b). Where an estate *pur autre vie* is limited (1) to A. and his heirs, the heir takes on A.'s death as special occupant (*Re Michell, Moore* v. *Moore*, 1892, 2 Ch. 96); (2) to A., his executors and administrators, the executor takes as special occupant (*Northen* v. *Carnegie*, 4 Drew. 491); and (3) to A., his heirs, executors and administrators, the heir takes as special occupant (*Atkinson* v. *Baker*, 4 T. R. 229).

Prior to the Statute of Frauds, if the limitation were simply to A. for the life of B., the estate went on A.'s death to the first person who took possession, who was termed a general occupant (*Re Michell, Moore* v. *Moore, sup.*). Further, inasmuch as an heir who took as special occupant did not take by descent, he was not liable to his ancestor's debts (*Doe* v. *Luxton*, 6 T. R. 292). To remedy these defects in the law, the 3rd section of the Statute of Frauds and the 9th section of 14 Geo. 2, c. 20, were passed, which sections have been repealed by sect. 2 of the present act and the above section substituted for them.

As to estates *pur autre vie*, see further *Lewis Bowles's case*, Tud. L. C. Conv., 4th ed. 98.

Cases under the section.

Where rents were devised to A., B., C. and their issue in equal shares during their lives and the life of the longer liver, and A. died before B. and C., leaving a child, the child was held to take an estate *pur autre vie*, and on his death intestate his interest (no special occupant having been named) was held to pass under this section to his legal personal representative (*Re Sheppard, Sheppard* v. *Manning*, 1897, 2 Ch. 67; compare *Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192). Where an estate *pur autre vie*

was conveyed to trustees and their heirs upon trust for an infant, the infant's estate passed under this section to his administratrix (*Mount Cashell* v. *More-Smythe*, 1896, A. C. 158). 1 Vict. c. 26, s. 6.

The words "in case there shall be no special occupant" in this section include both the case where there is no special occupant named in the grant, as also the case where the heir is named as special occupant, but the grantee dies without leaving an heir (*Plunket* v. *Reilly*, 2 Ir. Ch. R. 585; *Reynolds* v. *Wright*, 2 D. F. & J. 589).

In the case of deaths since 1897, it seems that all estates *pur autre vie* of a freehold nature, which before the Land Transfer Act, 1897, would have come to the heir as special occupant, will vest in the personal representative (L. T. Act, 1897, s. 1). Land Transfer Act, 1897.

7. No will made by any person under the age of twenty-one years shall be valid. No will of a person under age valid;

Sect. 24 makes a will speak from the testator's death; but this does not extend to the testator's capacity, and the will of an infant would not become operative by his attaining his majority (Sugd. R. P. Stat. 330). The power given by 12 Car. 2, c. 24, s. 8, to infants to appoint guardians of their children by will appears to be repealed (*Ib.*). As to an infant appointing a guardian by deed, see *Morgan* v. *Hatchell* (19 Beav. 86); *Re Brown* (18 Ch. Div. 61).

A will made by an infant seaman was held valid under sect. 11 (*Re M'Murdo*, L. R. 1 P. & M. 540).

8. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act. nor of a *feme covert*, except such as might now be made.

Under sub-sect. (1) of sect. 1 of the M. W. P. Act, 1882, a married woman is, in accordance with that act, capable of disposing by will of any real or personal property as her separate property in the same manner as if she were a *feme sole* (see note to that section, *ante*, p. 343); and by sect. 3 of the M. W. P. Act, 1893, sect. 24 of the Wills Act, 1837, is made applicable to the wills of married women (see *ante*, p. 361). The following note relates to the law independent of the effect of those sections. M. W. P. Acts, 1882 and 1893.

A married woman has, properly speaking, no testamentary capacity (*Dye* v. *Dye*, 13 Q. B. Div. 156). Sect. 8 of the Wills Act, 1837, preserved the incapacity of coverture as it stood before that act (*Bernard* v. *Minshull*, Johns. 297; *Thomas* v. *Jones*, 2 J. & H. 483; 1 D. J. & S. 81). The only cases, accordingly, in which a married woman can, independently of the M. W. P. Act, 1882, make a will are as follows:— Wills of married women independently of the M. W. P. Acts, 1882 and 1893.

(1.) She can dispose by will of separate estate, real and personal (*Taylor* v. *Meads*, 4 D. J. & S. 597; see *Dye* v. *Dye*, 13 Q. B. Div. 147).

(2.) She can, in exercise of a power, dispose by will of real and personal estate (*Noble* v. *Willock*, L. R. 7 H. L. 580; *Thomas* v. *Jones*, 1 D. J. & S. 63), and to such a will sect. 27 of the Wills Act, 1837, applies (*Bernard* v. *Minshull*, Johns. 296). As to the revocation of such a will, see *Hawksley* v. *Barrow* (L. R. 1 P. & M. 147); *Re Tenney* (45 L. T. 78).

(3.) She can, with the assent of her husband, dispose by will of personal estate (*Willock* v. *Noble*, L. R. 7 H. L. 580). His assent, however, to the particular will must be proved; a general assent is not sufficient (*Ib.* 597). The husband must survive the wife (*Ib.* 591), and if he does he can assent after her death (*Elliot* v. *North*, 1901, 1 Ch. 424). The husband has a *locus pœnitentiæ*

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until he has either acted on the will or has assented to probate (*Willock* v. *Noble*, 8 Ch. 790). An expression by a husband after his wife's death of an intention to prove was held sufficient assent (*Re Cooper*, 6 P. D. 34); but according to the present practice a husband, by proving his wife's will in general form, does not assent to the disposition (*Re Atkinson*, *Waller* v. *Atkinson*, 1899, 2 Ch. 1).

(4.) A married woman who is an executrix has, as such, power to make a will and to appoint an executor for the purpose of continuing the representation to the original testator (*Noble* v. *Willock*, L. R. 7 H. L. 590). The administrator with the will annexed, however, of the estate of a married woman does not, as such, represent an estate of which the married woman was executrix (*Re Bridger*, 4 P. D. 77).

Application to the wills of married women of sects. 24 and 27.

Even before the M. W. P. Act, 1893, the will made during coverture of a married woman who died during coverture passed after-acquired separate estate, even where she had no separate estate at the date of her will (*Charlemont* v. *Spencer*, 11 L. R. Ir. 490; see *Re Bowen*, *James* v. *James*, 1892, 2 Ch. 291). Where, however, a married woman, entitled to 3,800*l.* for her separate use, made a will which disposed of the 3,800*l.* and also contained a residuary gift, and her husband subsequently died, having left all his property to his wife, and she died without having re-executed her will after her husband's death, her will only disposed of the 3,800*l.*, and not of the property left by her husband (*Willock* v. *Noble*, L. R. 7 H. L. 580; see *Re Price*, *Stafford* v. *S.*, 28 Ch. D. 709; *Re Cuno*, *Mansfield* v. *M.*, 43 Ch. Div. 12; *Re Smith*, *Bilke* v. *Roper*, 45 Ch. D. 632, where a married woman's will was held not to have been republished after her husband's death).

Where a married woman, entitled for life to a rent-charge for her separate use, made a will during coverture, which she did not re-execute after her husband's death, the will passed accumulations of the rent-charge made during coverture, but not those made afterwards (*Re Wilson*, *Menteath* v. *Campbell*, 26 W. R. 848). Where, however, personal estate was settled in trust for A. during her life for her separate use, and after her decease, in case she should survive her husband, in trust for A. for her separate use absolutely, and A. survived her husband, her will made during the coverture disposed of the separate property (*Bishop* v. *Wall*, 3 Ch. D. 194).

It was decided that, notwithstanding sect. 8 of the Wills Act, 1837, a general gift in the will of a married woman operated, under sect. 27, to pass property over which she had only a testamentary power (*Bernard* v. *Minshull*, Johns. 276; see *Re Ludlam*, 63 L. T. 330; *Re Hernando*, *Hernando* v. *Sawtell*, 27 Ch. D. 284; *Re Price*, *Tomlin* v. *Latter*, 1900, 1 Ch. 442). And where a general power was vested in the survivor of A., B., and C., and C. ultimately became the survivor, it was held (under sects. 24 and 27) that the power was well exercised by a residuary devise in the will of C., made after the death of A., but during the life of B.; C. having been a married woman both at the date of her will and the date of her death (*Thomas* v. *Jones*, 1 D. J. & S. 63).

Will of married woman in execution of power which never arises.

Trust funds were limited to a married woman if she survived her husband, but if she predeceased him, she was to have a general power of appointment by will. During the coverture she made her will disposing of the property; she survived her husband, but did not re-execute her will. It was held that the power had not arisen, and the will was therefore inoperative (*Trimmell* v. *Fell*, 16 Beav. 537; *Price* v. *Parker*, 16 Sim. 198; see *Jones* v. *Southall*, 30 Beav. 187; *Blaiklock* v. *Grindle*, 7 Eq. 215).

Function of the Probate Division.

Before the Jud. Acts it was held that in the case of a will executed by a married woman, under a power, the Court of Probate must determine whether or not there was a will (*Re Hallyburton*, L. R. 1 P. & M. 90); and should see that every properly executed testamentary paper, material for the consideration of the Court of Chancery, was included in the probate

(*Re Fenwick*, L. R. 1 P. & M. 319); but that the Court of Probate would not determine whether or not the testatrix was testable (*Barnes* v. *Vincent*, 5 Moore, P. C. 201); nor whether the power had been duly executed (*Paglar* v. *Tongue*, L. R. 1 P. & M. 158); nor would it decide questions of construction (*Re De Pradel*, L. R. 1 P. & M. 454), all of which were questions for the Court of Chancery. The usual form of probate was limited to the property which the deceased had power to dispose of, and had disposed of, accordingly; and her husband or her next of kin were entitled to a grant of administration *cæterorum* (*Re Crofts*, L. R. 2 P. & M. 18; *Re Graham*, *Ib.* 385; *Noble* v. *Phelps*, *Ib.* 276, where see form of probate).

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Form of probate.

In a case decided after the Jud. Acts, but before the M. W. P. Act, 1882, and where probate had been granted in the old limited form, the Court of Appeal laid down that upon an application for probate, the Probate Division should as far as possible determine whether the married woman had separate property or had duly executed the testamentary power (*Re Tharp*, 3 P. Div. 76). But it has been pointed out that that Division may not have the requisite machinery (*Harding* v. *Sutton*, 59 L. T. 838).

Now, according to the rules made by the Probate Division in 1887, probates of wills of married women and of widows made during coverture, and letters of administration with such wills annexed, are granted in ordinary form with no limitation (*Re Price*, 12 P. D. 137; see, however, the limited forms of grant in *Re Leman*, 1898, P. 215; *Re Trefond*, 1899, P. 247). And *semble* upon such an application for probate there is a presumption that the married woman had separate property (*Harding* v. *Sutton*, 59 L. T. 838). The effect of the probate in general form is to enable the executor to get in the wife's assets, whether she had power to dispose of them by will or not, and does not affect the beneficial title, which may be subsequently decided in the Chancery Division (*Smart* v. *Tranter*, 43 Ch. Div. 587; *Re Lambert*, *Stanton* v. *Lambert*, 39 Ch. D. 626; see *Re Smith*, *Bilke* v. *Roper*, 45 Ch. D. 638). The taking out by a husband of probate of his wife's will in general form is not an assent by him to the disposition (*Re Atkinson*, *Waller* v. *Atkinson*, 1899, 2 Ch. 1).

9. No will shall be valid unless it shall be in writing (*e*) and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof (*f*) by the testator or by some other person in his presence and by his direction (*g*); and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (*h*); and such witnesses shall attest and shall subscribe the will in the presence of the testator (*i*), but no form of attestation shall be necessary (*k*).

Every will shall be in writing and signed by the testator in the presence of two witnesses at one time.

(*e*) The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence (*Sugden* v. *St. Leonards*, 1 P. D. 154; see *Woodward* v. *Goulstone*, 11 App. Cas. 469). But declarations made by a testator after the date of an alleged will are not admissible to prove either the due execution thereof (*Re Ripley*, 1 Sw. & Tr. 68; *Sugden* v. *St. Leonards*, *sup.*); or that it was executed in duplicate (*Atkinson* v. *Morris*, 1897, P. 40).

Where a will, the contents of which have been brought to the knowledge of a testator, has been executed by him, words cannot be omitted therefrom on the ground of error in the preparation of the will (*Harter* v. *Harter*, L. R. 3 P. & M. 11; *Rhodes* v. *Rhodes*, 7 App. Cas. 192; see rules stated in *Guardhouse* v. *Blackburn*, L. R. 1 P. & M. 109; *Garnett Botfield* v. *Garnett Botfield*, 1901, P. 335; *Collins* v. *Elstone*, 1893, P. 1). But words inserted by fraud or by mistake without the knowledge of the

1 Vict. c. 26, s. 9.

testator may be rejected (*Morell* v. *Morell*, 7 P. D. 68; *Fulton* v. *Andrew*, L. R. 7 H. L. 448). *Quære*, however, where their rejection alters the sense of the remainder (*Rhodes* v. *Rhodes*, *sup.*).

(*f*) As to the position of the signature of the testator, see the Wills Act Amdt. Act, 1852, s. 1, *post*, p. 477, and cases there quoted.

Signature by testator.

(*g*) A signature by the testator of his name after the attestation by the witnesses, although in their presence, is not a compliance with the statute (*Re Olding*, 2 Curt. 865; *Re Byrd*, 3 Curt. 117). A will was held to have been signed before the witnesses subscribed, although the confused recollection of the witnesses raised a doubt upon the point (*Cooper* v. *Bockett*, 3 Curt. 648; *Brenchley* v. *Still*, 2 Rob. 162; *Thompson* v. *Hall*, 16 Jur. 1144; *Re Jones*, 1877, W. N. 10). A mark by the testator for a signature was held sufficient, although the name did not appear (*Re Bryce*, 2 Curt. 325); and even where a wrong name was added to the mark, but there was no doubt as to the identity of the testator, the execution was held good (*Re Clarke*, 1 Sw. & Tr. 22; *Re Douce*, 2 Sw. & Tr. 593).

By some other person by testator's direction.

An attesting witness may sign the will for the testator by his direction (*Re Bailey*, 1 Curt. 914). The witness, in fact, attests the *direction* of the testator, and that direction amounts to an acknowledgment (*Smith* v. *Roberts*, 1 Rob. 262). But such signature, although made by the testator's direction, is insufficient if not made in his presence (*Kevil* v. *Lynch*, I. R. 8 Eq. 244). A party signing a will for a testator, who was too ill to sign, by his direction signed it in his own name, but expressed it to be on behalf of the testator. This was deemed sufficient (*Clark's case*, 2 Curt. 329). Where A., in the presence of a testator, and by his direction, impressed the testator's usual signature at the foot of a codicil, by means of a stamp, the will was duly signed (*Jenkyns* v. *Gaisford*, 11 W. R. 854). There must be some act or word on the part of the testator to show that the signature was made at his request (*Re Marshall*, 13 L. T. 643).

Signature made in presence of witnesses.

(*h*) The testator's signature must be made or acknowledged in the presence of the witnesses. Where the witnesses had seen the testatrix write what the Court presumed to be her signature, it was held sufficient, although they did not see the signature, and she did not acknowledge it to them (*Smith* v. *Smith*, L. R. 1 P. & M. 143). "Presence" means actual visual presence (*Brown* v. *Skirrow*, 1902, P. 3).

Acknowledgment of signature in presence of witnesses.

There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by the witnesses is his will, or state that his signature is inside the will (*Blake* v. *Blake*, 7 P. Div. 102; following *Hudson* v. *Parker*, 1 Rob. 14; and disapproving of *Beckt* v. *Howe*, L. R. 2 P. & M. 1; and *Gwillim* v. *Gwillim*, 2 Sw. & Tr. 200). Both witnesses must sign after the testator's signature shall have been made and acknowledged to them when both are present at the same time (*Moore* v. *King*, 3 Curt. Ecc. 243; *Wyatt* v. *Berry*, 1893, P. 5).

Where a will is signed by the testator before the witnesses are called in, the mere circumstance of calling in witnesses to sign without giving them any explanation of the instrument does not amount to a sufficient acknowledgment (*Ilott* v. *Genge*, 4 Moo. P. C. 265; *Re Swinford*, L. R. 1 P. & M. 630; *Pearson* v. *Pearson*, L. R. 2 P. & M. 451). It is not, however, necessary that the testator should say in express terms to the witnesses "That is my signature." A request for subscription has been held sufficient (*Keigwin* v. *Keigwin*, 3 Curt. 607; *Re Ashmore*, *Ib.* 756; *Gaze* v. *Gaze*, *Ib.* 451; *Re Davies*, 2 Rob. 337; *Re Claridge*, 39 L. T. 612; *Daintree* v. *Butcher*, 13 P. Div. 102). Where the request for subscription was made to the witnesses by a third party in the presence of the testatrix who said no word during the proceeding, there was a sufficient acknowledgment (*Inglesant* v. *Inglesant*, L. R. 3 P. & M. 172; *Re Bishop*, 30 W. R. 567; but see *Morritt* v. *Douglas*, L. R. 3 P. & M. 1). Where A. placed his seal on the paper, and delivered it as his act and deed, it was held there was no sufficient acknowledgment (*Re Sumners* 2 Rob. 295).

(*i*) It has long been settled, that after a will has been signed or acknowledged by the testator, there must be the subscription of the witnesses in the presence of the testator (*White* v. *British Museum*, 6 Bing. 310). To make a valid subscription and attestation to a will there must be either the name of the witness or some mark intended to represent it. A correction of an error in a previous writing of the witness's name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose (*Hindmarsh* v. *Charlton*, 8 H. L. C. 160). Nor the adding of an address (*Re Trevanion*, 2 Rob. 315). Nor the acknowledgment by a witness of his signature by putting a dry pen over it (*Hindmarsh* v. *Charlton*, 8 H. L. C. 160; *Playne* v. *Scriven*, 1 Rob. 772; *Horne* v. *Featherstone*, 73 L. T. 32). The court must be satisfied that the act done by the witness was intended by him to evidence his attestation. Where a man wrote the word "witness," it was held an insufficient attestation (*Re Eynon*, L. R. 3 P. & M. 92); also where another, after writing his christian name, was unable through feebleness to complete his signature (*Re Maddock*, L. R. 3 P. & M. 169). **1 Vict. c. 26, s. 9.** **Attestation and subscription by witnesses.**

The initials of attesting witnesses to a testamentary paper are a sufficient subscription under this act (*Re Christian*, 2 Rob. 110; *Re Martin*, 6 Not. Cas. 694; *Re Blewitt*, 5 P. D. 116; *Margary* v. *Robinson*, 12 P. D. 8). Where one of the attesting witnesses subscribed his description, without signing his name, it was held sufficient (*Re Sperling*, 12 W. R. 354).

A will may be attested by the witnesses making marks (*Re Amiss*, 2 Rob. 116); and the testator may write the names of the witnesses opposite their respective marks (*Re Ashmore*, 3 Curt. 756). But an attesting witness, able to write, cannot subscribe for another witness who is unable to write (1 Not. Cas. 456). A husband who is witness to a will cannot also subscribe for his wife (*Re White*, 2 Not. Cas. 461); nor a wife for her husband (*Re Duggins*, 39 L. J. Prob. 34). A will was attested by one witness in his own handwriting. He also held and guided the hand of a second witness who could neither read nor write; this was held sufficient (*Harrison* v. *Elvin*, 3 Q. B. 117; *Re Frith*, 27 L. J. Prob. 6). Where the names of two attesting witnesses to a will, who were unable to write, were written by another person whilst they held the top of the pen, the will was duly attested (*Re Lewis*, 31 L. J. Prob. 153; see *Re Cope*, 2 Rob. 335).

For a case where the name of a witness was erased by the testator and re-written by the witness, see *Re Coleman* (2 Sw. & Tr. 314); and for a case where the signatures of the witnesses were sworn to be in the handwriting of the testator, see *Re Lee* (4 Jur. N. S. 790).

If both the witnesses are dead, it will not be presumed that they did not both sign at the same time, from the difference in the colour of the ink (*Trott* v. *Trott*, 29 L. J. Prob. 156).

It is not necessary that the name of the witness should be written upon the same side of the paper on which the name of the testator occurs (*Re Chamney*, 1 Rob. 757; *Woodhouse* v. *Balfour*, 13 P. D. 2; *Margary* v. *Robinson*, 12 P. D. 8); but the court must be satisfied that the name of the witness was subscribed for the purpose of attesting the testator's signature (*Re Wilson*, L. R. 1 P. & M. 269; *Griffiths* v. *Griffiths*, L. R. 2 P. & M. 300; see *Re Streatley*, 1891, P. 172); and the testator's signature attested must be the operative one (*Sweetland* v. *Sweetland*, 4 Sw. & Tr. 6; *Ewen* v. *Franklin*, 1 Jur. N. S. 1220; *Re Dilkes*, L. R. 3 P. & M. 164; *Phipps* v. *Hale*, *Ib.* 166). The attestation of the witness, if not on the same sheet of paper as the signature of the testator, must be on paper physically connected therewith (*Re Braddock*, 1 P. D. 433; *Re Hatton*, 6 P. D. 204).

The execution must be attested by the witnesses in the actual or constructive presence of the testator (*Newton* v. *Clarke*, 2 Curt. 320; *Tribe* v. *Tribe*, 1 Rob. 275; *Longford* v. *Eyre*, 1 P. W. 740; *Casson* v. *Dade*, 1 Br. C. C. 99). Even in the case of a blind person it must appear that the will was so attested that the testator, if he had had his eyesight, could have **Testator's presence.**

1 Vict. c. 26, s. 9.

seen the witnesses subscribe (*Re Piercy*, 1 Rob. 278). Where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names (*Norton* v. *Bazett*, 3 Jur. N. S. 1084; *Jenner* v. *Ffinch*, 5 P. D. 106). But it is not necessary that the witnesses should subscribe in the presence of each other (*Faulds* v. *Jackson*, 6 Not. Cas. Suppl. 1; *Re Webb*, 2 Jur. N. S. 309).

Attestation clause should be added.

(*k*) Although a will may be valid without any attestation clause (*Bryan* v. *White*, 2 Robert. 315), yet one should be added; otherwise, in order to obtain probate, it is necessary to have an affidavit of one of the subscribing witnesses to prove that the provisions of the act, in reference to the execution of the will, have in fact been complied with (*Belbin* v. *Skeats*, 1 Sw. & Tr. 148; see *Re Thomas*, 1 Sw. & Tr. 255; *Byles* v. *Cox*, 74 L. T. 222).

Presumption in favour of due execution in absence of evidence.

If upon the face of a will to which there is no memorandum of attestation there be the signature of the testator at the foot or end thereof, and the subscriptions of two witnesses; in the absence or death of the witnesses, the *primâ facie* presumption is, that the testator signed in the joint presence of the two witnesses, and that they subscribed in his presence. If the subscribing witnesses do not remember the facts attendant upon the execution of the will, the presumption is the same (*Burgoyne* v. *Showler*, 1 Rob. 5; *Foot* v. *Stanton*, 2 Jur. N. S. 380; *Re Torre*, 8 Jur. N. S. 494; *Re Colyer*, 14 P. D. 48; *Woodhouse* v. *Balfour*, 13 P. D. 2; *Vinnicombe* v. *Butler*, 13 W. R. 392; *Re Puddephatt*, L. R. 2 P. & M. 97).

Evidence showing that statutory requisites were not complied with.

Where, however, the witnesses negative compliance with the requisites of the act, the will cannot be supported unless their evidence be rebutted by proof of circumstances, showing that the witnesses cannot be credited, or that from the facts and circumstances which they state their recollection fails them (*Re Ayling*, 1 Curt. 913; *Gove* v. *Gawen*, 3 Curt. 151; *Pennant* v. *Kingscote*, *Id.* 642; *Bennett* v. *Sharp*, 1 Jur. N. S. 456; *Leech* v. *Bates*, 1 Rob. 714; *Noding* v. *Alliston*, 14 Jur. 904; *Glover* v. *Smith*, 57 L. T. 60; *Crofts* v. *Crofts*, 13 W. R. 526; *Wright* v. *Rogers*, L. R. 1 P. & M. 678; *Bailey* v. *Frowan*, 19 W. R. 511; *Dayman* v. *Dayman*, 71 L. T. 699; see *Pilkington* v. *Gray*, 1899, A. C. 401). Where witnesses have deposed, the one positively that the will was not executed in the testator's presence, and the other as positively declared that it was, the court has given the preponderance to the witness deposing affirmatively in accordance with the statement set forth in the attestation clause (*Brenchley* v. *Still*, 2 Rob. 176, 177; *Farmar* v. *Brock*, 1 Deane, 187; 2 Jur. 670). Declarations by the testator are inadmissible (*Sugden* v. *St. Leonards*, 1 P. D. 227; see *Atkinson* v. *Morris*, 1897, P. 40; and compare *Re Chappell*, 1894, P. 98).

Invalid testamentary instrument rendered valid by subsequent instrument duly executed.

Although a testamentary instrument is not properly executed or attested, yet, if it is clearly referred to by one of later date properly executed and attested, it will be operative, and no particular form of expression is necessary; therefore, where there was a will duly executed, then a codicil attested by one witness only, and lastly, a codicil duly executed, which was described as "another codicil to my will," the second codicil was held to give operation to the first codicil (*Ingoldby* v. *Ingoldby*, 4 Not. Cas. 439; *Re Hillhouse*, 1 Eccl. & Adm. Rep. 111). It would be the same if the will were informally executed, but a codicil duly executed were to be described as a codicil to his last will (*Hill's Case*, 4 Not. Cas. 404; *Hally's Case*, 5 Not. Cas. 510); it is not properly a question of incorporation (see *Id.* 512). Alterations of a will made after its execution were held confirmed by subsequent execution of a codicil which did not, however, refer to them (*Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216).

Where a testator directed that in a certain event a former will which had been revoked by marriage should be revived, the former will was included in the probate (*Re Bangham*, 1 P. D. 429); but where a testatrix purported by a codicil to revive a will not only revoked but destroyed, the court refused to grant probate of the draft (*Hale* v. *Tokelove*, 2 Robert. 318; *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342; see *Re Steele*, L. R. 1 P. & M. 577; *Re Chilcott*, 1897, P. 223; *Re Reade*, 1902, P. 75).

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An unattested paper which would have been incorporated in an attested will or codicil executed according to the Statute of Frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of this section (*Allen* v. *Maddock*, 11 Moore, P. C. 427; see *Anderson* v. *Anderson*, 13 Eq. 381). The paper to be incorporated need not be void or valid *per se*, and whether of itself void or valid is equally entitled to probate (*Sheldon* v. *Sheldon*, 1 Robert. 81; and see *Dicken's Case*, 3 Curt. 60; *Willesford's Case*, *Ib.* 77; *Bacon's Case*, 3 Not. Cas. 644; *Smartt's Case*, 4 Not. Cas. 38; *Darby's Case*, 4 Not. Cas. 427). But the paper intended to be incorporated must be shown to have been in existence at the time the will was executed (*Singleton* v. *Tomlinson*, 3 App. Cas. 404; *Ferraris* v. *Hertford*, 3 Curt. 468; *Re Watkins*, L. R. 1 P. & M. 19; as to lists of articles referred to, see *Re Ash*, 2 Jur. N. S. 526; and as to a paper coming into existence between the execution of a will and a codicil, see *Re Truro*, L. R. 1 P. & M. 201; *Re MacGregor*, 60 L. T. 840). The will must refer to the paper as existing (*Durham* v. *Northen*, 1895, P. 66; *Re Hyslop*, *Hyslop* v. *Chamberlain*, 1894, 3 Ch. 522). And the paper must be clearly identified with the description of it given in the will (*Singleton* v. *Tomlinson*, *sup.*; *Smart* v. *Prujean*, 6 Ves. 565; *Von Straubenzee* v. *Monck*, 11 W. R. 109; *Re Norris*, 14 W. R. 348; *Re Garnett*, 1894, P. 90; see *Re Daniell*, 8 P. D. 14; *Symes* v. *Appelbe*, 57 L. T. 599). Where there is a reference in a duly executed testamentary instrument to another testamentary instrument imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, and such parol evidence is not excluded by this statute (*Allen* v. *Maddock*, 11 Moore, P. C. 427; see Wigram on Evid., prop. 5). The principle of this case, however, will not be extended (*Re Greves*, 1 Sw. & Tr. 250; 7 W. R. 86). Thus, where a codicil referred to "the last will of me," parol evidence was admitted to identify the will (*Re Heathcote*, 6 P. D. 30). But where the will did not refer to a document as then existing, the court refused to receive parol evidence, to show that the document was written before the will was signed (*Re Dallow*, L. R. 1 P. & M. 189; *Re Sunderland*, *Ib.* 198). A reference in a will to documents "accompanying this my will," was held an insufficient identification (*Re Yockey*, 29 L. T. 699). Where the will, if read as speaking at the date of the codicil, contains language which would operate as an incorporation of a document, such document is entitled to probate by force of the codicil, although not in existence until after the execution of the will (*Re Truro*, L. R. 1 P. & M. 201; see *Re Macgregor*, 60 L. T. 840; *Re Rendle*, 68 L. J. P. 125); but only if the language of the will refers to the document as existing (*Durham* v. *Northen*, 1895, P. 66).

Incorporation of unattested papers.

Paper must be in existence,

and capable of identification.

Effect of codicil on papers referred to in will.

In requiring the probate of an incorporated document the court exercises a discretion, and does not require it where the person having custody of the document refuses to produce it (*Re Sibthorp*, L. R. 1 P. & M. 106); or where the document is bulky (*Re Balme*, 1897, P. 261), or cannot be found (*Quihampton* v. *Going*, 24 W. R. 917). Where a foreign will was confirmed by an English will, probate of both was required (*Re Homden*, 30 L. T. 768; 43 L. J. P. & M. 26; see *Re Donaldson*, L. R. 3 P. & M. 45; *Re Bolton*, 12 P. D. 202; *Re Lockhart*, 1893, W. N. 80). *Secus*, where there was no such confirmation (*Re Astor*, 1 P. D. 150; see *Re De la Rue*, 15 P. D. 185; *Re Callaway*, *Id.* 147; *Re Seaman*, 1891, P. 253; *Re Fraser*, *Id.* 285; *Re Murray*, 1896, P. 65). As to probate of an English translation of a French will, see *Re Cliff*, 1892, 2 Ch. 229. And see *Re Von Linden*, 1896, P. 148.

Probate of incorporated documents.

Whether probate be granted or not the incorporated document will be regarded as part of the will (*Bizzey* v. *Flight*, 3 Ch. D. 269; *Quihampton* v. *Going*, *sup.* Even where not incorporated, memoranda in a ledger may be *primâ facie* evidence as to advances (*Whately* v. *Spooner*, 3 K. & J. 542; see *Smith* v. *Conder*, 9 Ch. D. 170).

Probate has been granted of a document in the form of a deed poll, properly executed, upon evidence that it was intended as a will (*Re Slimm*, 15 P. D. 156; *Milnes* v. *Foden*, *Id.* 105; see *Re Colyer*, 14 P. D. 48).

Will in form of a deed.

1 Vict. c. 26, s. 10.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

10. No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

This section applies to powers created since as well as before the act (*Hubbard* v. *Lees*, L. R. 1 Ex. 255). Where a power requires specifically a will with the solemnity of sealing in addition to those solemnities rendered necessary by the statute, this section applies; and declares that a will without such additional solemnity shall be sufficient; but the section does not touch the case of a power requiring an instrument in writing, sealed and delivered. Such a power was accordingly held not to have been duly exercised by a will executed in conformity with this act (*Taylor* v. *Meads*, 4 D. J. & S. 597, 602; following *West* v. *Ray*, Kay, 385; *Collard* v. *Sampson*, 4 D. M. & G. 224; and overruling *Buckell* v. *Blenkhorn*, 5 Ha. 131; *Man* v. *Ricketts*, 7 Beav. 93; see *Orange* v. *Pickford*, 4 Drew. 363; Sugden, Pow. 217—221, 8th ed.)

Publication of a will is equivalent to delivery. Accordingly, where a power was required to be exercised by instrument in writing signed, sealed, and delivered by the donee in the presence of witnesses, it was held well executed by a will "signed, sealed, published and acknowledged, and declared by the donee to be her last will," in the presence of witnesses (*Smith* v. *Adkins*, 14 Eq. 402).

Unattested instrument.

A testamentary instrument signed, but invalid for want of attestation, is not a good execution of a power to appoint by writing signed, or by will (*Re Daly*, 25 Beav. 456). But such an instrument did execute a power to appoint by any writing "in the nature of or purporting to be" a will (*Re Broad, Smith* v. *Draeger*, 1901, 2 Ch. 86).

Exercise by persons domiciled abroad of powers of appointing personal estate.

The present statute only applying (at least so far as wills of personal estate are concerned) to persons having an English domicil (*Bremer* v. *Freeman*, 10 Moo. P. C. 306, *ante*, p. 439), the will of a person domiciled abroad is not affected by the prohibitive portion of the above section (*Re Price, Tomlin* v. *Latter*, 1900, 1 Ch. 452). Thus a power of appointment by will, where no special formalities are required, can be executed by the will (proved in England) of a domiciled foreigner, invalid according to English law, but valid according to the law of the domicil (*D'Huart* v. *Harkness*, 34 Beav. 324; *Re Price, Tomlin* v. *Latter, sup.*; see *Re Harman, Lloyd* v. *Tardy*, 1894, 3 Ch. 607; but see *Hummel* v. *Hummel*, 1898, 1 Ch. 642). Again, in the case of a person domiciled abroad, his will can derive no validity from the enabling portion of the above section (*Re Price, Tomlin* v. *Latter, sup.*). Thus, where the instrument creating the power requires special formalities, a will which does not comply with such formalities does not execute the power, although it be valid according to the law of domicil and as such admitted to probate in England (*Barretto* v. *Young*, 1900, 2 Ch. 339, the case of a domiciled French subject). The decision in *Re Kirwan*, 25 Ch. D. 373, the case of a British subject domiciled abroad, may be supported on this ground (see *Re Price, Tomlin* v. *Latter*, 1900, 1 Ch. 452).

In the case of donees domiciled abroad of testamentary powers created by English instruments, the Probate Division has admitted to probate wills valid by the law of the testator's domicil but invalid according to English law (*Barretto* v. *Young*, 1892, 2 Ch. 339); and also wills invalid according to the law of the domicil but valid according to English law (*Re Hallyburton*, L. R. 1 P. & M. 90; *Re Huber*, 1896, P. 209). In the latter case the rule is to grant administration with the will annexed; the

grant in the case of a married woman whose husband does not consent being limited to such property as the deceased had power to dispose of and did dispose of by the document (*Re Trèfond*, 1899, P. 247; *Re Vannini*, 1901, P. 330). English law was held to govern the beneficial interests (*Re Megret, Tweedie* v. *Maunder*, 1901, 1 Ch. 547; *Powey* v. *Hordern*, 1900, 1 Ch. 492; *Re Bald*, 76 L. T. 462). 1 Vict. c. 26, s. 10.

11. Provided always, and be it further enacted, that any soldier being in actual military service (*l*), or any mariner or seaman being at sea (*m*), may dispose of his personal estate as he might have done before the making of this act. Soldiers' and mariners' wills excepted.

(*l*) According to the law existing before the Statute of Frauds, "Testaments as regarded personal property might be either written or verbal, otherwise called nuncupative; of which the former were committed to writing and published or declared by the testator as his will, the latter depended on merely oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing . . . . . written wills of personalty needed not in general any witnesses . . . . . and though written in another man's hand and never signed by the testator, yet if it proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate" (2 Steph. Com. 202, 203, 5th ed.). Law before the act.

The Statute of Frauds (29 Car. 2, c. 3), which restricted the mode of making wills, contained an exception in favour of the wills of soldiers in actual military service, and of seamen being at sea: and this exception has been continued by the present section. In the case, however, of wills disposing of the wages or effects of merchant seamen, regard must be had to 17 & 18 Vict. c. 104, s. 200, and in the case of wills of petty officers and seamen in the Royal Navy, and of marines and non-commissioned officers of marines, so far as the same relate to money payable by the Admiralty or effects or money in charge of the Admiralty, regard must be had to 28 & 29 Vict. c. 72. Statute of Frauds.

The privilege granted by sect. 11 is confined, so far as regards soldiers, by the insertion of the words, "actual military service," to those who are *on an expedition;* and, consequently, the will of a soldier made while he was quartered in barracks, either at home (*Drummond* v. *Parish*, 3 Curt. 522), or in the colonies (*White* v. *Repton*, 3 Curt. 818; *Re Phipps*, 2 Curt. 368; *Re Johnson*, 2 Curt. 341), is not privileged. The same was held as to the will of a soldier made at Bangalore, in the East Indies, whilst in command of the army there stationed, and who died whilst on a tour of inspection of the troops under his command (*Re Hill*, 1 Rob. 276). The test is whether under orders some step has been taken preparatory to joining forces in the field (*Re Hiscock*, 1901, P. 78). A will made by a soldier after mobilisation of his battalion was privileged (*Gattward* v. *Knee*, 1902, P. 99). And where an officer was on his way from one regiment to another, both regiments being at the time on active service, his will was privileged (*Herbert* v. *Herbert*, D. & Sw. 10). An unattested will, made by an officer on service at Berbice, was allowed to pass as that of a soldier in actual military service at the prayer of the party whose interest was prejudiced by such will (*Re Phipps*, 2 Curt. 368). The term "soldier" in this section extended to persons in the military service of the East India Company (*Re Donaldson*, 2 Curt. 386). As to obtaining probate of soldiers' wills privileged under this section, see *Re Hackett* (28 L. J. Prob. 42); *Re Neville* (*Ib.* 52); *Re Thorne* (4 Sw. & Tr. 36). Alterations occurring in a will made by a soldier in actual military service will be presumed to have been made during such service (*Re Tweedale*, L. R. 3 P. & M. 204). A will made on active service may be conditional on death during such service (see *Re Spratt*, 1897, P. 28, and cases in the last paragraph of this note). Soldiers.

(*m*) The term "mariner or seaman" does not exclude any person in his Seamen.

1 Vict. c. 26, s. 11.

Majesty's navy, though superior of the ship being "at sea," from the exception contained in this act (*Re Hayes*, 2 Curt. 338). The section applies to the purser of a man-of-war (*Ib.*), and to a surgeon in the navy (*Re Saunders*, L. R. 1 P. & M. 16), and to seamen, whether in the King's or merchant service (*Re Milligan*, 2 Rob. 108; *Morrell* v. *Morrell*, 1 Hagg. 51).

At sea.

This section was held to apply to the will of the commander-in-chief actually engaged in a naval operation on board a Queen's ship in a river (*Re Austen*, 2 Rob. 611). But not to the commander-in-chief of the naval force of Jamaica, living on shore at the official residence (*Seymour's case*, cited 3 Curt. 530; 2 Curt. 339). Where a naval officer, invalided at a foreign station, was returning home in a steamer, his will was privileged (*Re Saunders*, L. R. 1 P. & M. 16). As also the will of a seaman on board a man-of-war permanently stationed in Portsmouth Harbour (*Re M'Murdo*, L. R. 1 P. & M. 540). Where a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage is within the exception, although such will was in fact made on shore (*Re Lay*, 2 Curt. 375). The section applied to a will made on board a ship lying in harbour preparatory to sailing (*Re Patterson*, 79 L. T. 123); but not to a letter stating that the deceased had shipped on board a vessel, where it did not appear whether the letter was written before or after he went on board (*Re Corby*, 18 Jur. 634).

A will made under this section remains operative unless expressly revoked, although the maker of such will lives in England several years after (*Re Leese*, 17 Jur. 216); but probate was refused when the will was in a conditional form, *e.g.*, "Instructions to be followed if I die at sea or abroad" (*Lindsay* v. *Lindsay*, L. R. 2 P. & M. 459; *Re Porter*, *Ib.* 22; *Re Robinson*, *Ib.* 171; see *Re Spratt*, 1897, P. 28).

Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen and marines.

12. This act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.

This section, and 11 Geo. 4 & 1 Will. 4, c. 20 (which bound the crown: *Re Bevan*, 14 W. R. 147), have been repealed by 28 & 29 Vict. c. 112, s. 1.

Publication not to be requisite.

13. Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Will not to be void on account of incompetency of attesting witness.

14. If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to an attesting witness to be void.

15. If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or

personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will. 1 Vict. c. 26, s. 15.

The effect of the section is to render the devisee incapable of taking, and such a person cannot be reckoned in a class ascertainable at the testator's death or afterwards (*Re Coleman and Jarrom*, 4 Ch. D. 172). Where, accordingly, there was a devise to A. for life with remainder among her children as tenants in common, and one of A.'s children living at the death was an attesting witness, it was held that his share went to the rest of the class (*Fell* v. *Biddolph*, L. R. 10 C. P. 701). The decision was similar where the gift was to a class as joint tenants (*Young* v. *Davies*, 2 Dr. & Sm. 167); but was different in *Jull* v. *Jacobs* (24 W. R. 947), where the gift was held to be in effect a gift to surviving children by name.

Where the execution of a will was attested by two marksmen and signed also by two other persons as witnesses, the signature of the two latter was regarded as affixed likewise in attestation of the will, and the legacy to the wife of one of them failed (*Wigan* v. *Rowland*, 11 Hare, 157). And where a devisee attested a will as a third witness, at the request of another person, the testator objecting, his interest failed (*Randfield* v. *Randfield*, 11 W. R. 847). So where the third attestation was at the request of the testator (*Cozens* v. *Crout*, 21 W. R. 781). Where a will was executed in the presence of two witnesses, and the signature of a third person, who was residuary legatee, appeared also at foot of the will, the court received evidence that the legatee's name was not written to attest the testator's signature, and ordered it to be omitted in the probate (*Re Sharman*, L. R. 1 P. & M. 661; see *Re Purssglove*, 26 L. T. 405; *Re Smith*, 15 P. D. 2).

Attestation of codicil by legatee.

A legacy was given by will, and a codicil confirming the will was attested by the legatee: the gift was held good (*Gurney* v. *Gurney*, 3 Drew. 208; *Tempest* v. *Tempest*, 2 K. & J. 635; *Re Marcus*, 57 L. T. 399; see *Gaskin* v. *Rogers*, 2 Eq. 284). Where a testatrix gave a share of her residue to B., and one of the attesting witnesses to the will was B.'s wife, and by a codicil, attested by other witnesses, the testatrix confirmed her will, the codicil incorporated the will so as to render the gift to B. valid (*Anderson* v. *Anderson*, 13 Eq. 381; see *Burton* v. *Newbery*, 1 Ch. D. 234). In such a case the benefit is not lost by the legatee attesting a second codicil which confirms the will and first codicil (*Re Trotter, Trotter* v. *Trotter*, 1899, 1 Ch. 764).

Will attested by legatee's wife confirmed by codicil.

The marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise (*Thorpe* v. *Bestwick*, 6 Q. B. D. 311).

Gift in trust.

A bequest in trust was not invalidated by the wife of the trustee attesting the signature of the testatrix (*Cresswell* v. *Cresswell*, 6 Eq. 69). But where, by a codicil attested by A., personal estate was given to B. upon parol trusts in favour (amongst others) of A.; A.'s interest was held to fail, just as it would have done had the trust been declared in the codicil (*Re Fleetwood, Sidgreaves* v. *Brewer*, 15 Ch. D. 594).

Where a solicitor attested a will in which he was named trustee, and by which he was empowered to make professional charges, the above

1 Vict. c. 26, s. 15.

section deprived him of any right to profit costs (*Re Pooley*, 40 Ch. Div. 1; *Re Barber, Burgess* v. *Vinnicome*, 31 Ch. D. 665).

Creditor attesting to be admitted a witness.

16. In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

17. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

18. Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

Old law.

Under the old law the marriage of a testator did not revoke his will; but under certain circumstances there was an implied revocation by marriage and the birth of issue (1 Wms. Exors. 196, 8th ed.).

Foreigners.

It seems that this section applies to a will of moveables made either by a male foreigner domiciled in England or by a woman who marries a male foreigner domiciled in England; but not to such will made by a male foreigner domiciled abroad or by a woman who marries a male foreigner domiciled abroad (*Re Martin, Loustalan* v. *Loustalan*, 1900, P. 211).

Marriage with deceased wife's sister.

Under this section a will is not revoked by a marriage with a deceased wife's sister; and there is no distinction in such a case between a testator who is a natural-born subject and one who is a naturalized British subject (*Mette* v. *Mette*, 1 Sw. & Tr. 416). A will executed after a marriage invalid under the Indian Divorce Act, was revoked by a subsequent marriage between the same parties (*Warter* v. *Warter*, 15 P. D. 152).

Exception in case of wills in execution of powers.

Where by a settlement freeholds were, in default of appointment, limited to A., her heirs and assigns, A.'s will exercising a power was revoked by marriage, the exception not applying (*Vaughan* v. *Vanderstegen*, 2 Drew. 168; see *Logan* v. *Bell*, 1 C. B. 872). The reason for the exception is, that a revocation of the will in a case to which the exception applies, would operate only in favour of those entitled in default of appointment, and the new family of the testator would derive no benefit from it (*Re Fitzroy*, 1 Sw. & Tr. 133). The exception applies where in any contingency the property, in default of appointment, would not pass to the heir, &c. of the deceased (*Re Fenwick*, L. R. 1 P. & M. 319). Also, where such persons take under the settlement, and not by descent or under the Statute of Distributions (*Re Fitzroy*, 1 Sw. & Tr. 133; *Re Worthington*, 20 W. R. 260). It also applied where next of kin would have taken, not next of kin under the statute (*Re McVicar*, L. R. 1 P. & M. 671). Where, after making a will exercising a power and disposing of absolute property, a testator married, the exercise of the power was held to fall within the exception and limited administration was granted (*Re Russell*, 15 P. D. 111).

19. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. 1 Vict. c. 26, s. 19.

No will to be revoked by presumption.

See *Re Wells, Hardisty* v. *Wells* (42 Ch. D. 646).

20. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required (*o*), or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed (*p*), or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*q*). No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

(*o*) The use of the words "last will" in a testamentary paper does not necessarily import a revocation of all previous instruments either in the case of personalty (*Cutto* v. *Gilbert*, 9 Moo. P. C. 131; overruling on this point *Plenty* v. *West*, 1 Rob. 204; see *Lemage* v. *Goodban*, L. R. 1 P. & M. 61); or in the case of real estate (*Freeman* v. *Freeman*, 5 D. M. & G. 704). Words "last will."

An express revocatory clause in general terms revokes all former wills, including a prior testamentary appointment (*Sotheran* v. *Dening*, 20 Ch. Div. 99; *Harvey* v. *Harvey*, 32 L. T. 141; see *Cottrell* v. *Cottrell*, L. R. 2 P. & M. 397); even when the testatrix was assured it would not have such effect, and only executed on this understanding (*Collins* v. *Elstone*, 1893, P. 1). A revocatory clause in an Italian will was held to revoke an English will so far as regards personal estate and executors (*Cottrell* v. *Cottrell*, *sup.*). But an express revocatory clause is not essential, either in the case of ordinary wills (*Dempsey* v. *Lawson*, 2 P. D. 98), or in the case of testamentary appointments (*Re Tenney*, 45 L. T. 78). "The question is, What disposition did the testator intend? not Which or what number of papers did he desire or expect to be admitted to probate?" (*Dempsey* v. *Lawson*, 2 P. D. 107). Where, accordingly, upon the construction of a subsequent will, the court considered that it contained all the testamentary dispositions which the testatrix intended at that time to constitute her last will, a prior will was held revoked, although the subsequent will contained no residuary or revocatory clauses (*Dempsey* v. *Lawson*, *ubi sup.*; see *Henfrey* v. *Henfrey*, 4 Moo. P. C. 29; *McAra* v. *M'Cay*, 21 L. R. Ir. 138; *Palmer* v. *Peat*, 58 L. J. Prob. 44; *Cadell* v. *Wilcocks*, 1898, P. 21). On the other hand, a prior will was admitted to probate on the ground that the subsequent will did not dispose of the residue (*Re Petchell*, L. R. 3 P. & M. 153; *Re Hartley*, 29 W. R. 356). And if, upon the face of a testamentary document read in connection with the facts known to the testator at the time, it is doubtful whether the testator intended wholly to revoke a prior will, parol evidence will be admitted to ascertain the intention (*Jenner* v. *Finch*, 5 P. D. 206; see *Paton* v. *Ormerod*, 1892, P. 247). Express revocatory clause.

A subsequent devise inconsistent with a prior devise was held to revoke such prior devise, even where the subsequent devise was invalid, being to a charity (*Baker* v. *Story*, 31 L. T. 631; see, however, *Alexander* v. *Kirkpatrick*, L. R. 2 H. L. Sc. 397, 403). But where, by a fourth codicil (containing no revocatory clause) the whole personal estate was given to A. upon parol trusts, it was said that if effect could not have been given to the trusts, the original dispositions would have remained unaffected (*Re Fleetwood, Sidgreaves* v. *Brewer*, 15 Ch. D. 594). Where an appointment by will was revoked by a codicil which also purported to exercise the same power in an invalid manner, the revocation was held effectual, the doctrine of dependent relative revocation not applying (*Quinn* v. *Butler*, 6 Eq. 225; see *Re Gentry*, L. R. 3 P. & M. 80). A legacy given in clear

1 Vict. c. 26, s. 20.

terms will not be revoked unless the words of revocation are also clear (*Re Percival, Boote* v. *Dutton*, 59 L. T. 21; *Cleoburey* v. *Beckett*, 14 Beav. 583; see *Randfield* v. *R.*, 8 H. L. C. 235; *Kellett* v. *K.*, L. R. 3 H. L. 167).

To establish the revocation of a former will relating to personalty by a subsequent will not forthcoming; by parol evidence of execution only, in the absence of any draft or instructions, such evidence must be strong and conclusive as to the contents of the subsequent will (*Cutto* v. *Gilbert*, 9 Moo. P. C. 131); but where it was proved that a subsequent will (not forthcoming) contained a clause of revocation, the prior will was revoked (*Wood* v. *Wood*, L. R. 1 P. & M. 309; see *Brown* v. *Brown*, 8 E. & B. 876, a case of real estate).

Revocation by another will or codicil.

If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both papers are entitled to probate (*Lemage* v. *Goodban*, L. R. 1 P. & M. 57; *Geaves* v. *Price*, 11 W. R. 809; see *Re Howard*, L. R. 1 P. & M. 636; *Cadell* v. *Wilcocks*, 1898, P. 21; compare *Re Wilcock, Kay* v. *Dewhirst*, 1898, 1 Ch. 95).

A testator left four testamentary instruments duly executed. After the Ecclesiastical Court had held that the second and third alone were valid as to the personal estate (1 Rob. 204), the Court of Chancery, on the certificate of the Common Pleas (6 C. B. 201), decided that, as to the real estate, the last instrument alone constituted the last will (*Plenty* v. *West*, 16 Beav. 173).

Revocation by writing declaring an intention to revoke.

(*p*) A testatrix devised real estates, and by a subsequent deed, attested by two witnesses, she conveyed them on other trusts. It was held that the deed, assuming it to be void as a *turpis contractus*, was not a writing declaring an intention to revoke within this section (*Ford* v. *De Pontes*, 30 Beav. 572). A writing, by which a testator merely revokes a prior testamentary disposition, will not be admitted to probate (*Re Fraser*, L. R. 2 P. & M. 40); *secus*, if it be of a testamentary character (*Re Durance, ib.* 406; *Re Hubbard*, L. R. 1 P. & M. 53; and see *Re Hicks, ib.* 683).

Revocation by an act of destruction.

(*q*) A mere abandonment of his will by a testator is not a sufficient revocation. There must be some act done by him, or by some one in his presence, and by his direction (*Andrew* v. *Motley*, 12 C. B. N. S. 514).

Animus revocandi necessary.

All acts by which a testator may destroy or mutilate a testamentary instrument are in their nature equivocal: unless the act be done *animo revocandi*, there is no revocation (*Powell* v. *Powell*, L. R. 1 P. & M. 212).

Dependent relative revocation.

Where, therefore, the act of destruction is referable wholly and solely to the intention of setting up some other testamentary paper, the *animus revocandi* has only a conditional existence, the condition being the validity of the paper intended to be substituted; and where the condition is unfulfilled, there is no revocation (*Ib.*; *Dancer* v. *Crabb*, L. R. 3 P. & M. 98; *Cossey* v. *Cossey*, 69 L. J. P. 17; 82 L. T. 203; see *Stamford* v. *White*, 1901, P. 46); but the evidence must be clear as to the intention of the act of destruction (*Eckersley* v. *Platt*, L. R. 1 P. & M. 281); and subsequent declarations by the testator as to his intention will not be admitted (*Re Weston*, L. R. 1 P. & M. 633).

Mistake.

Where a testator tore up his will under a mistaken impression that it was invalid, there was no revocation (*Giles* v. *Warren*, L. R. 2 P. & M. 401; *Re Thornton*, 14 P. D. 82; *Beardsley* v. *Lacey*, 67 L. J. P. 35; 78 L. T. 25; distinguish *Collins* v. *Elstone*, 1893, P. 1); and so where a man destroyed his will in a fit of delirium tremens (*Brunt* v. *Brunt*, L. R. 3 P. & M. 37; see *Re Hine*, 1893, P. 282). But it seems that a testator may subsequently adopt the act so as to effect a revocation. Probate was granted of a will which depended for its validity upon a confirmation by codicil, although the codicil had been destroyed, the destruction being held to have been effected with no intention of revoking the will (*James* v. *Shrimpton*, 1 P. D. 433).

Part of will may be revoked by tearing.

It is not the manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means which will satisfy the requisites of the law; the act must be accompanied with the *intention* of revoking: there must be the *animus* as well as the act. It is the *animus*, also, which must govern the extent and measure of operation

to be attributed to the act (*Clarke* v. *Scripps*, 2 Rob. 567; *Clarkson* v. *Clarkson*, 2 Sw. & Tr. 497; see *Doe* v. *Harris*, 6 Ad. & Ell. 209). Thus, where the first seven or eight lines of a will have been cut and torn off, it was admitted to probate in its incomplete state (*Re Woodward*, L. R. 2 P. & M. 206; *Christmas* v. *Whinyates*, 3 Sw. & Tr. 81; see *Re Leach*, 63 L. T. 111; *Re Maley*, 12 P. D. 134). But where the third and fourth sheets of a will were alone discovered, a power to appoint by will or by any writing in the nature of a will was not duly executed (*Gullan* v. *Grove*, 26 Beav. 64). And where a testator destroyed some sheets of a will and substituted others, but did not re-execute, the whole will was revoked (*Treloar* v. *Lean*, 14 P. D. 49). 1 Vict. c. 26, s. 20.

Tearing off seal.

A testator having made a will executed under seal, and published and attested as a sealed instrument, afterwards for the purpose of revoking it tore off the seal and with it part of a word, the tearing off the seal was sufficient to revoke the will (*Price* v. *Powell*, 3 H. & N. 341; see *Doe* v. *Harris*, 6 Ad. & E. 209). By the usual statement in the witnessing clause at the end of a will that the testator has set his hand to the preceding pages, a testator makes the signatures on those pages a part of his will, and if having so recited he afterwards, *animo revocandi*, tears off the signatures from the preceding pages, it is a good revocation (*Williams* v. *Tyley*, Johns. 530). A will was held revoked by the testator cutting out his signature (*Hobbs* v. *Knight*, 1 Curt. 768; *Walker* v. *Armstrong*, 21 Beav. 305; on appeal, 4 W. R. 770), or erasing his own signature and those of the witnesses (*Re Morton*, 12 P. D. 141). Where the signature was scratched with a knife, but was still legible, probate was granted (*Re Godfrey*, 69 L. T. 22); and the accidental cutting through the signature of one of the witnesses was not a revocation (*Re Taylor*, 63 L. T. 230); nor was the erasure by the witnesses of their own signatures (*Margary* v. *Robinson*, 12 P. D. 8). Probate was granted in a case where the testator directed the name of an attesting witness to be erased (*Re Greenwood*, 1892, P. 7).

Tearing off signatures.

Signatures replaced.

A testator cut out of his will the names of the attesting witnesses, and afterwards on the same day replaced the piece so cut out, saying that the will would do for the present. The court granted probate (*Re Eeles*, 32 L. J. Prob. 4; see *Re De Bode*, 5 Not. Cas. 189). Where the signature of the testator to a will had been cut out, but gummed on to its former place, the will was not admitted to probate (*Bell* v. *Fothergill*, L. R. 2 P. & M. 148; *Magnesi* v. *Hazelton*, 44 L. T. 586); but where a testator partially erased his own signature, and then re-wrote it, probate was granted (*Re Kennett*, 2 N. R. 461).

Cancelling.

A will is not destroyed within this section by being struck through with a pen, the name of the testator being crossed out and the names of the attesting witnesses being struck through. It was said by Sir H. *Jenner*, that when the legislature, after mentioning "burning" a will, and "tearing" a will, speaks of "otherwise destroying" a will, they must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary meaning of the word, though it may have the same meaning metaphorically, as being a destruction of the contents of the will; it never could have been their intention that the cancelling of a will should be a mode of destroying it (*Stephens* v. *Taprell*, 2 Curt. 465; *Re Brewster*, 6 Jur. N. S. 56). A testatrix obliterated, with the intention of revoking, several passages of her will, so that none of the parts obliterated could be distinguished upon the face of the will: this was a complete revocation of those parts (*Townley* v. *Watson*, 3 Curt. 761).

Destruction by any person other than the testator.

If the act of destruction be done by any person other than the testator, it must be by the testator's order and in his presence. Where a codicil was burnt by a testator's order, but not in his presence, probate was granted of a draft copy (*Re Dadds*, D. & Sw. 290). Destruction by another in the presence of the testatrix was held not ratified (*Mills* v. *Milward*, 15 P. D. 20).

Onus of proof of revocation.

After the due execution of a will has been proved, the burden of proving that it was revoked lies upon those who set up the revocation; and in the

1 Vict. c. 26, s. 20.

absence of evidence, revocation will not be presumed (*Benson* v. *Benson*, L. R. 2 P. & M. 172). But where a will remains in the custody of the testator from the time when it is made until his death, and cannot then be found, the presumption of law is, that it was destroyed by the testator, *animo revocandi* (*Eckersley* v. *Platt*, L. R. 1 P. & M. 281; *Sugden* v. *St. Leonards*, 1 P. D. 231; *Allan* v. *Morrison*, 1900, A. C. 604). The presumption applies even where a duplicate copy properly executed exists in the custody of the solicitor (*Jones* v. *Harding*, 58 L. T. 60; *Paige* v. *Brooks*, 75 L. T. 455). The court must be satisfied that the will in the custody of the testator was not in existence at the time of his death (*Finch* v. *Finch*, L. R. 1 P. & M. 371). Where a will and a codicil revoking part of the will were in the custody of the testator, and only the will was forthcoming, the codicil was presumed to be revoked, but probate of the will was only granted so far as not revoked by the codicil (*Sanger* v. *Hart*, 77 L. T. 374). To rebut the presumption, declarations made by the testator that he has settled his affairs and appointed executors, and as to the person in whose possession the will is, are admissible in evidence (*Whiteley* v. *King*, 17 C. B. N. S. 756; 13 W. R. 83; *Sugden* v. *St. Leonards*, 1 P. D. 231), declarations to a contrary effect being admissible in answer (*Keen* v. *Keen*, L. R. 3 P. & M. 105). The presumption does not apply to a case where the testator becomes insane after the execution, and continues insane until his death (*Sprigge* v. *Sprigge*, L. R. 1 P. & M. 608).

Will in testator's custody not forthcoming at his death;

found mutilated at his death.

Where a will in the custody of a testator is found after his death mutilated, the presumption in the absence of evidence is that it was mutilated by him after its execution, and, if there be a codicil, after the execution of the codicil (*Christmas* v. *Whinyates*, 2 Sw. & Tr. 81; 11 W. R. 371).

Revocation of codicils.

Under the law before this statute, a codicil stood or fell with the will to which it belonged; under the new law, where a will has been revoked, it was once held that probate of the codicil would not be granted, unless the court was satisfied that the testator intended the codicil to operate separately from the will (*Re Greig*, L. R. 1 P. & M. 72; see *Re Ellice*, 12 W. R. 353). But it is now settled that a codicil can only be revoked by one of the modes indicated in this section, and is not revoked by the revocation of the will (*Re Savage*, L. R. 2 P. & M. 78; *Re Turner*, *ib.* 403; *Black* v. *Jobling*, L. R. 1 P. & M. 635; *Farrer* v. *St. Catherine's College*, 16 Eq. 19; *Gardiner* v. *Courthope*, 12 P. D. 14), unless there was an intention to revoke both (*Re Bleckley*, 8 P. D. 169).

Where a codicil confirms a will in general terms, the will, together with all previous codicils, is taken to have been confirmed (*Green* v. *Tribe*, 9 Ch. D. 231, 234); and a reference to the date of the will in the confirming codicil does not constitute an implied revocation of antecedent codicils (*Green* v. *Tribe*, *sup.*; *Re De La Saussaye*, L. R. 3 P. & M. 42). So where a third codicil confirmed a will (referred to by date) except as altered by a first codicil, it was held there was no implied revocation of a second codicil (*Follett* v. *Pettman*, 23 Ch. D. 337). An earlier codicil was, however, held under the circumstances to have been impliedly revoked (*McLeod* v. *McNab*, 1891, A. C. 471; see *Chichester* v. *Quatrefages*, 1895, P. 186; *Re Carritt*, 66 L. T. 379). And where a codicil is of itself inoperative, a confirmation by a later codicil of a will which is referred to by date and is antecedent to the inoperative codicil will not operate so as to set up the inoperative codicil (*Burton* v. *Newbery*, 1 Ch. D. 234; see *French* v. *Hoey*, 1899, 2 I. R. 472).

Revocation by married woman.

A married woman may revoke a will made under a power in any of the modes pointed out by this section (*Hawksley* v. *Barrow*, L. R. 1 P. & M. 147).

No alteration in a will shall have any effect unless

21. No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such

alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

1 Vict. c. 26, s. 21.

executed as a will.

Presumption as to time of alterations in wills.

The mere circumstance of the amount or the name of the legatee being inserted in different ink and in a different handwriting does not alone constitute an obliteration, interlineation or other alteration within the meaning of this section, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. In such circumstances the *onus probandi* lies upon the party who alleges such alteration to have been made prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator (*Greville* v. *Tylee*, 7 Moo. P. C. C. 320). The rule is stated in a similar manner in *Williams* v. *Ashton* (1 J. & H. 115); *Simmons* v. *Rudall* (1 Sim. N. S. 137).

More generally the rule is stated thus:—That in the absence of evidence there is a presumption that alterations on the face of a will were made after its execution (*Cooper* v. *Bockett*, 4 Moo. P. C. C. 439; *Re Sykes*, L. R. 3 P. & M. 26); and when a will has been republished by a codicil, after the execution of the codicil also (*Lushington* v. *Onslow*, 6 Not. Cas. 183). This presumption will not be rebutted by the fact that the alterations bear in the handwriting of the testator an earlier date than the will (*Re Adamson*, L. R. 3 P. & M. 253); but may be rebutted by evidence of declarations made by the testator before execution of the will (*Doe* v. *Palmer*, 16 Q. B. 747; *Dench* v. *Dench*, 2 P. D. 60), or of the codicil (*Re Sykes*, *sup.*); or by evidence of other persons that the alterations were made prior to the execution of the codicil (*Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216; see *Re Greenwood*, 1892, P. 7); or by the language of the codicil (*Re Heath*, 1892, P. 253). The court may look at any evidence for the purpose (*Re Tonge*, 66 L. T. 60).

Where an expert deposed that in his opinion some trifling alterations and interlineations appearing on the face of a will were written at the same time as the rest, they were admitted to probate (*Re Hindmarch*, L. R. 1 P. & M. 307; *Moore* v. *Moore*, I. R. 6 Eq. 166); and from the nature of certain interlineations and the internal evidence furnished by the document itself, the court concluded that they were made before execution and admitted them to probate (*Re Cadge*, L. R. 1 P. & M. 543; *Re Duffy*, I. R. 5 Eq. 506). Certain words were admitted as being in the nature of an interlineation (*Re Birt*, L. R. 2 P. & M. 214; see *Royle* v. *Harris*, 1895, P. 163).

Form of probate.

Where it appears that alterations have been made before execution, the probate is usually engrossed fair; but where the construction may be affected by the appearance of the original paper, probate is sometimes granted in fac-simile (1 Wms. Exors., 9th ed. 273). Where probate was granted with lines drawn in ink over the bequest of certain legacies, the Court of Chancery inferred the meaning of the testator from the instrument in that form (*Gann* v. *Gregory*, 3 D. M. G. 777; *Shea* v. *Boschetti*, 18 Beav. 321). In some cases the Court of Chancery has looked at the original will (*Manning* v. *Purcell*, 7 D. M. G. 55; *Compton* v. *Bloxham*, 2 Coll. 201; see *Oppenheim* v. *Henry*, 9 Hare, 802, note (*b*); *Child* v. *Elsworth*, 2 D. M. G. 683).

Meaning of "apparent."

Where alterations made subsequently to the execution of the will are not attested in the manner required by this section, probate will be granted of the will as it originally stood, if that is apparent (*Re Beavan*, 2

1 Vict. c. 26, s. 21.

Curt. 369; *Re Martin*, 1 Rob. 712; *Re Gaussen*, 16 W. R. 212); but if not, probate will be granted in blank as to such parts of the will as cannot be read (*Re Ibbetson*, 2 Curt. 337). In order to discover the words as they originally stood, the court will submit the will to the examination of persons accustomed to inspect writings; and it is sufficient if they can be made out with the aid of magnifying glasses, or by evidence of that nature (*Ib.*; *Finch* v. *Combe*, 1894, P. 191; *Re Brasier*, 1899, P. 36). Chemical agents have not been resorted to (*Re Horsford*, L. R. 3 P. & M. 211).

Pasting paper over words in a will is "obliteration" (*Finch* v. *Combe*, 1894, P. 191). Paper has been removed where it covered only the amount of a legacy (*Re Horsford*, L. R. 3 P. & M. 211); or to see whether what was written underneath amounted to revocation (*Re Gilbert*, 1893, P. 183).

The word "apparent" here used does not mean capable of being made apparent by extrinsic evidence, but applies to what is apparent on the face of the instrument itself. Where a testator obliterated *animo revocandi* several pages of his will, so that none of the parts could be distinguished upon the face of the will, this was a complete revocation of those parts (*Townley* v. *Watson*, 3 Curt. 761; see *Re Horsford*, L. R. 3 P. & M. 211).

Animus revocandi.

Although this section does not, like the preceding one, contain the words, "with the intention of revoking the same," yet intention must accompany the acts mentioned in this section in the same way as intention must accompany the acts mentioned in the 20th section. Under the Statute of Frauds (*Bibb* v. *Thomas*, 2 W. Bl. 1044) and this act, intention is indispensable; under the former statute, to burn, or to tear, or to obliterate a part of a will, was altogether a nullity, if such act was done without an intention to revoke, and only for the purpose of making immediately some new disposition or alteration; and if, from want of compliance with the statutory regulations, such new disposition or alteration could not take effect, then the burning, tearing or obliteration, in no degree revoked the will, but it remained in full force as if nothing had been done to it. Similar principles must be applied in cases arising under the present statute (*Brooke* v. *Kent*, 3 Moo. P. C. C. 349, 350). Where a testator intended to alter a legacy by substituting a different sum to that originally given, and such substituted sum was not effectually given for want of compliance with the statute, the original legacy was not revoked, and evidence was admissible to show the original amount (*Brooke* v. *Kent*, 3 Moo. P. C. C. 334; see *Re Horsford*, L. R. 3 P. & M. 211).

Attestation of alteration.

The initials of the testator and witnesses placed opposite an alteration are sufficient to render it valid (*Re Blewitt*, 5 P. D. 116); but not the initials of the witnesses only (*Re Shearn*, 43 L. T. 736; see *Re Dewell*, 17 Jur. 1130). As to whether the attestation gives validity to more than one alteration, see *Re Wilkinson* (6 P. D. 100); *Re Treeby* (L. R. 3 P. & M. 242).

As to when the signature to a will is to be deemed valid, see Wills Act Amendment Act, 1852, s. 1, and note thereto, *post*, p. 477.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

22. No will or codicil, or any part thereof, which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Codicil must show an

Before the act, the mere execution of a codicil to a will was sufficient to reaffirm the will by implication, and to revive it if it had been

revoked. The only difficulty was to determine to what will the instrument was intended as a codicil (*Re Steele*, L. R. 1 P. & M. 575, 578). Since the passing of this statute a will cannot be revived by mere implication. To revive a will, a codicil must show an "intention to revive"; and the intention must appear on the face of the codicil either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some expression conveying to the mind of the court with reasonable certainty the existence of the intention (*Ib.*). The word "confirm" in a codicil has the operation of "revive" used in the statute (*M'Leod* v. *M'Nab*, 1891, A. C. 476). As to republication, see *Re Smith, Bilke* v. *Roper* (45 Ch. D. 632, *post*, p. 476). Mere references in codicils to revoked wills by their dates were insufficient to revive them (*Re Steele, sup.*; *Re Dennis*, 1891, P. 326; see *Re Snowden*, 75 L. T. 279). Unless it can be explained by the special circumstances of the case, *Payne* v. *Trappes* (1 Rob. 583) seems inconsistent with the above authorities; see also *Re Reynolds* (L. R. 3 P. & M. 35); *Re Ince* (2 P. D. 111); *Re Gordon* (1892, P. 228). A codicil has been held by its language to revive a revoked will, although the reference to such revoked will by its date was inserted by mistake (*Re Stedham*, 6 P. D. 205; *Re Dyke*, *Ib.* 207; *Re Chilcott*, 1897, P. 223). As to the revival of codicils, see *Green* v. *Tribe* (9 Ch. D. 232); *Burton* v. *Newbery* (1 Ch. D. 234; *ante*, p. 458). Where a testator revoked a first will by a second will, and by a subsequent codicil confirmed his last will, the first will was revived (*Re Van Cutsem*, 63 L. T. 252, see the words of confirmation; see also *Re Turner*, 64 L. T. 895).

1 Vict. c. 26, s. 23.

intention to revive.

Reference to revoked will by date.

A testatrix duly executed a will, and subsequently thereto, two other wills, both of which contained a clause revoking all former wills. She afterwards destroyed the two latter wills. Held, that the first will was not thereby revived, and that parol evidence was not admissible to show an intention to revive (*Major* v. *Williams*, 3 Curt. 432; *Powell* v. *Powell*, 1 P. & M. 209; *James* v. *Shrimpton*, 1 P. D. 431; *Re Hodgkinson*, 1893, P. 339).

Destruction of revoking instrument.

The will intended to be revived must be in existence: and if a codicil refer to a will with the intention of reviving it, and it turn out that such will had been entirely burnt or destroyed by the testator *animo revocandi*, the codicil cannot effect its revival (*Hale* v. *Tokelove*, 2 Rob. 318; *Newton* v. *Newton*, 12 Ir. Ch. R. 118; *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342).

Will to be revived must be in existence.

A revoked will may be revived conditionally (*Re Bangham*, 1 P. D. 429).

Where a testator gave 100*l.* to his executor, and by a subsequent codicil gave him 500*l.* in substitution, and then revoked the second gift, the first gift was not set up again (*Boulcott* v. *Boulcott*, 2 Drew. 25).

Revocation of a substituted legacy.

23. No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

A devise not to be rendered inoperative by any subsequent conveyance or act.

This clause of the act applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower; but it does not apply to cases where the thing meant to be given is gone (*Moor* v. *Raisbeck*, 12 Sim. 139; *Blake* v. *Blake*, 15 Ch. D. 487). All those cases in which it was formerly held that a will was revoked by an alteration of the estate of the testator, are now put an

1 Vict. c. 26, s. 23.

end to by this section (*Ford* v. *De Pontes*, 30 Beav. 593). As to revocation by alteration of estate, see, further, *Plowden* v. *Hyde* (2 D. M. & G. 684; *Jacob* v. *Jacob* (82 L. T. 270); 1 Jarm. Wills, 128 *et seq.*); and as to the bearing of this section upon wills prior to 1838, see *Langford* v. *Little* (2 J. & Lat. 613); *Walker* v. *Armstrong* (21 Beav. 284).

Devise of lands and subsequent contract to sell.

A testatrix having devised a real estate, afterwards sold it. The purchase was not completed until after her death. It was held that the purchase-money belonged to the personal representatives, and not to the devisees of the testatrix (*Farrar* v. *Winterton*, 5 Beav. 1). A similar decision was given where the estate devised had been conveyed to a purchaser who had remortgaged to the testatrix as a security for the purchase-money (*Moor* v. *Raisbeck*, 12 Sim. 139; *Re Clowes*, 1893, 1 Ch. 214; compare *Re Carter, Dodds* v. *Pearson*, 1900, 1 Ch. 801). And where the owner of an estate, after having devised it to an infant, agreed under compulsion to sell a portion of it to a railway company, and died before completion, his executors, and not the devisee, were entitled to the purchase-money (*Re Manchester R. Co.*, 19 Beav. 365; *Ex p. Hawkins*, 13 Sim. 569). The rents, however, until completion will in such a case pass to the devisee (*Watts* v. *Watts*, 17 Eq. 217). Compare with the above cases the similar result arrived at where the owner of an estate granted an option of purchase which was exercised after his death (*Lawes* v. *Bennett*, 1 Cox, 167; *Re Isaacs, Isaacs* v. *Reginall*, 1894, 3 Ch. 506).

On the other hand where the owner of freeholds granted a lease of them with an option of purchase to the lessee, and on the same day executed a codicil confirming a specific devise of these freeholds in a previous will, and the lessee exercised the option after the testator's death, the specific devisee took the purchase-money (*Re Pyle, Pyle* v. *Pyle*, 1895, 1 Ch. 724; see *Drant* v. *Vanse*, 1 Y. & C. Ch. 580; *Emuss* v. *Smith*, 2 De G. & Sm. 722).

As to the effect of a devise upon lands contracted to be sold, see, further, 1 Jarm. Wills, 51 *et seq.*; 1 Dart, V. & P. 301. And as to the effect, under the old law, of a contract to sell lands upon a prior devise, see *Andrew* v. *Andrew* (8 D. M. & G. 336; Sugd. R. P. Stat. 360—364).

Revocation of prior devise by contract under power of sale.

Where land was settled to such uses as A. should by will appoint, with a power of sale in trustees exerciseable with A.'s consent, an appointment of the land by A. under his general power had no effect on the purchase-money of the property sold with his consent, nor on the land purchased with such money (*Gale* v. *Gale*, 21 Beav. 349; *Blake* v. *Blake*, 15 Ch. D. 481). There was a similar result in the case of a special power (*Re Moses, Beddington* v. *Beddington*, 1902, 1 Ch. 100; *Re Dowsett, Dowsett* v. *Meakin*, 1901, 1 Ch. 398).

Bequest of leaseholds and subsequent purchase of fee.

Where a testator bequeathed certain leaseholds for all the residue of the terms for which the same should be held by him at his death, and afterwards acquired the fee, it was held that the fee passed (*Struthers* v. *Struthers*, 5 W. R. 809; see *Cox* v. *Bennett*, 6 Eq. 422; *Saxton* v. *Saxton*, 13 Ch. D. 359). So with respect to an increased share in a partnership business (*Re Russell, Russell* v. *Chell*, 19 Ch. D. 432). A devise, however, of a mortgage estate is adeemed by a subsequent acquisition of the equity of redemption (*Yardley* v. *Holland*, 20 Eq. 428).

A will shall be construed to speak from the death of the testator.

24. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A gift of a testator's real and personal estate in a will prior to 1838 was read as a gift of the real estate belonging to the testator at the date of the will, and of the personal estate belonging to him at the date of his death (1 Jarm. Wills, 5th ed. 290; see, further, Hawk. Wills, 14; *Hance* v. *Truwhitt*, 2 J. & H. 216).

A bequest if specific under the law before this act remains specific since the act, but is enlarged in its operation (*Bothamley* v. *Sherson*, 20 Eq. 313). If the words of a specific gift describe a particular property which the testator had at the date of his will, that, and that alone, will pass. But where the specific gift is generic (as "all my lands in the Parish of Dale"), it will now pass all the testator's lands in that parish at his death (*Re Bridger, Brompton Hospital* v. *Lewis*, 1894, 1 Ch. 302). The section leaves open the question whether a particular property passes by the specific or residuary devise (*Re Portal and Lamb*, 30 Ch. D. 50). It is doubtful whether the section applies to the construction of an exception (*Hughes* v. *Jones*, 1 H. & M. 765). **1 Vict. c. 26, s. 24.**

The "contrary intention" need not be expressed in so many words (*Cole* v. *Scott*, 1 H. & T. 477). The date may show a contrary intention (*Re Wells, Hardisty* v. *Wells*, 42 Ch. D. 646). Again, a contrary intention may appear from a particular description being given of the subject of the gift. A testator devised all his freehold estate at B., which he purchased of C.; but a small piece of land, purchased with the estate by the testator of C., and always held with it, was leasehold. The testator subsequently purchased the fee of that small piece: the codicil did not pass the after-acquired fee (*Emuss* v. *Smith*, 2 De G. & Sm. 722). See *Pierce* v. *A.-G.* (3 W. R. 612), where a subsequently-acquired freehold house was held not to pass under a gift of leaseholds and all other estate and effects. Where, however, a testator has bequeathed particular leaseholds, describing them as such, and has subsequently acquired the fee, the fee has been held to pass (*Struthers* v. *Struthers*, 5 W. R. 809; *Miles* v. *Miles*, 1 Eq. 462; *Cox* v. *Bennett*, 6 Eq. 422; *Wedgwood* v. *Denton*, 12 Eq. 290; *Saxton* v. *Saxton*, 13 Ch. D. 359). A devise of freeholds was limited, so as to exclude after-acquired property, by the words "which I have lately purchased" (*Cave* v. *Harris*, 57 L. T. 768). **Contrary intention.** **Particular description of subject of gift.** **Leaseholds.**

Where a testatrix devised "all my Quendon Hall estates in Essex," other estates in the same locality, acquired after the date of her will, did not pass. The term was an arbitrary designation which had acquired a certain meaning in the mind of the testatrix, and could not be extended to other property to which she had not ascribed the arbitrary designation (*Webb* v. *Byng*, 1 K. & J. 580; see *Castle* v. *Fox*, 11 Eq. 554). But where a testator devised his estate called Cleeve Court, property acquired after the date of the will, and treated by the testator as additions to Cleeve Court, passed (*Castle* v. *Fox*, 11 Eq. 542; see also *Strevens* v. *Bailey*, 8 Ir. C. L. R. 410). So where a testator had two adjoining properties, a devise by name of one of them which he occupied was held to pass a portion which he also occupied of the other (*Re Potter, Stevens* v. *Potter*, 83 L. T. 405). **Arbitrary designations of real estate.**

As to the effect of the words "heretofore mentioned," &c., occurring in the description of the property, see *Jepson* v. *Key* (2 H. & C. 873). **"Heretofore mentioned."**

Devises have been held to pass after-acquired real estate, notwithstanding provisions which seemed to refer to personal estate only (*Stokes* v. *Salomons*, 9 Hare, 75; *O'Toole* v. *Browne*, 3 El. & Bl. 572; *Lloyd* v. *Lloyd*, 7 Eq. 458).

"A gift of 'all my stock' would pass all stock to which the testator was entitled at the time of his death. But suppose the bequest were of 'all my stock which I have purchased,' that would make a considerable difference, and would, I think, be enough on the face of the will to show that the testator was defining the particular portion of property which he intended to give as being property then in his possession" (*Douglas* v. *Douglas*, Kay, 405; see *Re Gray, Dresser* v. *Gray*, 36 Ch. D. 207). "When I refer to a particular thing, such as a ring or a horse, and I bequeath it as 'my ring' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention,' to which the act in its 24th section refers, does not appear on the face of the will; but when a bequest is of that which is generic—of that which may be increased or diminished, then, I apprehend, the Wills Act requires something more on the face of the will, for the purpose of indicating such 'contrary inten- **Descriptions of money, stock, &c.** **"My."**

1 Vict. c. 26, s. 24.

tion,' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my'" (*Goodlad* v. *Burnett*, 1 K. & J. 348). A testatrix bequeathed, "*My* New Three-and-a-quarter per Cent. Annuities." At the date of her will she was possessed of 3,010*l.* 3*s.* 5*d.* per Cent. Annuities; and, at her death, of 17,010*l.* like annuities; held, that the bequest comprised the latter sum (*Goodlad* v. *Burnett*, 1 K. & J. 341; *Trinder* v. *Trinder*, 1 Eq. 695; *Bothamley* v. *Sherson*, 20 Eq. 312). See and distinguish the cases where bequests of "my shares" or "my debentures" have been held to fail on the ground of ademption (*Re Gibson*, 2 Eq. 669; *Re Lane, Luard* v. *Lane*, 14 Ch. D. 856). A bequest "of my stock in trade and debts accruing therefrom" was held to pass the testator's stock in trade and trade debts existing at the time of his death (*Ferguson* v. *Ferguson*, I. R. 6 Eq. 199; see also *Moore* v. *Madden*, I. R. 2 Eq. 511). Where a testator, after reciting his title to one-third of a business, bequeathed "all my share in the business," and after the date of the will acquired the whole business; the will operated upon the testator's interest at his death (*Re Russell, Russell* v. *Chell*, 19 Ch. D. 432).

Effect of words referring to present time.

Again, a contrary intention may appear from the words of the gift referring to the present time. Thus, where a testator devised the house "wherein I *now* reside," and "all the remainder of my real estates whereof I am *now* seised," and afterwards devised "all such trust estates as are *now* vested in me, or as to the leasehold premises as shall be vested in me at the time of my death:" freehold estates purchased between the date of his will and his death, did not pass (*Cole* v. *Scott*, 1 Hall & T. 477; 1 Mac. & G. 518). The word "now" received the same construction in *Hutchinson* v. *Barrow* (6 H. & N. 533; 9 W. R. 538); and "a gift of the house I now live in" was held to refer to the house as occupied by the testatrix at the date of the will (*Williams* v. *Owen*, 9 L. T. 200; *Re Edwards, Rowland* v. *Edwards*, 63 L. T. 481). On the other hand, where a testator devised a messuage wherein A. "now resides, with the stables or appurtenances thereto belonging and therewith occupied;" a garden acquired by the testator after the date of his will, passed (*Re Midland R. Co.*, 34 Beav. 525; see *Re Champion, Dudley* v. *Champion*, 1893, 1 Ch. 101). Under a gift of "any other property that I may now possess," personalty acquired after the date of the will passed (*Wagstaff* v. *Wagstaff*, 8 Eq. 229; *Hepburn* v. *Skirving*, 4 Jur. N. S. 651). And the decision in *Cole* v. *Scott*, *sup.*, was dissented from (*Castle* v. *Fox*, 11 Eq. 542). A testator bequeathed leaseholds to A. charged with "the annuity of 9*l.* now charged thereon in favour of my sister;" held, that leaseholds acquired after the date of the will were included in the bequest (*Re Ord, Dickinson* v. *Dickinson*, 12 Ch. Div. 22). As to the effect of the words "in their present state," see *Re Portal and Lamb* (30 Ch. Div. 50). And as to a reference to lands "lately purchased," see *Cave* v. *Harris* (57 L. T. 768). Under a devise of lands "of which I am seised" at a particular place, lands acquired after the date of the will have been held to pass (*Doe* v. *Walker*, 12 M. & W. 591; *Langdale* v. *Briggs*, 3 Sm. & Giff. 246; *Lilford* v. *Keck*, 30 Beav. 300).

"Now."

Lands "of which I am seised."

Codicil.

As to the effect on this question of a codicil confirming the will, see *Re Champion, Dudley* v. *Champion* (1893, 1 Ch. 101); compare *Re Blackburn, Smiles* v. *Blackburn* (43 Ch. D. 75); *Re Taylor, Whitby* v. *Highton* (58 L. T. 842).

Releases.

A release of all moneys due from A. was construed as a release of moneys due at death, although the will contained a recital as to the sums in which A. was "now indebted" (*Everett* v. *Everett*, 7 Ch. Div. 428). But where a testator exonerated A. from "all claims in respect of moneys laid out by me in improvements of the estate in Scotland, and which money has, according to the laws of Scotland, been charged thereon;" the exoneration only applied to moneys so charged at the date of the will (*Douglas* v. *Douglas*, Kay, 400). And a release of interest was held to be confined by a recital in the will to interest on a debt due to the testator at the date of the will (*Sidney* v. *Sidney*, 17 Eq. 65).

A gift of "such part of any residue which may by law be given" to charity took effect having regard to the state of the law at the testator's death (*Re Bridger, Brompton Hospital* v. *Lewis*, 1894, 1 Ch. 297; see *Re Hume, Forbes* v. *Hume*, 1895, 1 Ch. 422). 1 Vict. c. 26, s. 24. Charitable gifts.

A residuary devise of real estate was held to be specific before the Wills Act (*Mirehouse* v. *Scaife*, 2 M. & Cr. 695). And such a devise remains specific, notwithstanding the Wills Act (*Hensman* v. *Fryer*, 3 Ch. 420; *Gibbins* v. *Eyden*, 7 Eq. 371; *Phillips* v. *Low*, 1892, 1 Ch. 50). Accordingly, lands specifically devised, lands comprised in a residuary devise, and personal estate specifically bequeathed, are to be applied rateably in payment of debts (*Eddels* v. *Johnson*, 1 Giff. 22; *Pearmain* v. *Twiss*, 2 Giff. 130; *Clark* v. *Clark*, 4 Giff. 702; *Lancefield* v. *Iggulden*, 10 Ch. 136). But a pecuniary legatee, unless the legacy is charged on the residuary real estate, has no right to call upon a residuary devisee to contribute to the payment of debts (*Farquharson* v. *Floyer*, 3 Ch. D. 109; *Re Bawden, National Provincial Bank* v. *Cresswell*, 1894, 1 Ch. 693; see *ante*, p. 403). Residuary devise remains specific notwithstanding this statute.

By sect. 3 of the M. W. P. Act, 1893 (*ante*, p. 361), this section applies to the wills of married women. See the note to sect. 8 of the present act (*ante*, p. 444). Married women.

For the bearing of this section on wills in execution of powers, see the note to sect. 27 (*post*, p. 470). Powers.

After the date of his will a testator was duly declared lunatic, and so remained till his death. During his lunacy changes were made by the court in the state of his property. It was held, that his will must be read as speaking from its date and not from the death of the testator (*Wheeler* v. *Thomas*, 4 L. T. 173). Lunatics.

This section of the act does not apply to the objects of the testator's bounty. A testator bequeathed certain funds to A., a widow, for life or until her marriage, and after her death or marriage, amongst her children. A. married again between the date of the will and the death of the testator, and he was aware of her marriage: it was held, that A. was not entitled to the income of the funds (*Bullock* v. *Bennett*, 7 D. M. & G. 283; see *Gibson* v. *Gibson*, 1 Drew. 62). The words in the section, "with reference to the real estate and personal estate comprised in it," mean "so far as the will comprises dispositions of real and personal estate" (*Langdale* v. *Briggs*, 8 D. M. & G. 436). As to the period from which a will speaks, with reference to the objects of the gifts contained in it, see Jarm. Wills, 5th ed. 302; and as to the construction of a gift to the husband of an unmarried daughter of the testator, see *Radford* v. *Willis*, 7 Ch. 7. Section does not apply to the objects of gift.

25. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will. A residuary devise shall include estates comprised in lapsed and void devises.

In wills prior to 1838, a residuary devise does not include specific devises which lapse (Hawk. Wills, 44), or which are void (*Smith* v. *Lomas*, 12 W. R. 949). But a residuary bequest does include lapsed and void legacies (Hawk. Wills, 40; see 1 Jarm. Wills, 5th ed. 609). This section is to be construed upon the principle of assimilating a residuary devise of real estate to a similar bequest of personalty (*Carter* v. *Haswell*, 26 L. J. Ch. 576; 5 W. R. 308; see *Blight* v. *Hartnoll*, 23 Ch. Div. 218). Rule as to wills prior to 1838.

A testatrix devised estate E. to A. absolutely, and "all my freeholds, &c. not hereinbefore devised" to A. for life, with remainders over; A. died before the testatrix: held, that estate E. passed under the residuary devise (*Green* v. *Dunn*, 20 Beav. 6). A testator devised specific real estate Residuary devises within this section.

1 Vict. c. 26, s. 25.

to M., and devised and bequeathed "*All other real and personal estate of which he might die possessed*" to M. and others of his children. M. died in his lifetime: it was held, that the devise expressed by the words "all other, &c." was a residuary devise within this section, and included the real estate devised to M. (*Cogswell* v. *Armstrong*, 2 K. & J. 227; and see *Culsha* v. *Cheese*, 7 Hare, 236; *Hickson* v. *Wolfe*, 9 Ir. Ch. R. 452).

It has been held that a residuary devise operating as an appointment under a special power is within this section; *Jessel*, M. R., laying down that the word "devise" in the act includes in general a devise by way of appointment under a power, whether special or general (*Freme* v. *Clements*, 18 Ch. D. 499). This principle, however, has been disapproved by the Court of Appeal, who have held that it does not apply to sect. 33 (*Holyland* v. *Lewin*, 26 Ch. Div. 266).

Gift of particular residue.

The section applies only where there is a universal residuary devise, and does not apply to a gift of a particular residue. Thus where a testatrix devised to A. certain lands in the parish of H., which devise was held void, and to the plaintiff the rest of her hereditaments in the same parish, the plaintiff did not take the lands comprised in the void devise (*Springett* v. *Jennings*, 6 Ch. 333; *Re Brown*, 1 K. & J. 521). But a residuary gift of freeholds only may be a residuary devise within the section (*Re Mason, Ogden* v. *Mason*, 1901, 1 Ch. 619).

Compare *M'Kay* v. *M'Kay*, 1900, 1 Ir. R. 213, where lapsed legacies were held to fall into a particular residue; and *Johns* v. *Wilson*, 1900, 1 Ir. R. 342, where there were two residuary gifts.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

26. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

Law before the act.

In the case of wills prior to 1838, "if a man has lands in fee and lands for years and devises all his lands . . . . the fee simple lands pass only and not the lands for years: but if he has no fee simple the lease for years passes" (*Rose* v. *Bartlett*, Cro. Car. 293). This rule was in substance overruled by the first portion of the above section (*Butler* v. *Butler*, 28 Ch. D. 72).

Cases on the section.

Devise of land.

Both the reversion in fee and also a derivative leasehold interest in the same land were held to pass under a devise of "freehold land" at a certain place (*Matthews* v. *Matthews*, 4 Eq. 278; see *Re Guyton and Rosenberg*, 1901, 2 Ch. 593).

Devise of real estate.

Where a testator gave his "real estates" upon certain trusts and his personal estates upon other trusts, it was argued that the gift of real estates was a "general devise" within this section, and included leaseholds belonging to the testator; but it was held that the leaseholds passed with the personal estate (*Butler* v. *Butler*, 28 Ch. D. 66).

Where a testator having bequeathed the residue of his personal estate to A., devised all his lands, &c. at W. in the county of Durham, and at B. in the county of York, and all other his real estates in the counties of Durham and York, and all his estate and interest therein to trustees; it was held, under this section, by Sir J. *Romilly*, following the opinion of the Courts of Exchequer (5 Exch. 752), and Queen's Bench (18 Q. B. 474); but contrary to the opinion of Lord *Langdale* (11 Beav. 237), that the tes-

tator's leaseholds in Durham passed to the trustees (*Wilson* v. *Eden*, 16 Beav. 153). 1 Vict. c. 26, s. 26.

A gift of real estate situate at a particular place has been held to include leaseholds (*Moase* v. *White*, 3 Ch. D. 163; *Best* v. *Standeven*, 1872, W. N. 44; *Re Davison, Greenwell* v. *Davison*, 58 L. T. 304).

Where a testator who had no freeholds, but had leaseholds which he believed to be freeholds, gave his real estate upon trust to make a payment; the leaseholds were charged with the payment (*Gully* v. *Davis*, 10 Eq. 562).

It would seem that the limitations of a will being applicable in their entirety to freehold land only is not by itself sufficient to show a contrary intention within the section (*Wilson* v. *Eden*, 16 Beav. 153; *contra*, *S. C.*, 11 Beav. 238). But the circumstance has great weight when combined with other indications in the will (*Prescott* v. *Barker*, 9 Ch. 174, in which case *Wilson* v. *Eden* was observed upon unfavourably). Where, in addition to a general devise of real estate, the will contained an express bequest of leaseholds, this showed a contrary intention (*Re Guyton and Rosenberg*, 1901, 2 Ch. 593). Contrary intention.

27. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. A general gift shall include estates over which the testator has a general power of appointment

The general rule governing wills prior to 1838 has been thus stated: "It is clearly settled that a general devise or bequest will not, independently of the late statute, operate as an execution of a power; but it is also settled that where a testator disposes of real estate, not having any other than what is subject to the power, he is in such case to be taken as dealing with that estate; and that as to both realty and personalty, if the court is satisfied by the manner in which the particular property is referred to, that the testator intended to deal with that property, the disposition will be a valid execution of the power" (*Lake* v. *Currie*, 2 D. M. & G. 547; see Hawk. Wills, 22—26; 1 Jarm. Wills, 5th ed. 629 *et seq.*; *Re Comber*, 14 W. R. 172; *Re Bringloe*, 26 L. T. 58). Where a married woman was the donee of the power, the rule seems to be, that if the will would be ineffectual unless construed as an execution of the power, that construction shall prevail; but that if there is any other subject upon which her will may operate, the power will not be executed (1 Jarman, 5th ed. 629, 631; *A.-G.* v. *Wilkinson*, 2 Eq. 816). Rule as to wills prior to 1838.

Under the new law it is necessary to show a contrary intention in order to exclude the execution of the power; while under the old law it was necessary to show the intention to exercise the power (*Lake* v. *Currie*, 2 D. M. & G. 548). New law.

For a case where the will of a foreigner domiciled abroad operated as an exercise of a general power under this section, see *Re Price, Tomlin* v. *Latter*, 1900, 1 Ch. 442; and the note to sect. 10, *ante*, p. 450. Foreign wills.

1 Vict. c. 26, s. 27.

What powers are within this section.

This section is confined to general powers, and does not extend to a special or limited power (*Re Williams, Foulkes* v. *Williams*, 42 Ch. Div. 93). Thus a power to appoint by will amongst children in such manner as the appointor shall think proper, is not within this section of the act (*Cloves* v. *Awdry*, 12 Beav. 604; *Russell* v. *Russell*, 12 Ir. Ch. R. N. S. 377). Nor is a power given by a testator to his wife to appoint by will among her relations or friends (*Re Caplin*, 2 Dr. & Sm. 527). Nor is a power to appoint to anyone except A. (*Re Byron, Williams* v. *Mitchell*, 1891, 3 Ch. 474), but such a power would seem to be within the section after the death of A. (*Ib.*). A power to appoint by deed or will to all and every "person or persons, child or children," was within this section (*Cofield* v. *Pollard*, 5 W. R. 774). A power of appointment by will only is within this section (*Re Powell*, 18 W. R. 228). A general bequest does not under this section operate as an execution of a power to appoint "by will referring to the power" (*Phillips* v. *Cayley*, 43 Ch. Div. 222; overruling *Re Marsh, Mason* v. *Thorne*, 38 Ch. D. 630; see *Re Phillips, Robinson* v. *Burke*, 41 Ch. D. 417; *Re Tarrant*, 1889, W. N. 146; *Re Davies, D.* v. *D.*, 1892, 3 Ch. 63).

Special powers.

Special powers not being within sect. 27, it is necessary to find a reference either to the power or the property. So held as regards personal estate (*Re Mattingley*, 2 J. & H. 426; *Rooke* v. *Rooke*, 2 Dr. & Sm. 38; see *Re Milner*, 1899, 1 Ch. 563; *Re Sharland*, 1899, 2 Ch. 536. And compare *Re Mayhew, Spencer* v. *Cutbush*, 1901, 1 Ch. 677; *Kent* v. *Kent*, 1902, P. 108). As regards real estate, it was held before this act that where the testator had no real estate at the date of his will, a general devise to an object of the special power would exercise the power (*Standen* v. *Standen*, 2 Ves. jun. 589; see *Denn* v. *Roake*, 6 Bing. 478); but having regard to sect. 24 of the act this reason no longer applies (*Re Mills, Mills* v. *Mills*, 34 Ch. D. 186; *Re Williams, Foulkes* v. *Williams*, 42 Ch. Div. 93).

Powers exercised by general residuary bequest;

Under this section a general residuary bequest will operate as an exercise of a power to appoint sums of money up to a specified amount (*Re Jones, Greene* v. *Gordon*, 34 Ch. D. 65); and also as an appointment of personal estate which the testator has power to appoint as he thinks proper (*Re Spooner*, 2 Sim. N. S. 129; *Clifford* v. *Clifford*, 9 Hare, 675; *A.-G.* v. *Brackenbury*, 1 H. & C. 782).

The statute makes the fund which is subject to the general power part of the testator's personal estate; for the purpose of paying debts and legacies it went in the same way as the other personal estate (*Williams* v. *Williams*, 1900, 1 Ch. 159; see, however, *Re Davies*, 13 Eq. 167; *Fleming* v. *Buchanan*, 3 D. M. G. 979).

by general pecuniary legacies.

General pecuniary legacies, with no particular fund indicated for the payment, are bequests of personal property described in a general manner; and where the proper assets are inadequate, the will must be held to include personal estate subject to a general power, so far as necessary to satisfy such legacies (*Hawthorn* v. *Shedden*, 3 Sm. & Giff. 293; *Re Wilkinson*, 4 Ch. 587; see *Williams* v. *Williams*, *sup.*). So a power of appointment over a reversionary fund was exercised by a pecuniary legacy in the will of a married woman who had no property apart from the power (*Ludlam* v. *Ludlam*, 63 L. T. 330). Where a testator having a general power makes a will directing the payment of his debts without more, and appointing an executor, the appointed fund is liable for the payment of his debts, if his own estate is insufficient (*Re Davies*, 13 Eq. 166; *Wilday* v. *Barnett*, 6 Eq. 193; see *Laing* v. *Cowan*, 24 Beav. 112; *Re Hodgson, Darley* v. *Hodgson*, 1899, 1 Ch. 666). *Wickens*, V.-C., was of opinion that the same rule would apply, though no executor were appointed; but that an appointment of an executor without more would not make the fund assets (*Re Davies*, 13 Eq. 166; *Re Thurston, Thurston* v. *Evans*, 32 Ch. D. 508; *Re Power, Acworth* v. *Stone*, 1901, 2 Ch. 665).

Direction for payment of debts.

Appointment of executor.

Where the power is exercised and an executor appointed, a good receipt can be given either by an executor (*Re Hoskin*, 6 Ch. D. 281) or an administrator with the will annexed (*Re Peacock, Kelcey* v. *Harrison*, 1902, 1 Ch. 552). As to estate duty, see *Re Power, Acworth* v. *Stone* (1901, 2 Ch.

659), and cases there cited; *Re Dixon*, *Penfold* v. *Dixon* (1901, W. N. 243). 1 Vict. c. 26, s. 27.

A general power of appointment over real estate (which was represented by stock liable to re-investment) was held not to be exercised by a bequest of "all moneys that I die possessed of," there being a tenant for life who, after the death of the testator, had a right to call for re-investment (*Re Greares*, 23 Ch. D. 313). But where there was no such person, the power was held to have been exercised by a bequest of "the residue of my personal estate," regard being had to the interpretation of "personal estate" in sect. 1 of this act (*Chandler* v. *Pocock*, 16 Ch. Div. 648); in which last case the testatrix had procured the stock to be transferred into her own name before her death (see *Re Harman*, *Lloyd* v. *Tardy*, 1894, 3 Ch. 607). Stock liable to re-investment in land.

Where the appointee predeceases the testator, the question arises whether the property appointed passes as in default of appointment or devolves as the property of the appointor. "The question is one of intention, viz., whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed" (*per Chatterton*, V.-C., *Re De Lusi*, 3 Ir. L. Rep. 232; adopted *Re Pinede*, 12 Ch. D. 672; *Willoughby-Osborn* v. *Holyoake*, 22 Ch. D. 240). In the case of general powers of appointment over real estate where the donee of the power devised her real estate to trustees in trust for A., who predeceased her, it was held there was a resulting trust for the heir of the testatrix (*Re Van Hagan*, *Sperling* v. *Rochfort*, 16 Ch. Div. 18). And the heir was also held to take in the case of a direct appointment to A. (*Willoughby-Osborn* v. *Holyoake*, 22 Ch. D. 238; *Re Horton*, *Horton* v. *Perks*, 51 L. T. 420; *Coxen* v. *Rowland*, 1894, 1 Ch. 406). In the case of general powers of appointment over personal estate where the will of the donee contained a direct gift of residue to A., who predeceased the testator, the appointed property passed to the next of kin of the appointor (*Re Ickeringill*, *Hinsley* v. *Ickeringill*, 17 Ch. D. 151; *Re Pinede*, 12 Ch. D. 667; see *Re Marten*, *Shaw* v. *Marten*, 1902, 1 Ch. 314). The last cases were decided on the construction of particular wills. In other cases the property was held to pass as in default of appointment (*Re Davies*, 13 Eq. 163; *Re Thurston*, *Thurston* v. *Evans*, 32 Ch. D. 508, where the appointment directed that the property the subject of the power should continue to be held by the trustee of the instrument creating the power; *Re Boyd*, *Kelly* v. *Boyd*, 1897, 2 Ch. 232). Appointee predeceasing the testator. Real estate. Personal estate.

Where the will of the donee of the power contained an express appointment to A., who predeceased him, and also a residuary gift, it was held that the residuary legatee took the property the subject of the power (*Re Spooner*, 2 Sim. N. S. 129; *Re Elen*, *Thomas* v. *McKeckine*, 1893, W. N. 90; see *Gale* v. *Gale*, 21 Beav. 349. See the rules laid down, Farwell, Powers, 238, 2nd ed.

So A. having power to appoint 1,000*l.* by will, and which in default of appointment was given over to B., duly appointed it to C., who died in the testator's lifetime: A. afterwards made a codicil giving his residue, and the dividends due at his death on the 1,000*l.* to his wife: it was held, that the 1,000*l.* passed to the wife under the residuary gift (*Bush* v. *Cowan*, 32 Beav. 228). In one case (see the terms of the residuary clause) the next of kin of the appointor were held to take (*Wilkinson* v. *Schneider*, 9 Eq. 423).

The "contrary intention" referred to in the section must be looked for in the will alone (*Boyes* v. *Cook*, 14 Ch. Div. 57; *Re Marsh*, *Mason* v. *Thorne*, 59 L. T. 595). The rule is to inquire whether there is anything in the will inconsistent with the notion that the gift is meant to operate as an execution of the power (*Scriven* v. *Sandon*, 2 J. & H. 743). And for the purpose of ascertaining this contrary intention, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger (*Re Clark*, *Maddick* v. *Marks*, 14 Ch. Div. 422). The contrary intention has been found in the fact that the bequest is of personal estate "not otherwise effectually disposed of" (*Moss* v. *Harter*, 2 Contrary intention.

1 Vict. c. 26, s. 27.

Sm. & G. 458); and also on the comparison of the words of two successive wills (*Pettinger* v. *Ambler*, 1 Eq. 510); and also in the fact that the will referred to a power different from the one possessed by the testatrix at her death (*Thompson* v. *Simpson*, 44 L. T. 710). It has, however, not been found in a confirmation of the settlement creating the power (*Hutchins* v. *Osborn*, 3 De G. & J. 142; *Lake* v. *Currie*, 2 D. M. & G. 536).

Effect of sects. 24 and 27.

Coupling sections 24 and 27 together, the true construction of this statute is, that a will may operate as an execution of all powers vested in the testator immediately before his death (*Thomas* v. *Jones*, 2 J. & H. 482).

General powers executed by wills of prior date.

General powers have been held to have been executed by wills dated prior to the instrument creating the power (*Patch* v. *Shore*, 2 Dr. & Sm. 589; *Hodsdon* v. *Dancer*, 16 W. R. 1101); even where the power has been created by the testator himself subsequently to the will (*Boyes* v. *Cook*, 14 Ch. Div. 53; *Re Hernando*, *Hernando* v. *Sawtell*, 27 Ch. D. 284; *Airey* v. *Bower*, 12 App. Cas. 263). The circumstances under which a testator has executed the subsequent instrument cannot be looked at to ascertain a contrary intention (*Boyes* v. *Cook*, *sup.*, disapproving of *Re Ruding*, 14 Eq. 266; see *Thompson* v. *Simpson*, 44 L. T. 710; *Airey* v. *Bower*, *sup.*; *Re Wells*, *Hardisty* v. *Wells*, 42 Ch. D. 646). Where A. bequeathed her residue to such persons as B. should by deed or will appoint, and in default over, and B. died before A., B.'s will did not operate as an execution of the power by anticipation (*Jones* v. *Southall*, 32 Beav. 31).

Special power.

Sect. 24 does not apply to a will made in exercise of a special power (*Re Hayes*, *Turnbull* v. *Hayes*, 1901, 2 Ch. 529; *Re Moses*, *Beddington* v. *B.*, 1902, 1 Ch. 100; *Doyle* v. *Coyle*, 1895, 1 I. R. 205; see *Re Wells*, *Hardisty* v. *Wells*, 42 Ch. D. 657; and see *Stillman* v. *Weedon*, 16 Sim. 26, where a special power was executed by will of prior date, which referred to the property which was the subject of the power).

Powers given to survivor of several.

A general power given to the survivor of two persons may, under sect. 24, be exercised by the will of the ultimate survivor executed during the joint lives (*Thomas* v. *Jones*, 1 D. J. & S. 63). As to whether a special power can be so exercised, see Sugd. Powers, 124, 8th ed.; *Cronin* v. *Roche* (8 Ir. Ch. R. 103); *Cooper* v. *Martin* (3 Ch. 47); *Re Blackburn* (1889, W. N. 188). Where a power to appoint among children is to be exercised by the survivor of the husband and wife "after the decease of the other": a will made during their joint lives by the one who survived does not operate as an execution (*Cave* v. *Cave*, 8 D. M. & G. 131); but does so operate if subsequently confirmed by codicil after the death of the other (*Re Blackburn*, *Smiles* v. *Blackburn*, 43 Ch. D. 75).

Married women.

Sect. 27 applies to the wills of married women (*Bernard* v. *Minshull*, Johns. 276; see the note to sect. 8, *ante*, p. 444). As to a fund subject to a general power of appointment exercisable and exercised by a married woman's will being liable for her debts, see the note to 3 & 4 Will. 4, c. 104, *ante*, p. 403, and sect. 4 of the M. W. P. Act, 1882, *ante*, p. 348.

Powers of revocation in deeds.

With regard to the exercise by will of powers of revocation and new appointments in deeds, a general devise by will subsequent in date to the deed reserving the power does not *per se* amount by virtue of this section to an exercise of such power (*Re Brace*, *Welch* v. *Colt*, 1891, 2 Ch. 671; *Charles* v. *Burke*, 43 Ch. D. 223, n.). In a case decided apart from this section, it was said that the intention to revoke must be shown; but might either appear by the express terms, or might be inferred from the circumstance that the will would otherwise be ineffectual (*Pomfret* v. *Perring*, 5 D. M. & G. 775; *Palmer* v. *Newell*, 20 Beav. 38).

Pomfret v. *Perring* (*sup.*), was the case of a special power of appointment, but the reasoning applied to general powers (*Re Brace*, *Welch* v. *Colt*, 1891, 2 Ch. 677). In another case a power of revocation reserved by deed was not exercised by a will dated before the deed, the date amounting to a contrary intention within sect. 24 (*Re Wells*, *Hardisty* v. *Wells*, 42 Ch. D. 646).

Revocation of testamentary appointments.

In the case of appointments by will a general clause of revocation in a later will revokes an appointment by an earlier will, unless it be entirely unreasonable that it should have that effect (*Sotheran* v. *Dening*, 20 Ch.

Div. 99; *Harvey* v. *Harvey*, 32 L. T. 141; *Re Eustace*, L. R. 3 P. & M. 183; *Re Kingdon*, *Wilkins* v. *Pryer*, 32 Ch. D. 604; *Cadell* v. *Wilcocks*, 1898, P. 26). The old rule as to this was different (*Re Merritt*, 1 Sw. & Tr. 112; *Re Joys*, 4 Sw. & Tr. 214). A testamentary appointment may be revoked by a subsequent will containing dispositions inconsistent with the earlier will, and which does not refer thereto, but is expressed to be in exercise of all powers, &c. (*Re Tenney*, 45 L. T. 78); and even where not so expressed (*Re Gibbes*, *White* v. *Randolf*, 37 Ch. D. 143; see *Cadell* v. *Wilcocks*, 1898, P. 27). 1 Vict. c. 26, s. 27.

28. Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will. A devise without any words of limitation shall be construed to pass the fee.

In wills prior to 1838, a devise of lands to a person without any words of limitation confers an estate for life only (Hawk. Wills, 130). The various cases in which such indefinite devises are enlarged to a fee simple are considered (Jarm. Wills, 5th ed. 1131; Hawk. Wills, 131; Tudor, L. C. Conv. 166 *et seq.*; and see *Lloyd* v. *Jackson*, L. R. 2 Q. B. 269; *Bolton* v. *Bolton*, L. R. 5 Ex. 145; *Pickwell* v. *Spencer*, L. R. 7 Ex. 105; *Re Harrison*, 5 Ch. 408; *Lander* v. *Elsmore*, 27 L. T. 603; *Re De la Hunt and Pennington*, 57 L. T. 874; *Yarrow* v. *Knightley*, 8 Ch. Div. 736; *Hill* v. *Brown*, 1894, A. C. 125). The mere fact of a devise, otherwise conferring an estate for life only, being to several persons to be divided equally among them, did not enlarge the interest to a fee (*Gatenby* v. *Morgan*, 1 Q. B. D. 685). Rule as to wills prior to 1838.

Where a testator devised his real estate to a devisee in fee charged with annuities, the annuitants took the annuities for life; and it was said that this section of the act only applies to real estate vested in or in the power of the testator, and not to estates or interests created *de novo* by his will (*Nicholls* v. *Hawkes*, 10 Hare, 342). Cases under this section.

A devise, before 1838, of "rents and profits" to A. without words of limitation passes an estate for life: such a devise, since 1837, passes the fee (Hawk. Wills, 120; *Re Martin*, *Martin* v. *Martin*, 1892, W. N. 120). And a devise of the "income" of land also passes the fee (*Mannox* v. *Greener*, 14 Eq. 456). Where A., seised in fee of freeholds, devised them to B., "to be kept in trust for C., that is, B. is to let the premises, and give the rent to my son C. for his support"; C. took the absolute interest (*Malcolmson* v. *Malcolmson*, 17 L. T. O. S. 44). Where a testator gave to his niece the house she lived in, and grass for a cow in Gill Field, she took an estate in fee simple in the house, and the right of pasture of a cow during her pleasure (*Reay* v. *Rawlinson*, 29 Beav. 88; conf. *Pym* v. *Harrison*, 32 L. T. 817, a case under the old law).

Lord *St. Leonards* considered that cases where, after the devise without any words of limitation, there are gifts over also without words of limitation, were not within the purview of the act, and that it would be dangerous to extend it to them (R. P. Stat. 382).

Where the particular devise is without words of limitation, a "contrary intention" that the fee shall not pass does not appear from the fact that in other parts of the will words of inheritance have been used (*Wisden* v. *Wisden*, 2 Sm. & Giff. 396); nor from the fact of a power of appointment in favour of children and a husband being given to a married woman in a devise in her favour of copyholds to be her separate property (*Brook* v. *Brook*, 3 Sm. & G. 280). So, the fact that, in a devise to two persons, power was given to the devisees to sell their property for their life, followed by a direction that the survivor of the devisees should take the property given to the other, was no indication that such survivor should take a life interest only (*Chellew* v. *Martin*, 21 W. R. 671). Contrary intention.

1 Vict. c. 26, s. 28.

A contrary intention, however, may be found from the whole will (*Crumpe* v. *Crumpe*, 1900, A. C. 127; and see *Pelham Clinton* v. *Newcastle*, 1902, 1 Ch. 34, 45, where the words were held to create an estate in special tail male). A contrary intention was collected from the circumstance, that by the same will an estate was subsequently given which could not come into existence unless the first devise was construed to be a life estate (*Gravenor* v. *Watkins*, L. R. 6 C. P. 500). And where a testator devised freeholds to several as joint tenants and to the survivor of them, his heirs and assigns, the latter words indicated a contrary intention within the section, so that the devisees took as joint tenants for life with a contingent remainder in fee to the survivor (*Quarm* v. *Quarm*, 1892, 1 Q. B. 184).

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

29. In any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Old rules of construction as to wills prior to 1838.

In wills prior to 1838, the words "die without issue" and "die without leaving issue," in gifts both of real and personal estate, are construed to mean the death of the person spoken of and failure of his issue at the time of his death or at any time afterwards; unless the context shows the meaning to be confined to a failure of issue at the time of his death. The words "die without leaving issue" in devises of real estate are construed in the same way as the words "die without issue;" but in bequests of personalty they import a failure of issue at the death of the person spoken of (Hawk. Wills, 205, 213).

The various cases in which the words "die without issue," &c., occurring in wills prior to 1838 are restrained by the context to mean a failure of issue at the death of the person are considered in Hawk. Wills, 207; Jarm. Wills, 5th ed. 1320 *et seq.* As to the effect of similar limitations occurring in a deed, see *Morgan* v. *Morgan* (10 Eq. 99); *Olivant* v. *Wright* (9 Ch. D. 646).

Cases under new law.

It was said, that the object of this section is to redress the inconvenience which had arisen from the words "dying without issue," and other similar words having acquired a legal meaning different from the popular meaning (*Greenway* v. *Greenway*, 1 Giff. 138). In the case of wills since 1837, words importing failure of issue have been held to mean failure of issue at the death (*Re Mid Kent Co.*, 11 W. R. 417; *Jarman* v. *Vye*, 2 Eq. 784; *Dowling* v. *Dowling*, 1 Ch. 612; see *Re Allen*, 3 Drew. 382).

The section applies to a gift over on death without "male issue" (*Re Edwards*, *Edwards* v. *Edwards*, 1894, 3 Ch. 644; *Upton* v. *Hardman*, Ir. R. 9 Eq. 157). But the section does not touch the question whether any particular form of words shall import want or failure of issue during the life of the person spoken of, or a want or failure of issue at the time of

his death; the only construction excluded by the section being an indefinite failure of issue. In some cases, to which this section has no application, gifts over upon death without leaving issue have been read as gifts over upon death without having had issue (*Treharne* v. *Layton*, L. R. 10 Q. B. 459; see *Re Ball, Slattery* v. *Ball*, 40 Ch. Div. 11). As to "die without children," see *Mathews* v. *Gardiner*, 19 Beav. 254; *Re Booth, Pickard* v. *Booth*, 1900, 1 Ch. 768. 1 Vict. c. 26, s. 29.

As this section is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body" (*Re Sallery*, 11 Ir. Ch. R. 236; *Dawson* v. *Small*, 9 Ch. 651; *Harris* v. *Davis*, 1 Coll. 416, and the remarks on that case, Jarm. 5th ed. 1322; see *contra*, *Dodds* v. *Dodds*, 10 Ir. Ch. R. 476). Words importing failure of issue.

This section of the act has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one"; which additional words, upon the authority of decided cases, modify their meaning (*Morris* v. *Morris*, 17 Beav. 198).

Contrary intention was inferred from the context in *Neville* v. *Thacker*, 23 L. R. Ir. 344. It was doubted whether the words "unless a contrary intention shall appear by the will by reason of such person having a prior estate tail" applied to a gift of personalty, or are to be confined to a gift of real estate in which alone, properly speaking, there can be an estate tail (*Greenway* v. *Greenway*, 2 D. F. & J. 137). The words had been previously applied to a gift of personalty (*Green* v. *Green*, 3 De G. & Sm. 480; see also *Green* v. *Giles*, 5 Ir. Ch. 25; *Re O'Beirne*, 1 J. & Lat. 352). Contrary intention.

The operation of the section is limited by the final proviso. For a case within this proviso, see *Re Bence, Smith* v. *Bence*, 1891, 3 Ch. 242, 249; and see *Re Chinnery*, 1 L. R. Ir. 296. The cases in which words importing a failure of issue refer to the objects of a preceding gift are discussed Jarm. Wills, 5th ed. 1285 *et seq.*; Theobald, 5th ed. 620. Final proviso.

In the case of a will coming into operation after 31 December, 1882, which contains an executory limitation over of land on failure of issue, regard should be had, in ascertaining the effect, to sect. 10 of the Conv. Act, 1882 (see *Re Booth, Pickard* v. *Booth*, 1900, 1 Ch. 768).

30. Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication. No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

See note to sect. 31.

31. Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied. Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

In wills prior to 1838, where a testator devised lands to his executors

1 Vict. c. 26, s. 31.

for payment of his debts, or until his debts were paid, the executors only took an estate for so many years as were necessary to raise the sum required (Co. Litt. 42 a; 8 Rep. 96 a; 1 P. Wms. 509). It was the same where an estate was devised till such time as a particular sum should be raised out of the rents and profits (*Cordell's case*, Cro. Eliz. 316; 1 P. Wms. 118; Co. Litt. 45 b; Com. Dig. Biens (A. 1).

According to the old law, trustees under a devise to them and their heirs *primâ facie* took a fee; and that estate could not be cut down unless it could be pointed out on the face of the will what less estate they took (*Collier* v. *Walters*, 17 Eq. 261, 263; see also *Baker* v. *White*, 20 Eq. 174). The cases are collected, Theobald, 5th ed. 390.

In wills since 1837 the result of the present act "is, that trustees whose estate is not expressly defined by the will must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee" (Jarman, 5th ed. 1166).

In wills since 1837 trustees have been held to take an estate in fee from having a power of leasing (*Re Eddel*, 11 Eq. 559), and a power of maintenance (*Berry* v. *Berry*, 7 Ch. D. 657), and from being directed to pay debts (*Marshall* v. *Gingell*, 21 Ch. D. 790; *Re Brooke*, *Brooke* v. *Brooke*, 1894, 1 Ch. 43).

Devises of estates tail shall not lapse.

32. Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

33. Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

As to the doctrine of lapse, see Jarman, 5th ed. 307; *Elliot* v. *Davenport*, Tudor, L. C. Conv. 4th ed. 475.

Date of death of devisee or legatee.

The words "shall die" in this section refer to the period at which the act came into operation. Thus lapse was prevented by this section where the devisee or legatee died before the date of the will, but after the act came into operation (*Winter* v. *Winter*, 5 Hare, 306; *Mower* v. *Orr*, 7 Hare, 473; *Wisden* v. *Wisden*, 2 Sm. & G. 396; and see *Loxley* v. *Heath*, 27 Beav. 535); *secus*, where he died before the act came into operation (*Wild* v. *Reynolds*, 5 Not. Cas. 1; *Barkworth* v. *Young*, 4 Drew. 21).

This section was held to extend to a case where the issue of the legatee, who was alive at the death of the testator, was not the same issue as was in existence when the legatee died (*Re Parker*, 1 Sw. & Tr. 523; but see Sugd. R. P. Stat. 393).

Effect of section.

This section does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the

lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee. Therefore he can dispose of it by his will, notwithstanding his death in the lifetime of the original testator (*Johnson* v. *Johnson*, 3 Hare, 157; *Re Mason*, 34 Beav. 494; *Pickersgill* v. *Rodgers*, 5 Ch. D. 163). And if he dies intestate it passes to his representatives as part of his estate (*Re Peerless, Peerless* v. *Smith*, 1901, W. N. 151). Probate duty was held to be payable in the same manner as if the legatee had survived the testator (*Perry* v. *Regina*, L. R. 4 Exch. 28; distinguish *A.-G.* v. *Loyd*, 1895, 1 Q. B. 496). Estate duty is payable in the same way (*Re Scott*, 1900, 1 Q. B. 372). 1 Vict. c. 26, s. 33.

The fictitious survivorship created by this section will not be extended beyond the limits necessary to carry out the purpose of the act. Therefore, where a married woman in whose settlement there was a covenant to settle property coming to her during the coverture, and to whom a legacy was left by her father's will, predeceased him, but by reason of her having issue the legacy did not lapse, the legacy was not within the covenant (*Pearce* v. *Graham*, 32 L. J. Ch. 359). Where, however, after a bequest to a daughter, a testator directed that "in case she survived him" the legacy should be subject to the trusts of the daughter's settlement; and the daughter predeceased the testator, leaving issue; the legacy was ordered to be paid to the settlement trustees (*Re Hone*, 22 Ch. D. 663).

The gift is to take effect as if the beneficiary had died immediately after the testator. Accordingly, where a married woman to whom a legacy was left by her father's will died in his lifetime leaving her husband surviving, who also died before the father, administration to the married woman's estate was granted as if she had died immediately after her father (*Re Councill*, L. R. 2 P. & M. 314). And where a married woman to whom freeholds were devised in fee by her father's will, died in his lifetime leaving her husband surviving, and also issue of her marriage, the husband was held entitled to an estate by the curtesy (*Eager* v. *Furnivall*, 17 Ch. D. 118). A child who was held to take under this section having devised to his father, the devise lapsed (*Re Hensler, Jones* v. *Hensler*, 19 Ch. D. 612).

This section renders it necessary for a testator intending that a legacy given to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will (*Re More*, 10 Hare, 178). Where a testator gave a legacy to his daughter, with a gift over, in the event of her dying unmarried, to such of his other children as she should appoint, and in default of appointment to his other children equally, and the daughter died in the testator's lifetime, unmarried, and without having exercised the power of appointment: it was held that the legacy had not lapsed, and that one of the other children was entitled to a share (*Kellett* v. *Kellett*, I. R. 5 Eq. 298).

Section does not apply to gifts to a class.

The section applies wherever the words of the will amount to a gift to children as *personæ designatæ* (*Stansfield* v. *Stansfield*, 15 Ch. D. 84). As to the application of the section to a gift to "my surviving children," see *Fullford* v. *Fullford* (16 Beav. 565). The intention of the legislature was to provide against lapse merely, and not to alter the construction to be put on any will. On arriving at the conclusion that there would have been a lapse, then the statute applies, not otherwise. This section does not apply to the case of a gift to a class, for according to the rule before the act, under a gift to children as a class, the share to which a surviving child would have been entitled did not lapse in consequence of his death in the testator's lifetime (*Olney* v. *Bates*, 3 Drew. 323; *Browne* v. *Hammond*, Johns. 215; *Re Jackson, Shiers* v. *Ashworth*, 25 Ch. D. 164). It is immaterial that the class consists of only one person (*Re Harvey, Harvey* v. *Gillow*, 1893, 1 Ch. 567).

Gifts in exercise of powers.

This section applies to a testamentary appointment made under a general power (*Eccles* v. *Cheyne*, 2 K. & J. 676), but not under a special power (*Griffiths* v. *Gale*, 12 Sim. 354; *Freeland* v. *Pearson*, 3 Eq. 663; *Holyland* v. *Lewin*, 26 Ch. D. 266).

1 Vict. c. 26, s. 34.

Act not to extend to wills made before 1838, nor to estates *pur autre vie* of persons who die before 1838.

34. This act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and this act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Revocation of wills prior to 1838 by acts since 1837.

The provisions of the statute as to the operation of a will and of the gifts in it do not apply to wills prior to 1838 (*Langford* v. *Little*, 2 J. & Lat. 633; see *Randfield* v. *Randfield*, 9 W. R. 1); but with respect to the revocation of wills prior to 1838, acts of revocation done subsequently to 1837 must be considered with reference to the statute (*Hobbs* v. *Knight*, 1 Curt. 768; *Benson* v. *Benson*, L. R. 2 P. & M. 172).

Republication.

Formerly wills of personalty might be republished by parol acts or declarations of the testator; and republication made a will speak from the date at which it was republished (1 Wms. Exors. 9th ed. 163, 170). But since this statute nothing short of a re-execution of a will itself, or the formal execution under the act of some document which directly or impliedly affirms it, can confer new or further testamentary validity upon it beyond that which it derived from its original execution (*Noble* v. *Phelps*, L. R. 2 P. & M. 282; and see *Rolfe* v. *Perry*, 3 D. J. & S. 481). As to the effect of republication by codicil before the Act, see *Mountcashel* v. *More-Smyth*, 1895, 1 I. R. 346; 1896, A. C. 158.

Will re-executed by codicil.

Under this section the effect of the re-execution of the will by the codicil is the same as if the testator had at the date of the codicil made a will in the words of the will so re-executed (*Winter* v. *Winter*, 5 Hare, 306; *Anderson* v. *Anderson*, 13 Eq. 381). A codicil made after the act to a will made before the act was held to have the effect of bringing a bequest in the will to a deceased daughter under the 33rd section of this act (*Skinner* v. *Ogle*, 1 Rob. 363); and in another case to bring within the operation of the will lands acquired subsequently to the date of the codicil (*Langdale* v. *Briggs*, 3 Sm. & G. 246; *Doe* v. *Walker*, 12 M. & W. 591). The confirmation, however, of a will by codicil does not revive a legacy adeemed in the interval between the will and the codicil (*Montague* v. *Montague*, 15 Beav. 565; see *Sidney* v. *Sidney*, 17 Eq. 65); nor bring the will within the Married Women's Reversionary Interests Act, 1857 (*ante*, p. 333) (*Re Elcom, Layborn* v. *Grover Wright*, 1894, 1 Ch. 303).

Words of confirmation in a codicil were held to amount to a republication of the will as of the date of the codicil (*Re Champion, Dudley* v. *Champion*, 1893, 1 Ch. 101; see *Re Pyle, P.* v. *P.*, 1895, 1 Ch. 724). A subsequent testamentary instrument which did not refer to a will did not amount to republication (*Re Smith, Bilke* v. *Roper*, 45 Ch. D. 632). A codicil which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil (*Burton* v. *Newbery*, 1 Ch. D. 234; see *McLeod* v. *McNab*, 1891, A. C. 471; *French* v. *Hoey*, 1899, 2 I. R. 472).

Act not to extend to Scotland.

35. This act shall not extend to Scotland.

As to the adoption of this act in the colonies, see 4 Davidson, Conv. 350, n.; Hayes & Jarm. Wills, 59, 7th ed.

II.—The Wills Act Amendment Act, 1852.

15 & 16 Vict. c. 24.

An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills."

[17th June, 1852.]

Whereas the laws with respect to the execution of wills require further amendment: be it therefore enacted as follows:

15 & 16 Vict. c. 24, s. 1.

1 Vict. c. 26.

1. Where by an act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction (*r*): every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*s*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*t*), or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*u*), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses (*x*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made (*y*).

When signature to a will shall be deemed valid.

(*r*) The Wills Act, 1837, s. 9, *ante*, p. 445; where see note.

15 & 16 Vict. c. 24, s. 1.

A will was held to be duly executed where the signatures of the testator and the attesting witnesses were written on a separate piece of paper, which had been previously wafered to the foot of the will (*Cook* v. *Lambert*, 11 W. R. 401; *Re Horsford*, L. R. 3 P. & M. 211). But there must be evidence that the paper was so attached at the time of signature (*Re West*, 12 W. R. 89).

Signature placed on paper wafered to will.

(*s*) Where the signature was at the end of a notarial minute, which immediately followed the will, it was held that such a signature was a compliance with this statute (*Page* v. *Donovan*, 3 Jur. N. S. 220). Signatures placed beside or opposite to the end of the will have been held good (*Re Wright*, 4 Sw. & Tr. 35; *Re Jones*, 13 W. R. 414; *Re Williams*, L. R. 1 P. & M. 4; *Re Coombs*, *Ib.* 302; *Re Stokes*, 31 L. T. 552; see *Royle* v. *Harris*, 1895, P. 163).

Where a testator signed the first five sheets of a will, but omitted to sign the sixth, which was the last, and the attesting witnesses signed all six sheets, no part of the will was admitted to probate (*Sweetland* v. *Sweetland*, 13 W. R. 504; *Re Dilkes*, L. R. 3 P. & M. 164; see *Re Garnett*, 1894, P. 90). So where the testator's mark was placed in the middle of the writing (*Margary* v. *Robinson*, 12 P. D. 8).

Blanks.

(*t*) Wills have been held duly executed where blank spaces were left after the concluding words (*Hunt* v. *Hunt*, L. R. 1 P. & M. 209; *Re Archer*, L. R. 2 P. & M. 252). So where the will was on the first page, and the signatures were on the fourth page of an otherwise blank sheet of foolscap (*Re Fuller*, 1892, P. 377). As to the effect of "blanks" in charitable gifts, see *Re White*, 1893, 2 Ch. 41; *Re Macduff*, 1896, 2 Ch. 451.

Signature in attestation clause.

(*u*) A. wrote his will, concluding with an attestation clause, in which his name appeared. He afterwards called in two witnesses, told them the paper was his will, read the latter portion of it to them, including the attestation, and requested that they would sign their names, which they did; the execution was valid (*Re Walker*, 2 Sw. & Tr. 354; see *Smith* v. *Smith*, L. R. 1 P. & M. 143; *Re Cusmore*, *Ib.* 653; *Re Harris*, 23 W. R. 734; *Re Pearn*, 1 P. D. 70).

(*x*) Probate was granted in a case in which the signature of the testator occurred beneath that of the witnesses (*Re Jones*, 1877, W. N. 10; *Byles* v. *Cox*, 74 L. T. 222).

Words following signature,

(*y*) Words written underneath and following the signature of the testator have been included in the probate (*Re Brompton*, 33 L. J. Prob. 153; *Re Woodley*, *Ib.* 154; *Re Powell*, 13 W. R. 696; *Re Ainsworth*, L. R. 2 P. & M. 151; *Re Birt*, *Ib.* 214), but a clause written underneath the signature, although before execution, has been excluded (*Re Greator*, 2 Jur. N. S. 1172; *Re Dallow*, L. R. 1 P. & M. 189; *Re Dearle*, 39 L. T. 93; *Re White*, 1896, 1 I. R. 269; see *Re Anstie*, 1893, P. 283; *Re Gee*, 78 L. T. 843). As also a clause added by testator after signing his name (*Re Arthur*, L. R. 2 P. & M. 273). In one case the first side of a sheet of paper, where the signature occurred, was held to be the last side (*Re Wotton*, L. R. 3 P. & M. 159; *Re Gilbert*, 78 L. T. 762; see *Royle* v. *Harris*, 1895, P. 163).

inserted after signing.

Act to extend to certain wills already made.

2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court

of competent jurisdiction, in consequence of the defective execution of such will. 15 & 16 Vict. c. 24, s. 2.

3. The word "will" shall in the construction of this act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said act of the first year of the reign of her Majesty Queen Victoria. Interpretation of "will."

Wills Act, 1837, s. 1, *ante*, p. 436.

4. This act may be cited as "The Wills Act Amendment Act, 1852." Short title of act.

III.—The Wills Act, 1861.

24 & 25 Vict. c. 114.

An Act to Amend the Law with respect to Wills of Personal Estate made by British Subjects. [6th August, 1861.]

Be it enacted by, &c., as follows: 24 & 25 Vict. c. 114, s. 1.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin. Wills made out of the kingdom to be admitted if made according to the law of the place where made.

Before this act, a will must have been executed according to the law of the country where the testator was domiciled at the time of his death (Wms. Exors. 9th ed. 303). And a will so executed, though not falling within sect. 1, will still be good under sect. 4.

When a British subject dies abroad after the passing of this act, leaving a will executed in England, in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign domicil (*Re Rippon*, 3 Sw. & Tr. 177).

Under the first condition in the section a will may be admitted to probate if made according to the law of the place of execution, although such law prescribes no specific forms (*Stokes* v. *Stokes*, 67 L. J. P. 55; 78 L. T. 50). Under the same condition probate will be granted of a will in English form made in France by a British subject which is well executed according to French law (*Re Lacroix*, 2 P. D. 94; see *Milnes* v. *Foden*, 15 P. D. 105).

As to what documents an English court will look at in construing a

24 & 25 Vict. c. 114, s. 1.

French will, see *Re Cliffe*, 1892, 2 Ch. 229; *Di Sora* v. *Phillipps*, 10 H. L. C. 639.

As to probate of the wills of donees (domiciled abroad) of testamentary powers created by English instruments, see the note to sect. 10 of the Wills Act, 1837 (*ante*, p. 450).

This act does not extend to the case of a will in English form executed abroad by an alien; and in spite of the Naturalization Act, 1870, such a will cannot be admitted to probate, even where the testator's domicile of origin was English (*Bloxam* v. *Favre*, 9 P. Div. 130). Where an alien was naturalized, but the letters of naturalization excepted from the rights thereby conferred any rights of a native born British subject out of the British Dominions, the above act did not apply (*Re Carlo Gatti*, 39 L. T. 639).

In determining what papers are testamentary under this act the court will have regard to the law of one country only (*Pechell* v. *Hilderley*, L. R. 1 P. & M. 673).

Probate is conclusive that an instrument is testamentary, but does not determine the validity of the dispositions contained in it (*Whicker* v. *Hume*, 7 H. L. C. 124). It seems, therefore, that this act leaves the extent of the power of testamentary disposition over personal property in England to be determined by the law of the testator's domicile at his death, except in cases within sect. 3 (4 Davidson, Conv. 349, n.). Compare *Pouey* v. *Hordern*, 1900, 1 Ch. 492, and other cases quoted, *ante*, p. 457.

In the case of a will of English leaseholds, the English law governs the formalities of execution (*Pepin* v. *Bruyere*, 1902, 1 Ch. 24; see *Re Watson*, *Carlton* v. *Carlton*, 1887, W. N. 142), and also questions as to the validity of the gifts (*Freke* v. *Carbery*, 16 Eq. 461; see *Duncan* v. *Lawson*, 41 Ch. D. 394).

See further as to this statute, Sugd. R. P. Stat. 398 *et seq.*; Hayes & Jarm. Wills, 539 *et seq.*, 7th ed.

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Sect. 2 applies as well to a naturalized British subject as to a British subject by birth (*Re Gally*, 1 P. D. 438). The will of a Scotchman in Scotch form was held to pass English leaseholds (*Re Watson*, *Carlton* v. *Carlton*, 1887, W. N. 142).

Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Probate was granted of a will made by a domiciled Scotchman who subsequently acquired an English domicile (*Re Reid*, L. R. 1 P. & M. 74).

This section appears to mean not merely that the will is to remain a valid instrument, notwithstanding a change of domicile, but that as to property within the United Kingdom its operation is not to be curtailed (4 Davidson, Conv. 349, n.).

4. Nothing in this act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this act.

24 & 25 Vict. c. 114, s. 4.

Nothing in this act to invalidate wills otherwise made.

5. This act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this act.

Extent of act.

IV.—The Domicil Act, 1861.

24 & 25 Vict. c. 121.

An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within her Majesty's Dominions.

[6th August, 1861.]

24 & 25 Vict. c. 121, s. 1.

Whereas by reason of the present law of domicile the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign states: be it therefore enacted by, &c., as follows:

No British subject dying in a foreign country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, &c., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

1. Whenever her Majesty shall by convention with any foreign state agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the London Gazette no British subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing of his or her intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to moveables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid.

It is believed that no such convention has yet been agreed to. See

24 & 25 Vict. c. 121, s. 2.

further, as to the probable operation of the act, Hayes & Jarm. Wills, 540, 7th ed.; Sugd. R. P. Stat. 398.

No foreign subject dying in Great Britain or Ireland to be deemed to have acquired a domicile unless resident therein for one year immediately preceding his or her death, &c.

2. After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that no subject of any such foreign country who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed, and deposited with her Majesty's secretary of state for the home department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession.

Who this act shall not apply to.

3. This act shall not apply to any foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions.

When subjects of foreign states shall die in her Majesty's dominions, and there shall be no persons to administer to their estates, the consuls of such foreign states may administer.

4. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent, shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit.

As to administration of property in England belonging to a person domiciled out of this country, see Wms. Exors. 853, 1387, 9th ed.; *Re Dost Aly Khan* (6 P. D. 6), and the cases quoted *ante*, pp. 409, 439.

ENACTMENTS RELATIVE TO JUDGMENTS AFFECTING REAL AND PERSONAL PROPERTY.

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I.—THE JUDGMENTS ACT, 1838.

1 & 2 VICT. c. 110.

An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England.

[16th August, 1838.]

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1 & 2 Vict. c. 110, s. 11.

Sheriff empowered to deliver execution of lands to judgment creditor.

11. And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law: be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of elegit, or any precept in pursuance thereof, shall be directed at the suit of any person upon any judgment, which at

1 & 2 Vict. c. 110, s. 11.

the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior courts at Westminster, to take and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity: provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform and render, in case such execution had not issued: and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: [*provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed*].

Proviso as to copyhold lands.

Proviso as to purchasers, mortgagees and creditors.

The words in italics have been repealed by the Stat. Law Rev. Act, 1874.

What may be taken under an elegit.

Before this act the writ of elegit (which was founded on 13 Edw. I, c. 18, the Statute of Westminster), affected only one moiety of the judgment debtor's lands. This section, however, has extended the remedy of the judgment creditor to the *whole* of the debtor's lands. The section expressly includes (1) copyholds which were not subject to execution under the old law (see *ante*, p. 410). (2) Rectories and tithes, which however are not ecclesiastical but lay (*Hawkins* v. *Gathercole*, 6 D. M. & G. 24; *Bates* v. *Brothers*, 2 Sm. & G. 509; *Sweeny* v. *Fleming*, 14 Ir. Ch. R. 23). (3) Land over which the debtor has a disposing power, as to which see the note to sect. 13 (*post*, p. 490). (4) Land held in trust for the debtor (as to this see before the act the Statute of Frauds, s. 10; *Hunt*

v. *Coles*, 1 Comyns, 226; *Steele* v. *Phillips*, Beatty, 193; *Hickson* v. *Aylward*, 3 Molloy, 25). The present section did not change the nature of the trust estates which might be taken under an elegit, and the old authorities apply (*Re Newcastle*, 8 Eq. 705; *Digby* v. *Irvine*, 6 Ir. Eq. R. 155). According to these authorities it was held that the trust must be a clear and simple trust for the debtor only (*Doe* v. *Greenhill*, 4 B. & Ald. 684; *Forth* v. *Norfolk*, 4 Madd. 503; *Harris* v. *Booker*, 4 Bing. 96). A term held on trust to attend the inheritance might be taken (*Doe* v. *Evans*, 1 C. & M. 450); but with regard to a particular equitable interest in leaseholds it was said that it could not be taken (*Re Newcastle*, 8 Eq. 706). An equity of redemption cannot be taken either in freeholds (*Beckett* v. *Buckley*, 17 Eq. 435; *Wells* v. *Kilpin*, 18 Eq. 298; *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 282; *Plunket* v. *Penson*, 2 Atk. 290; see *Thornton* v. *Finch*, 4 Giff. 515), or in leaseholds (*Salt* v. *Cooper*, 16 Ch. D. 544). **1 & 2 Vict. c. 110, s. 11.**

The following interests in land may, according to decided cases, be taken under an elegit:—An estate tail (*Ashburnham* v. *St. John*, Cro. Jac. 85; Gilb. Exec. 106; see *Lewis* v. *Duncombe*, 20 Beav. 398; *Re Anthony*, *A.* v. *A.*, 1893, 3 Ch. 498). An estate for life, even in land excluded from a power of leasing (*Davis* v. *Marlborough*, 2 Swans. 121). The estate of a joint tenant (*Lord Abergavenny's case*, 6 Rep. 78 b; 2 Cru. Dig. 376), or of a tenant in common or a coparcener (2 Cru. Dig. 54). A reversion expectant on a lease for years or lives (*Bishop of Bristol*, 3 Leon. 113; *R.* v. *Lane*, 6 M. & W. 489; *Re South*, 9 Ch. 373). In the last-mentioned case the creditor to whom the land has been delivered cannot eject the tenants (*Doe* v. *Wharton*, 8 T. R. 2); but may sue (*Hatton* v. *Haywood*, 9 Ch. 236; *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565), or distrain (*Lloyd* v. *Davies*, 2 Ex. 103), for rent falling due after the inquisition (*Sharp* v. *Key*, 8 M. & W. 379); and this without attornment by the tenants (*Lloyd* v. *Davies*, *sup.*; *Rogers* v. *Pitcher*, 6 Taunt. 207). As to a reversion expectant on a mortgage for a term of years, see *Poole* v. *Whitt* (15 M. & W. 571); *Plunket* v. *Penson* (2 Atk. 293); *Johns* v. *Pink* (1900, 1 Ch. 296). Leaseholds may be taken (*Re Hobson*, 33 Ch. D. 493; *Carter* v. *Hughes*, 2 H. & N. 714; *Fleetwood's case*, 8 Rep. 171), notwithstanding the Bankruptcy Act, 1883, s. 146 (*Richardson* v. *Webb*, 1 Morrell, 40), including the interest of a lessee who had mortgaged but remained in possession (*Johns* v. *Pink*, *sup.*). Land in ancient demesne (*Cox* v. *Barnsley*, Hob. 47; *Martin* v. *Wilks*, Moore, 211). A rent-charge (Moore, 32; see *Wooton* v. *Shirt*, Cro. Eliz. 742). Land belonging to a railway company; whether surplus (*Re Hull & Barnsley R. Co.*, 40 Ch. D. 119), or that on which the line, &c. is built (*Re Cowbridge R. Co.*, 5 Eq. 413). Land held by a public body for a public purpose (*Worrall Waterworks Co.* v. *Lloyd*, L. R. 1 C. P. 719; see, however, *Jersey* v. *Uxbridge Authority*, 1891, 3 Ch. 183). Land of which a receiver has been appointed (*Gooch* v. *Haworth*, 3 Beav. 428); but the leave of the court must be obtained (*Bowen* v. *Brecon R. Co.*, 3 Eq. 541). Land subject to an equitable mortgage (*Whitworth* v. *Gaugain*, 1 Phil. 728; *Brunton* v. *Neale*, 14 L. J. Ch. 8).

What may not be taken.

The following interests in land cannot be taken under an elegit:—An equity of redemption either in freeholds or leaseholds comprised in a legal mortgage (*Beckett* v. *Buckley* and other cases quoted, *sup.*). Land of which the debtor was mortgagee, but which has become vested by conveyance in a purchaser or mortgagee for valuable consideration, the vendor's mortgage being paid off then or previously (the Judgments Act, 1855, s. 11; see *Avison* v. *Holmes*, 1 J. & H. 544; *Greaves* v. *Wilson*, 25 Beav. 434). An interest in remainder (*Re South*, 9 Ch. 369; *Re Hamilton*, 31 Ch. Div. 294). Land comprised in a prior voluntary conveyance (*Beavan* v. *Oxford*, 6 D. M. & G. 529). The interest of a debtor in land which has already been taken under an elegit (*Carter* v. *Hughes*, 2 H. & N. 714). A rent-seck (*Walsall* v. *Heath*, Cro. Eliz. 656). An inalienable office (*Anon.*, Dyer, 7). Glebe or a churchyard (*Arbuckle* v. *Cowtan*, 3 Bos. & P. 327; *Parry* v. *Jones*, 1 C. B. N. S. 345). As to an advowson, see *Robinson* v. *Tongue* (3 P. Wms. 401).

1 & 2 Vict. c. 110, s. 11.

The goods and chattels personal of a debtor cannot now be taken under an elegit (Bankruptcy Act, 1883, ss. 146, 168). Nor an equitable reversionary interest in the proceeds of sale of real estate (*Tyrrell* v. *Painton*, 1895, 1 Q. B. 205).

Nature of interest of tenant by elegit.

Where the land delivered is freehold, the judgment creditor acquires a chattel interest measured by the satisfaction of the debt; while the judgment debtor has remaining in him an interest in the nature of a reversion. Where the land is leasehold, the judgment creditor acquires the whole term, subject to a legal title in the nature of an executory interest in the judgment debtor (*Johns* v. *Pink*, 1900, 1 Ch. 304). As to a tenant by elegit taking a conveyance of parts of the lands extended, see *Hele* v. *Bexley* (17 Beav. 14).

Inquisition.

In an inquisition on an *elegit* it is sufficient to describe the land in such a manner as would be sufficient to identify it in a conveyance (*Doe* v. *Parry*, 13 M. & W. 356).

Beneficed clerk.

Where the judgment debtor is a beneficed clerk, and has no lay fee in the bailiwick of the sheriff to whom the writ was directed, the creditor may, as soon as the return is filed, sue out one or more writs of *fieri facias de bonis ecclesiasticis*, or of sequestration (R. S. C. Ord. 43, rr. 3, 4, 5).

Sheriff's poundage.

As to a sheriff's poundage, see 29 Eliz. c. 4, s. 1; the Estreats Act, 1716, s. 16; 8 Geo. 1, c. 25, s. 5; 1 Vict. c. 55; and the Sheriffs Act, 1887, ss. 20, 29; *Nash* v. *Allen*, 4 Q. B. 784; *Pilkington* v. *Cooke*, 16 M. & W. 615; *Marshall* v. *Hicks*, 10 Q. B. 15; *Lee* v. *Dangar*, 1892, 1 Q. B. 231; 1892, W. N. 71; *Shoppee* v. *Nathan*, 1892, 1 Q. B. 245; *Woolford* v. *Levy*, *ib.* p. 772.

As to the present form of the writ of elegit, see R. S. C. App. H., No. 3. The writ and inquisition should be filed by the sheriff in the Central Office (*Johns* v. *Pink*, 1900, 1 Ch. 296).

As to other modes of satisfying a judgment by means of the land of the judgment debtor, see *post*, p. 510.

Sheriff empowered to seize money, bank notes, &c., and to pay money or bank notes to execution creditors, and to sue for amount secured by bills of exchange and other securities.

12. By virtue of any writ of fieri facias to be sued out of any superior or inferior court, [*after the time appointed for the commencement of this act,*] or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution, any money or bank notes, which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer, by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or

without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

1 & 2 Vict. c. 110, s. 12.

Proviso as to indemnity of sheriff.

The words in *italics* have been repealed by the S. L. Rev. Act, 1874.

Effect of section.

The effect of this section is to place bank notes and money seized under a *fi. fa.* upon the same footing as goods; therefore they are not to be treated as the property of the execution creditor until handed over by the sheriff to him (*Collingridge* v. *Paxton*, 11 C. B. 683); and are not available in the sheriff's hands to satisfy a writ of *fi. fa.* lodged with him against such execution creditor at the suit of a third person (*Ib.*).

Cases under this section.

This section does not extend to a debt owing to the judgment debtor (*Helmore* v. *Smith*, 35 Ch. Div. 447; *Harrison* v. *Paynter*, 6 M. & W. 387; *Alleyn* v. *Darcy*, 5 Ir. Ch. R. 56); or to money in the hands of a third party in trust for him (*Robinson* v. *Peace*, 7 Dowl. P. C. 93; *Fieldhouse* v. *Croft*, 4 East, 510), as in the hands of a sheriff (*Collingridge* v. *Paxton*, 11 C. B. 683; see *Harrison* v. *Paynter*, 6 M. & W. 387; *Masters* v. *Stanley*, 8 Dowl. P. C. 169), unless the sheriff has appropriated it for the debtor (*Wood* v. *Wood*, 4 Q. B. 397). A charging order has, however, been made on cash in court to assist an execution on a *fi. fa.* (*Brereton* v. *Edwards*, 21 Q. B. Div. 488; but see *France* v. *Campbell*, 9 Dowl. P. C. 914); and leave has been given to seize a cheque drawn in favour of the debtor by the Accountant-General, but not delivered to him (*Watts* v. *Jeffreys*, 3 Mac. & G. 422; see *Courtoy* v. *Vincent*, 15 Beav. 486). It has been said that this section applies only to securities of a similar nature to those expressly mentioned (*Rollason* v. *Rollason*, 34 Ch. D. 496). Policies of assurance, however, have been held within it (*Stokoe* v. *Cowan*, 29 Beav. 637; see *contra*, *Re Sargent*, 7 L. R. Ir. 66), also the covenant to pay in a mortgage (*Avison* v. *Holmes*, 1 J. & H. 530).

Fieri facias generally.

What may be taken.

Independently of this section, the sheriff can, under a *fi. fa.*, seize all goods and chattels belonging to the debtor, including, in particular, the following: (1) Terms of years and leaseholds (*Fleetwood's case*, 8 Rep. 171; *Doe* v. *Smith*, 1 M. & R. 137; *Taylor* v. *Cole*, 3 T. R. 292; *Doe* v. *Donston*, 1 B. & Ald. 230; see *Doherty* v. *Nelson*, 1895, 2 Ir. R. 90); which may be sold without seizing or taking possession of either the indenture of lease or the property (*Coleman* v. *Rawlinson*, 1 F. & F. 330). The term remains in the debtor until assignment by the sheriff (*Playfair* v. *Musgrove*, 14 M. & W. 239; *Giles* v. *Grover*, 9 Bing. 128;

1 & 2 Vict. c. 110, s. 12.

Doe v. *Jones*, 9 M. & W. 372), which must be by deed (8 & 9 Vict. c. 106, s. 3); and the tenants in possession cannot be turned out by the sheriff (*R.* v. *Deane*, 2 Show. 85; see *Taylor* v. *Cole*, 3 T. R. 292; *Burden* v. *Kennedy*, 3 Atk. 739; *Doe* v. *Brawn*, 5 B. & Ald. 243). (2) A rent-charge (*York* v. *Twiner*, Cro. Jac. 78). (3) Growing crops (*Re Woodham*, 20 Q. B. D. 40; *Gwilliam* v. *Barker*, 1 Price, 274; see the Landlord and Tenant Act, 1851, s. 2). (4) Fixtures which the debtor can remove as against his landlord (*Place* v. *Flagg*, 4 M. & R. 277; *Winn* v. *Ingleby*, 5 B. & Ald. 625; *Pitt* v. *Shew*, 4 B. & Ald. 206; *Evans* v. *Roberts*, 5 B. & C. 841; see *Dumergue* v. *Rumsey*, 2 H. & C. 777). (5) Ships or shares in ships (*Harley* v. *Harley*, 11 Ir. Ch. R. 451; *Dickinson* v. *Kitchen*, 8 El. & Bl. 789). (6) The interest of a pawnbroker in a pledge (*Rollason* v. *Rollason*, 34 Ch. D. 495; see *Squire* v. *Huetson*, 1 Q. B. 308). (7) Goods let to the debtor (*Lancashire Co.* v. *Fitzhugh*, 6 H. & N. 502). (8) The property of a partnership where judgment has been recovered against the firm (Partnership Act, 1890, s. 23; for the case where a partner is an infant, see *Lovell* v. *Beauchamp*, 1894, A. C. 607), but not when it has been recovered against an individual partner (Partnership Act, 1890, s. 23; see *Brown Janson* v. *Hutchinson*, 1895, 1 Q. B. 737; 1895, 2 Q. B. 126). For the old practice, see *Helmore* v. *Smith*, 35 Ch. Div. 436.

What may not be taken.

The following cannot be seized under a *fi. fa.*:—Clothes, bedding, and tools, to the value of 5*l.* (Small Debts Act, 1845, s. 8); certain farm produce (Sale of Farming Stock Act, 1816). An equitable interest in leaseholds (*Re Newcastle*, 8 Eq. 700; *Scott* v. *Scholey*, 8 East, 467), or an equity of redemption of leaseholds (*Lyster* v. *Dolland*, 1 Ves. 431). Fixtures annexed to the debtor's freehold (*Winn* v. *Ingleby*, 5 B. & Ald. 625). Rolling stock, plant and buildings of a railway which is open for traffic (Rail. Cos. Act, 1867, s. 4; see *Re East India Dock Co.*, 38 Ch. D. 576; *Midland Co.* v. *Potteries R. Co.*, 6 Q. B. D. 36; *Re Knott End Ry. Act*, 1898; 1901, 2 Ch. 8). Stock or shares (*Brereton* v. *Edwards*, 21 Q. B. Div. 499; see sect. 14, *post*); or an equitable interest in stock (*Horn* v. *Horn*, Amb. 78). Goods pawned by the debtor (*Young* v. *Lambert*, L. R. 3 P. C. 142). Goods over which the debtor has a lien (*Legge* v. *Evans*, 6 M. & W. 36). Goods of the debtor over which another has a lien (*Rogers* v. *Kennay*, 9 Q. B. 592). The copyright of a newspaper (*Ex p. Foss*, 2 De G. & J. 230). Goods sold for valuable consideration, though with the intention of defeating an execution (*Wood* v. *Dixie*, 7 Q. B. 892); goods validly mortgaged (*Scarlett* v. *Hanson*, 12 Q. B. Div. 213; *Re Opera, Limited*, 1891, 3 Ch. 260); unless in either of the last two cases the purchaser, or mortgagee, had notice of the writ being in the hands of the sheriff (19 & 20 Vict. c. 97, s. 1). Goods over which a receiver has been appointed, unless with leave of the court (*Russell* v. *East Anglian R. Co.*, 3 Mac. & G. 104; see *Edwards* v. *Edwards*, 2 Ch. Div. 291). Goods which the debtor holds solely as trustee (*Fenwick* v. *Laycock*, 2 Q. B. 108; *Re Morgan, Pillgrem* v. *Pillgrem*, 18 Ch. Div. 93; see *Sykes* v. *Sykes*, L. R. 5 C. P. 113).

Lunatic debtor.

Goods of a lunatic not in the custody of the Court of Lunacy may be taken under a *fi. fa.* (*Re Clarke*, 1898, 1 Ch. 336); but goods in such custody cannot be seized, and can only be made available for the creditor after provision has been made for the maintenance of the lunatic and for costs (*Re Winkle*, 1894, 2 Ch. 519; see *Re Seager Hunt*, 1900, 2 Ch. 54; *Davies* v. *Thomas*, 1900, 2 Ch. 462).

Landlord's rent.

The sheriff is not bound or able to levy under a *fi. fa.* whatever the value of the goods may be, unless the execution creditor first satisfies the landlord's rent (*Cocker* v. *Musgrove*, 9 Q. B. 230; *Risley* v. *Ryle*, 11 M. & W. 16), to the extent of one year's arrears (8 Anne, c. 14, s. 1; see the Execution Act, 1844, s. 67), which is due at the time of taking possession under the writ (*Hoskins* v. *Knight*, 1 M. & S. 245; see *Wintle* v. *Freeman*, 11 Ad. & Ell. 539). As to the usual practice of the sheriff paying the landlord, see *Re Mackenzie*, 1899, 2 Q. B. 575. And as to the liability

of the sheriff to the landlord, see *Thomas* v. *Mirehouse*, 19 Q. B. D. 563; Woodfall, 530, 16th ed. As to cases within the County Courts Act, 1888, s. 160, see *Hughes* v. *Smallwood*, 25 Q. B. D. 306. As to taxes, see Taxes Management Act, 1880, s. 88. 1 & 2 Vict. c. 110, s. 13. Taxes.

Where the goods have been seized but not sold, the judgment creditor may, as soon as the return has been filed, sue out a writ of *venditioni exponas* (R. S. C. Ord. 43, rr. 2, 5; see D. C. P. 861; Chitty's Archbold, 865). Where the judgment debtor is a beneficed clerk and has no goods in the bailiwick of the sheriff to whom the writ was directed, the creditor may as soon as the return is filed, sue out one or more writs of *fieri facias de bonis ecclesiasticis*, or of sequestration (R. S. C. Ord. 43, rr. 3, 4 and 5; see *Allen* v. *Williams*, 2 Sm. & G. 455; Bankruptcy Act, 1883, s. 52 (1); D. C. P. 863; Chitty's Archbold, 1176). Sale. Beneficed clerk.

As to execution against corporations and companies, see R. S. C., Ord. 42, r. 31; Chitty's Archbold, 1052, 1070, 14th ed.; and as to execution against companies in liquidation, see Buckley, 260, 7th ed. Corporations and companies.

13. A judgment already entered up, or to be hereafter entered up, against any person in any of her Majesty's superior courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed of, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion or other interest, in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents and hereditaments; and every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing, under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment; [*or in cases of judgments already entered up, or to be entered up, before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act,*] nor shall such charge operate to give the judgment creditor any preference in case of the Judgment to operate as a charge on real estate. Charge not to be enforced until after expiration of a year.

1 & 2 Vict. c. 110, s. 13.

bankruptcy of the person against whom judgment shall have been entered up unless such judgment shall have been entered up one year at least before the bankruptcy; [*provided also, that as regards purchasers, mortgagees or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed:*] provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice.

Proviso as to purchasers.

The words in *italics* have been repealed by the S. L. R. Act, 1874.

Under sect. 2 of the Land Charges Act, 1900 (*post*, p. 509, where see note), a judgment does not now operate as a charge on land until a writ or order for enforcing it is registered under sect. 5 of the Land Charges Act, 1888 (*post*, p. 504).

Order of Probate Division.

Before the Judicature Acts an order of the Probate Court did not operate as a charge under this section (*Pratt* v. *Bull*, 1 De G. J. & S. 141; *Crispin* v. *Cumano*, L. R. 1 P. & M. 622; as to a decree of the Divorce Court for alimony, see *Exp. Holden*, 13 C. B. N. S. 641; *Sidney* v. *Sidney*, 1867, W. N. 248). Since the Judicature Acts a judgment of the Probate Division operates as a charge under the section (*Re Harrison and Bottomley*, 1899, 1 Ch. 469; see *Oliver* v. *Lowther*, 42 L. T. 47). As to orders of Courts of Equity, see sect. 18, *post*, p. 497 and note.

Lands in Middlesex and Yorkshire.

According to the decisions in the case of lands in Middlesex and Yorkshire, the charge under this section did not take effect until registration in the local registry (*Westbrook* v. *Blythe*, 3 El. & Bl. 737; *Johnson* v. *Holdsworth*, 1 Sim. N. S. 106; see *Hughes* v. *Lumley*, 4 El. & Bl. 274; *Cathrow* v. *Eade*, 1 Sm. & Giff. 423). By the Land Registry (Middlesex Deeds) Act, 1891, s. 6, it is provided, that it shall not be necessary for the validity of any judgment, statute or recognizance, that it should be registered under the Middlesex Registry Act, 1708. The priority of judgments affecting lands in Yorkshire depends on local registration (*Neve* v. *Flood*, 33 Beav. 666; Yorkshire Registries Act, 1884, ss. 4, 14). Notice of an earlier unregistered judgment was held immaterial (*Benham* v. *Keane*, 3 D. F. & J. 318; see as to mortgages, *Rolland* v. *Hart*, 6 Ch. 678).

What lands are affected by judgments under this section.

It has been said that this section includes every possible interest in lands of every possible description, except, perhaps, land held in ancient demesne (*Harris* v. *Davison*, 15 Sim. 133). The following interests in land have been held to be within it. Lands of which the debtor is tenant in tail (*Re Anthony, A.* v. *A.*, 1893, 3 Ch. 498; see *Lewis* v. *Duncombe*, *inf.*). Leaseholds assigned to the judgment debtor to secure an annuity (*Harris* v. *Davison*, 15 Sim. 133). Land charged with money covenanted to be paid to the debtor (*Russell* v. *M'Cullock*, 1 K. & J. 313, see *Younghusband* v. *Gisborne*, 1 De G. & S. 209). The interest of a mortgagee (*Clare* v. *Wood*, 4 Hare, 81). The interest of a *cestui que trust* in a mortgage investment of a trust fund (*Avison* v. *Holmes*, 1 J. & H. 530). As to a legal estate in remainder, see *Re Harrison and Bottomley*, 1899, 1 Ch. 471. The words referring to land over which the debtor has a disposing power, extend only to the beneficial interest of the debtor therein, such as the interest of an heir subject to the debts of his ancestor (*Kinderley* v. *Jervis*, 22 Beav. 1); and do not include lands comprised in a prior voluntary conveyance (*Beavan* v. *Oxford*, 6 D. M. & G. 509). A tenant in tail in possession has, under these words, been ordered to execute a disentailing deed to give effect to the charge under this section (*Lewis* v. *Duncombe*, 20 Beav. 398; see *Re Anthony, A.* v. *A.*, 1893, 3 Ch. 502). As to the effect of a judgment on the lands of a corporation, see *Arnold* v. *Gravesend*, 2 K. & J. 574.

1 & 2 Vict. c. 110, s. 13.

What are not affected.

This section does not extend to an ecclesiastical benefice (*Hawkins* v. *Gathercole*, 6 D. M. & G. 1; *Bates* v. *Brothers*, 2 Sm. & Giff. 509; *Long* v. *Storie*, 3 De G. & S. 308; *Metcalf* v. *York*, 1 M. & C. 547); or a share in the proceeds of land devised on an absolute trust for sale (*Thomas* v. *Cross*, 2 Dr. & Sm. 423); or land of which the debtor was mortgagee, but which has become vested by conveyance, in a purchaser or mortgagee for valuable consideration, and the debtor's mortgage paid off thereupon or previously (Judgments Act, 1855, s. 11; see *Greaves* v. *Wilson*, 25 Beav. 434).

Nature of the charge created by this section.

It has been said that that which formerly, by force of the Statute of Westminster, 13 Edw. 1, st. 1, c. 18, was a general charge upon lands, by force of this section became a specific charge (*Rolleston* v. *Morton*, 1 Dru. & War. 171, 195; Sugd. V. & P. 663, 11th ed.). So judgment creditors of an insolvent plaintiff, whose estates were sold by order of court, were necessary parties to the conveyance (*Hotham* v. *Somerville*, 9 Beav. 63). So also were judgment creditors of the heir of a devisee of land, which had been sold in a suit to administer the real estate of the testator (*Craddock* v. *Piper*, 14 Sim. 310). So also those of a prior purchaser who had entered into possession, but not paid in full, where the land was resold under an order of court in an action by the vendor (*Greycoat Hospital* v. *Westminster Commrs.*, 1 De G. & J. 531). The charge arising under this section is within the Real Estate Charges Act, 1877 (*Re Anthony, A.* v. *A.*, 1892, 1 Ch. 450). But it is an equitable charge; so it does not vest the rents in the creditor (*Seymour* v. *Lucas*, 1 Dr. & Sm. 177). So an equitable mortgagee has priority over a subsequent judgment creditor, although the latter may have acquired the legal seisin and possession of the land, under an *elegit*, without notice of the mortgage (*Whitworth* v. *Gaugain*, 1 Phil. 728; *Langton* v. *Horton*, 1 Hare, 561; see the cases as to charging orders quoted under sect. 14, *post*, p. 495). And it was held that a judgment was not such a charge on land as would, by means of registration in Middlesex, take precedence of an unregistered mortgage created before the act (*Cathrow* v. *Eade*, 1 Sm. & Giff. 423).

Proceedings in equity to enforce judgments against land under this section.

Proceedings in equity to enforce the charge given by this section must be by the person to whom the money is payable under the judgment (*Crowther* v. *Crowther*, 4 W. R. 351). After a year from entering up his judgment, a creditor might enforce his equitable charge, although a year had not elapsed since registration of the judgment (*Derbyshire R. Co.* v. *Bainbrigge*, 15 Beav. 146); but he could not proceed before a year from the entering up of the judgment (*Smith* v. *Hurst*, 10 Hare, 30). And within the year the court declined to appoint a receiver (*Smith* v. *Hurst*, 1 Coll. C. C. 705); even where fraud was alleged (*Smith* v. *Hurst*, 10 Hare, 30); except where the debtor was entitled to a life interest (*Yescombe* v. *Landor*, 28 Beav. 80; see *Partridge* v. *Foster*, 34 Beav. 1; *Tillett* v. *Pearson*, 22 W. R. 209). Upon a bill of foreclosure filed by a mortgagee after the bankruptcy of his mortgagor, a judgment creditor, who had entered up judgment against the mortgagor less than one year previously to the bankruptcy, was properly made a defendant (*Harrison* v. *Pennell*, 6 W. R. 712). Under the Land Charges Act, 1900 (*post*, p. 508), registration must now be effected, not of the judgment, but of the writ or order enforcing it.

As regards the right method of enforcing the charge, the better opinion (arrived at after some conflict of authority: *Footner* v. *Sturgis*, 5 De G. & Sm. 736; *Bull* v. *Faulkner*, 1 De G. & Sm. 685; *Ford* v. *Wastell*, 2 Phil. C. C. 591; *Jones* v. *Bailey*, 17 Beav. 582; *Messer* v. *Boyle*, 21 Beav. 559) appears to be that the remedy is foreclosure, not sale (*Re Owen*, 1894, 3 Ch. 227; *Sadler* v. *Worley*, 1894, 2 Ch. 175). A judgment creditor, who has been in possession under an *elegit*, must account in the same manner as a mortgagee in possession (*Bull* v. *Faulkner*, 1 De G. & S. 685). Judgment creditors were not allowed successive periods of three months each to redeem, but one period of three months was given to them or any of them (*Radcliff* v. *Salmon*, 4 De G. & S. 526; *Stead* v. *Banks*, 5 De G. &

1 & 2 Vict. c. 110, s. 14.

S. 560; *Bates* v. *Hillcoat*, 16 Beav. 139). As to proceedings by a tenant by *elegit* to redeem a mortgage, see *post*, p. 511.

Contribution.

As to contribution between various portions of the judgment debtor's real estate where some of them had been aliened for value after judgment, see 3 Rep. 11 b; *Hartly* v. *O'Flaherty*, Beatty, 61; and see 16 & 17 Car. 2, c. 5; *Averall* v. *Wade*, Lloyd & G. 252; *Handcock* v. *Handcock*, 1 Ir. Ch. R. N. S. 444.

Stock and shares in public funds and public companies belonging to the debtor and standing in his own name to be charged by order of a judge.

14. If any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any government stock, funds, or annuities (*a*), or any stock or shares of or in any public company in England (whether incorporated or not) (*b*) standing in his name in his own right, or in the name of any person in trust for him (*c*), it shall be lawful for a judge of one of the superior courts (*d*), on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor (*e*); provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order (*f*).

3 & 4 Vict. c. 82, s. 1. Dividends, interest, &c. Stock, &c., in court.

The Judgments Act, 1840, s. 1, after reciting the above section, declares that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent as well in any such stocks, funds, annuities or shares as aforesaid as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares: and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion in, to, or out of any such stock, funds, annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant-general of the Court of Chancery, or the accountant-general of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always, that no order of any judge as to any stock, funds, annuities or shares standing in the name of the accountant-general of the Court of Chancery or the accountant-general of the Court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stock, funds, annuities or shares or payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

1 & 2 Vict. c. 110, s. 14.

The judgment in respect of which a charging order is asked under the present section must be for an ascertained sum (*Wiggery* v. *Tepper*, 6 Ch. Div. 364; *Chadwick* v. *Holt*, 8 D. M. & G. 584); but the sum may be a sum payable at a future date (*Bagnall* v. *Carlton*, 6 Ch. D. 130). A judgment for costs is not sufficient, until they have been taxed (*Wiggery* v. *Tepper*, *sup.*; *Jones* v. *Williams*, 8 M. & W. 349; *contra*, *Burns* v. *Irving*, 3 Ch. D. 291). As to an order for payment of money to the credit of a cause, see *Ward* v. *Shakeshaft* (1 Dr. & Sm. 272). A charging order cannot be made against an executor in respect of judgment recovered against his testator (*Stewart* v. *Rhodes*, 1900, 1 Ch. 386), and leave to issue execution against the executor does not enable such an order to be made (*Ib.*). An order under sect. 109 of the Lunacy Act, 1890, charging costs on the estate of a person is not a charging order within this section and Ord. 46, r. 1 (*Re Cathcart*, 1893, 1 Ch. 466).

Judgment in respect of which charging order is made.

What can be charged.

Annuities.

(*a*) Arrears of a government annuity are not chargeable (*Taylor* v. *Turnbull*, 4 H. & N. 495). Nor is a pension granted by the East India Co. (*Morris* v. *Manesty*, 7 Q. B. 674). As to a charging order on an annuity "payable out of the suitor's fund" by order of the Lord Chancellor, in pursuance of 46 Geo. 3, c. 128, see *Witham* v. *Lynch* (1 Exch. 391).

Public companies within this section.

(*b*) A banking co-partnership, which made returns to the Stamp Office pursuant to the Country Bankers Act, 1826, was held to be a public company not incorporated within the meaning of this section (*Macintyre* v. *Connell*, 1 Sim. N. S. 225; see *Graham* v. *Connell*, 19 L. J. Ex. 361). It is doubtful whether a mining company on the cost-book principle is a public company within the meaning of this section (*Nicholls* v. *Rosewarne*, 6 C. B. N. S. 480; 7 W. R. 612).

What interest of judgment debtor can be charged.

(*c*) The following interests in stock, &c., can according to decided cases be charged under this section:—A contingent equitable interest in stock (*Baker* v. *Tynte*, 29 L. J. Q. B. 233; *Cragg* v. *Taylor* (2), L. R. 2 Ex. 131), an equity of redemption in stock (*Re Royal Bank of Australia*, 25 L. J. Ch. 649; see *Fuller* v. *Earle*, 7 Ex. 796); stock in court to the credit of a lunatic debtor (*Horne* v. *Pountain*, 23 Q. B. D. 264; *Re Leavesley*, 1891, 2 Ch. 1; *Re Plenderleith*, 1893, 3 Ch. 332; *Re Brown*, *Llewellin* v. *Brown*, 1900, 1 Ch. 489); the interest of a legatee in stock standing in the name of the testator (*Errington* v. *Prior*, 10 I. L. R. 79); the interest of the debtor in stock held on trust for him and another (*South Western Co.* v. *Robertson*, 8 Q. B. D. 17; see *Fowler* v. *Churchill*, 11 M. & W. 57). In such last-mentioned case the order need not define the extent of the chargeable interest, the trustees being responsible for giving proper effect to the order (*South Western Co.* v. *Robertson*, *sup.*, where there was a clause of forfeiture on alienation; see *White* v. *O'Grady*, 2 Ir. Ch. R. 333; *Hodgens* v. *Hodgens*, I. R. 11 Eq. 439).

What cannot be charged.

The following cannot be charged under this section:—Stock of a deceased judgment debtor in the hands of his representative (*Finney* v. *Hinde*, 4 Q. B. D. 102; *Stewart* v. *Rhodes*, 1900, 1 Ch. 386; *Wallace* v. *M'Cann*, 4 Ir. Eq. R. 522). Stock to which the debtor is entitled as executor, though he is also beneficially interested as legatee (*Taylor* v. *Turnbull*, 4 H. & N. 495; see *Hodgens* v. *Hodgens*, I. R. 11 Eq. 439). Stock forming part of an estate the proceeds of which after conversion are bequeathed to the debtor (*Dixon* v. *Wrench*, L. R. 4 Ex. 154). Stock or shares of which the debtor is only trustee (*Re Blakeley Ordnance Co.*, 25 W. R. 111; 35 L. T. 617; *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. 332; see as to the old practice, *Rogers* v. *Holloway*, 5 Man. & G. 292; *Fuller* v. *Earle*, 7 Ex. 796; *Cragg* v. *Taylor*, L. R. 1 Ex. 148); even where the shares were qualification shares standing in the name of a director, and which according to the articles of association of the company were to be held by him "in his own right" (*Cooper* v. *Griffin*, 1892, 1 Q. B. 740; *Howard* v. *Sadler*, 1893, 1 Q. B. 1). Property of a married woman which she is restrained from anticipating (*Stanley* v. *Stanley*, 7 Ch. D. 589; *Smith* v. *Whitlock*, 34 W. R. 414). Cash in court to the credit of the judgment debtor (*Brereton* v. *Edwards*, 21 Q. B. Div. 488); but such cash can be

1 & 2 Vict. c. 110, s. 14.

charged under the general jurisdiction of the court (*Ib.*; see *Re Bell, Carter* v. *Stadden*, 54 L. T. 370; 34 W. R. 363). Cash in the hands of a trustee for the judgment debtor cannot be charged (*Robinson* v. *Pearce*, 7 Dowl. 93; see *Wallace* v. *M'Cann*, 4 Ir. Eq. R. 522). An order charging an equitable debt could not be obtained (*Horsley* v. *Cox*, 4 Ch. 92); but such a debt can be attached (*Wilson* v. *Dundas*, 1875, W. N. 232).

Practice.

(*d*) Charging orders may be made by any judge of the Supreme Court (R. S. C., Ord. 46, r. 1; see *Brereton* v. *Edwards*, 21 Q. B. Div. 488); where a judge in chambers refuses an order on the ground that the shares are worthless, the court will not review his decision (*Wicks* v. *Shanks*, 67 L. T. 609). In the Queen's Bench Division the order *nisi* may be made by a master, though it cannot be discharged by him (*Mitchell* v. *De Vesey*, 67 L. T. 53). But the order absolute must be made by a judge (R. S. C., Ord. 54, r. 12 (*l*)). The person to show cause against making the order absolute must be the person against whom the judgment was recovered. So an executor cannot show cause in the case of a judgment recovered against his testator (*Stewart* v. *Rhodes*, 1900, 1 Ch. 386). The writ in an action to enforce a charging order made under this section cannot be served out of the jurisdiction (*Mority* v. *Stephan*, 58 L. T. 850; 36 W. R. 779; see *Re Gethin*, I. R. 11 Eq. 512). See further as to the practice, Dan. Ch. Pr.; Chit. Arch. 919; *Brown* v. *Bamford* (9 M. & W. 42); *Graham* v. *Connell* (19 L. J. Ex. 361); *Robinson* v. *Burbidge* (9 C. B. 289).

Forms of order.

When the fund is large and the debt small an adequate part only of the fund should be charged (*Horne* v. *Pountain*, 23 Q. B. D. 267; see *Stanley* v. *Bond*, 8 Beav. 50). In the case of a lunatic debtor the order may provide that the charge should not be enforceable till the death of the lunatic or further order (*Re Leavesley*, 1891, 3 Ch. 1). For a form of order charging shares in a company, see *Re Connell* (35 L. J. Ch. 649); *Re Imperial Association* (1868, W. N. 80). For the case of a charging order against a corporation, see *A. G.* v. *Thetford* (8 W. R. 467). See further as to forms of orders, Seton, 477 *et seq.*, 6th ed.

Charge operates from date of order *nisi*.

A charging order, when made absolute, operates from the making of the order *nisi* (*Haly* v. *Barry*, 3 Ch. 452; *Brereton* v. *Edwards*, 21 Q. B. Div. 488; see *Warburton* v. *Hill*, Kay, 470). A decree for administration subsequent to the order *nisi* will not prevent its being made absolute (*Haly* v. *Barry*, *sup.*; see *Stewart* v. *Rhodes*, 1900, 1 Ch. 386).

Effect of charging order.

(*e*) The effect of a charging order depends on the validity of the judgment, not on the capacity of the judgment debtor to give a valid charge (*Re Leavesley*, 1891, 2 Ch. 1). So a charging order founded on a valid judgment against a lunatic is good (*Ib.*; *Horne* v. *Pountain*, 23 Q. B. D. 264), and will be given effect to by the High Court in respect of funds in that court (*Re Brown, Llewellin* v. *Brown*, 1900, 1 Ch. 489). Such an order, however, does not deprive the court in lunacy of its power to dispose for the benefit of the lunatic of the funds charged (*Re Plenderleith*, 1893, 3 Ch. 332); but when his maintenance is provided for, the creditor will be allowed his legal rights (*Re Seager Hunt*, 1900, 2 Ch. 54). A charging order founded on a judgment for money lent to the judgment debtor during his infancy will have no effect at all (*Re Onslow*, 20 Eq. 677). A charging order may or may not, according to the terms of the gift, determine an interest of the debtor determinable on alienation (*Montefiore* v. *Behrens*, 1 Eq. 171; *Roffey* v. *Bent*, 3 Eq. 759; *Re Kelly, West* v. *Turner*, 59 L. T. 494; see *South Western Co.* v. *Robertson*, 8 Q. B. Div. 17). A charging order is not an execution within sect. 45 of the Bankruptcy Act, 1883 (*Re Hutchinson*, 16 Q. B. D. 515). Nor is it a "transaction" protected by sect. 49 of the same Act (*Re O'Shea, Courage* v. *O'Shea*, 1895, 1 Ch. 325). After an order has been made charging stock standing in the names of trustees, the bank is still bound to pay the dividends to the trustees, who alone are responsible for the application thereof (*Bristed* v. *Wilkins*, 3 Hare, 235; *Fowler* v. *Churchill*, 11 M. & W. 57, 323; *South Western Co.* v. *Robertson*, 8 Q. B. D. 17).

1 & 2 Vict. c. 110, s. 14.

A charging order does not give a judgment creditor priority over a prior charge, legal or equitable, even if he has no notice of it (*Re Bell, Carter* v. *Stadden*, 54 L. T. 370; 34 W. R. 363; *Haly* v. *Barry*, 3 Ch. 452; *Brearcliff* v. *Dorrington*, 4 De G. & S. 122; see *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. 338); and even if the mortgage was made after the judgment (*Scott* v. *Hastings*, 4 K. & J. 633; *Dunster* v. *Glengall*, 3 Ir. Ch. R. 47; see *Gray* v. *Stone*, 69 L. T. 282); and (in the case of stock held on trust) even if no notice was given by the mortgagee to the trustees (*Beavan* v. *Oxford*, 6 D. M. & G. 524, 532; *Kinderley* v. *Jervis*, 22 Beav. 28; *Scott* v. *Hastings*, *sup.*; see *Pickering* v. *Ilfracombe R. Co.*, L. R. 3 C. P. 235; *Robinson* v. *Nesbitt*, *Id.* 264; overruling *Watts* v. *Porter*, 3 El. & Bl. 743). A surety who, under the Public Money Drainage Act, 1856, is entitled to be recouped for over contribution out of certain stock, has priority over a judgment creditor who has a charging order on such stock (*Silk* v. *Eyre*, I. R. 9 Eq. 393).

Effect as against mortgagees.

Effect as against solicitor's lien.

Where a fund in court had been recovered by the exertions of a solicitor, he was held entitled (in respect of his lien for costs) to priority over a judgment creditor of his client, who had obtained both a charging order and a stop order (*Haymes* v. *Cooper*, 33 Beav. 431).

Final proviso.

(*f*) The proviso does not prevent the creditor from obtaining a stop order as regards dividends accruing within the six months (*Watts* v. *Jefferyes*, 3 Mac. & G. 372; see *Bristed* v. *Wilkins*, 3 Hare, 235).

Enforcement of order.

A charging order, after it has been made absolute, is not within the proviso in sect. 15 (*post*), and cannot be rescinded (*Jeffreys* v. *Reynolds*, 48 L. T. 358; *Drew* v. *Willis*, 1891, 1 Q. B. 450). A judgment creditor may, however, be restrained from proceeding on a charging order if improperly obtained (*Leese* v. *Martin*, 17 Eq. 224). The remedy of the judgment creditor who has obtained a charging order is sale, not foreclosure (*D'Auvergne* v. *Cooper*, 1899, W. N. 256; see *Ricketts* v. *Ricketts*, 1891, W. N. 29). Such a sale can only be ordered in a separate action brought for the purpose (*Leggott* v. *Western*, 12 Q. B. D. 287), which may be commenced by originating summons under R. S. C., Ord. 55, r. 5a (*Cohen* v. *Beadell*, 92 L. T. Jo. 250).

Stop orders.

Where stock is in court to the credit of the debtor, a charging order, made by any judge of the High Court and duly notified to the paymaster-general, will bind it without any stop order (*Brereton* v. *Edwards*, 21 Q. B. Div. 488; S. C. Funds Rules, 99). A stop order may be obtained without any preliminary charging order having been made (*Hopewell* v. *Barnes*, 1 Ch. D. 630; *Shaw* v. *Hudson*, 48 L. J. Ch. 689). See further as to stop orders, R. S. C., Ord. 46, rr. 12 and 13, and the forms in Seton, 6th ed. 491 *et seq.*

Charging orders under other jurisdiction.

In addition to powers contained in the above sections, charging orders may be made by way of equitable execution under the general equitable jurisdiction of the court. Such orders have been made in the case of cash in court (*Brereton* v. *Edwards*, 21 Q. B. Div. 488), and in the case of the assets of a firm in the hands of a receiver (*Kewney* v. *Attrill*, 34 Ch. D. 345; *Re Cardus*, *Armstrong* v. *Paris*, 1888, W. N. 17).

Equitable execution.

Partnership.

In the case of a judgment against a partner the partnership assets cannot be taken in execution, but an order charging his interest in the partnership may be obtained (Partnership Act, 1890, s. 23). Such an order is not a transaction protected by sect. 49 of the Bankruptcy Act, 1883 (*Wild* v. *Southwood*, 1897, 1 Q. B. 317). The section applies in the case of foreign firms having a branch in England (*Brown, Janson & Co.* v. *Hutchinson*, 1895, 1 Q. B. 737). Accounts should only be directed under this section under special circumstances (*S. C.*, 1895, 2 Q. B. 126). Such an order was enforced by sale in *Re Seager Hunt* (1900, 2 Ch. 54). See generally, as to the practice, R. S. C., Ord. 46, rr. 1 a, 1 b.

Cost in Lunacy.

The costs of proceedings in lunacy may be charged on the property of the lunatic or alleged lunatic (Lunacy Act, 1890, s. 109; *Re Cathcart*, 1893, 1 Ch. 466).

1 & 2 Vict. c. 110, s. 15.

Order of judge to be made in the first instance ex parte, and on notice to the bank or company to operate as a distringas.

15. [*And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities or shares hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted that*] every order of a judge charging any government stock, funds or annuities, or any stock or shares in any public company, under this act, shall be made in the first instance ex parte, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain [*the Governor and Company of*] the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and [*that*] if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then and in such case the corporation, or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and [*that*] no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, [*that*] unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit.

See the note to preceding section. The words in italics have been repealed by the Stat. Law Rev. Act, 1874. For the notice which has now been substituted for the old writ of distringas, see R. S. C., Ord. 46, r. 3 *et seq.*

[*Sect.* 16 *as to taking the body of a debtor was repealed by S.L.R. Act*, 1874.]

Judgment debts to carry interest.

17. Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment [*or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest,*]

until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. 1 & 2 Vict. c. 110, s. 17.

The words in italics were repealed by the Civil Procedure Acts Repeal Act, 1879.

Formerly a judgment did not carry interest, but interest might be recovered in the shape of damages (*Gaunt* v. *Taylor*, 3 M. & K. 302).

A judgment given for securing an annuity carries interest under this section (*Knight* v. *Bowyer*, 4 De G. & J. 619). Where a judgment was entered by consent for a sum to be paid by half-yearly instalments, no interest was payable so long as the instalments were duly paid (*Caudery* v. *Finnerty*, 66 L. T. 684). A judgment of a county court does not carry interest (*R.* v. *Essex*, 18 Q. B. D. 704).

The interest payable under this section is a debt due from the judgment debtor (*Re Clagett*, 36 W. R. 653); and may be included in a bankruptcy notice on the judgment (*Re Lehmann*, 62 L. T. 941). On the recovery of judgment on a covenant the covenant is merged in the judgment (*Ex parte Fewings*, 25 Ch. D. 355). But a mortgagee may on the construction of his deed be entitled to retain his security until paid interest at a rate higher than 4 per cent. (*Economic Society* v. *Usborne*, 1902, A. C. 147; see cases quoted *ante*, p. 208). The interest given by this section runs, if the judgment is pronounced in court, from that date (R. S. C. Ord. 41, r. 3; Ord. 42, r. 16), otherwise from the date of the entering up (R. S. C. Ord. 41, rr. 3, 4; Ord. 42, r. 16).

The judgment carries interest until satisfaction. As to when a judgment at law is satisfied for the purpose of carrying interest, see *Sinclair* v. *G. E. R. Co.* (L. R. 5 C. P. 391).

Where execution is delayed by an appeal, interest is given under R. S. C. Ord. 58, r. 19. As to interest where the judgment of a colonial court is reversed by the privy council, see *Rodger* v. *Comptoir d'Escompte* (L. R. 3 P. C. 465). Appeal.

This section applies to judgments as well for costs as for the subject-matter of the action (*Pitcher* v. *Roberts*, 12 L. J. Q. B. 178; see *Newton* v. *Conyngham*, 17 L. J. C. P. 288); interest running in the absence of special order, from the date of the judgment (*Pyman* v. *Burt*, 1884, W. N. 100; *Landowners' Co.* v. *Ashford*, 33 W. R. 41; *Re London Wharfing Co.*, 53 L. T. 112; 33 W. R. 836; *Boswell* v. *Coaks*, 57 L. T. 742; 36 W. R. 65; *Taylor* v. *Roe*, 1894, 1 Ch. 413). The section does not apply where the costs are directed to be paid out of an estate, as in an administration action (*Re Marsden, Withington* v. *Neumann*, 40 Ch. D. 475; *A.-G.* v. *Nethercote*, 11 Sim. 529; see the Solicitors Act, 1860, s. 27). Nor does the section apply to costs given in a foreclosure action (*Eardley* v. *Knight*, 41 Ch. D. 537); but where in such a case the costs are ordered to be added to the security, then, independently of this section, interest at 4 per cent. runs from the date of the taxing master's certificate (*Ib.*; *Lippard* v. *Ricketts*, 14 Eq. 291). As to the payment of interest on costs on an appeal, see *Edge* v. *Gallon* (1899, W. N. 137). Costs.

See also as to payment as between solicitor and client of interest on costs, Solicitors' Remuneration Act, 1881, Ord. 7; *Blair* v. *Cordner* (19 Q. B. D. 516).

See further the note as to interest generally, *ante*, p. 206.

18. All decrees or orders of courts of equity, and all rules of courts of common law, [*and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy,*] and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs, charges or expenses, shall be payable shall be Decrees and orders of courts of equity, &c. to have effect of judgments.

1 & 2 Vict. c. 110, s. 18.

deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending, [*and by the Lord Chancellor and the court of review in matters of bankruptcy,*] and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses are by such orders or rules respectively directed to be paid.

The words in *italics* were repealed by the S. L. Rev. Act, 1874.

This section is extended to the equity court of Durham as to lands within its jurisdiction (Judgments Act, 1855, s. 2). As to enforcing a judgment of the Durham court against land outside its jurisdiction, see Palatine Court of Durham Act, 1889, s. 3. As to the Lancaster court, see the Court of Chancery of Lancaster Act, 1850, s. 24.

Cases under this section.

A decree ordering a defendant to pay a sum of money, interest and costs, when ascertained, was held to be within this section (*Beaufort* v. *Phillips*, 1 De G. & Sm. 321). Also a judgment entered up under the Solicitors Act, 1843, s. 43 (*Griffiths* v. *Hughes*, 16 M. & W. 809); and an interlocutory order for payment of costs by one person to another (*Taylor* v. *Roe*, 1894, 1 Ch. 413); but not a decree for an account and payment of what should be found due (*Chadwick* v. *Holt*, 8 D. M. & G. 584; *Garner* v. *Briggs*, 6 W. R. 378); nor an order for a foreclosure (*Burrows* v. *Holley*, 35 Ch. D. 123); nor the chief clerk's certificate finding money to be due to a party, though adopted by the judge (*Manefield* v. *Ogle*, 4 De G. & J. 38); nor a decree directing payment to the credit of a cause (*Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269; *Ward* v. *Docker*, 5 Jur. N. S. 1287; compare *Re Leeds Bank*, 1 Ch. 150; *Johnson* v. *Burgess*, 15 Eq. 398; see *Gibbs* v. *Pike*, 9 M. & W. 351; see *Exp. Hammond Brown*, 67 L. T. 234). As to enforcing a decree in the last-mentioned form, see R. S. C. Ord. 42, r. 4; *Re Coney*, *Coney* v. *Bennett*, 29 Ch. D. 993; *Re Whiteley*, *Whiteley* v. *Learoyd*, 56 L. T. 846; *De la Pole* v. *Dick*, 29 Ch. Div. 351.

A rule for taxation of costs, and an allocatur of the master, do not amount to a judgment within this section (*Shaw* v. *Neale*, 6 H. L. C. 581); nor a judge's order for payment of money obtained *ex parte* (*Richards* v. *Patterson*, 8 M. & W. 313; see *Neale* v. *Postlethwaite*, 8 Dowl. P. C. 100).

Enforcement of judgment or orders.

Under R. S. C. Ord. 42, r. 3, a judgment for the payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the Jud. Act, 1873, might have been enforced at the time of the passing thereof. And under R. S. C. Ord. 42, r. 24, every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect. Any person not a party to a cause or matter in whose favour any order is made may enforce such order by the same process as if he were a party, and a judgment or order may be enforced against him as if he were a party (R. S. C. Ord. 42, r. 26). By sects. 93 and 94 of the Bankruptcy Act, 1883, the Court of Bankruptcy was united with the Supreme Court. And under the Bankruptcy Rules, 1886, No. 93, every order of the court in bankruptcy may be enforced as if it were a judgment to the same effect (see also r. 107).

Orders in bankruptcy.

Execution.

Every person to whom any sum of money or any costs shall be payable under a judgment shall, so soon as they are payable, be entitled to execution (R. S. C. Ord. 42, r. 17; see before this rule *Doe* v. *Barrell*, 10 Q. B. 531; *Doe* v. *Hampson*, 5 Dowl. & L. 484; *Wallis* v. *Sheffield*, 3 Jur. 1002; *Hill* v. *Brown*, 16 M. & W. 796). And where costs are given to be ascertained by taxation, a separate writ may be issued for them when taxed (R. S. C. Ord. 42, r. 18; *Harris* v. *Jewell*, 1883, W. N. 216; see before

this rule, *Jones* v. *Williams*, 8 M. & W. 349; *Hodgson* v. *Patterson*, 5 Scott, N. R. 76; *Cetti* v. *Bartlett*, 9 M. & W. 840). As to a judgment on a condition, see R. S. C. Ord. 42, r. 9; *Gibbs* v. *Flight* (13 C. B. 803). 1 & 2 Vict. c. 110, s. 18.

Under the Arbitration Act, 1889, a submission, unless a contrary intention is expressed therein, has the same effect as if it had been made an order of court (sect. 1), and an award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect (sect. 12). Awards.

For the older cases as to enforcing awards under this section, see *Jones* v. *Williams* (11 Ad. & Ell. 175); *Dickenson* v. *Allsop* (13 M. & W. 722); *Fawcett* v. *E. C. R. Co.* (6 Dowl. & L. 54); *Mackenzie* v. *Sligo R. Co.* (9 C. B. 250); *Lambe* v. *Jones* (9 C. B. N. S. 478); *Lloyd* v. *Harris* (8 C. B. 63).

[*Sect.* 19, *providing for the registration of judgments, was repealed by the Land Charges Act*, 1900.

Sect. 20, *providing for new or altered writs to give effect to the Judgments Act*, 1838, *was repealed by the Civil Procedure Acts Repeal Act*, 1879. *See now R. S. C. Ord.* 42, *r.* 14.

Sect. 21 *extended the provisions of the Judgments Act*, 1838, *to the Common Law Courts of Lancaster and Durham, the jurisdiction of which was transferred to the High Court by the Judicature Act*, 1873, *s.* 16.

Sect. 22 *contains provisions for the removal of judgments of inferior courts into the High Court for the purpose of enforcement.*]

II.—Judgments Act, 1839.

2 & 3 Vict. c. 11, s. 7.

Registration of Lis Pendens.

7. No lis pendens shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade or profession, of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such lis pendens; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions hereinbefore contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of lis pendens which shall be registered under the provisions of this act. 2 & 3 Vict. c. 11, s. 7. Purchasers not to be affected by any *lis pendens*, unless such suit is duly registered as directed by this act.

Lis pendens affects a purchaser not because it amounts to notice, but

2 & 3 Vict. c. 11, s. 7.

because the law does not allow one party, *pendente lite*, to alienate the property in dispute so as to affect his opponent (*Bellamy* v. *Sabine*, 1 De G. & J. 578; *Price* v. *Price*, 35 Ch. D. 302). There should be no registration as a *lis pendens*, unless a claim is made in the proceeding against some specific property (*Ex p. Thornton*, 2 Ch. 178). As to the doctrine of *lis pendens* generally, see *Bellamy* v. *Sabine* (1 De G. & J. 566); *Kinsman* v. *Kinsman* (1 R. & M. 617); *Wigram* v. *Buckley* (1894, 3 Ch. 483). As to the protection afforded by registration, see *Beyfus* v. *Bullock* (7 Eq. 391). And as to negligence on the part of a solicitor for not registering a *lis pendens*, see *Plant* v. *Pearman* (20 W. R. 314).

What is *lis pendens*.

An order under sect. 7 of the S. L. A. 1884, may be registered as a *lis pendens* (see sub-sects. (5) and (6) of that section, *post*). In the following cases the proceeding was held to be a *lis pendens:* a suit to establish a will (*Garth* v. *Ward*, 2 Atk. 174); a redemption action by a mortgagor (*Ib.*); a foreclosure action by a mortgagee (*Winchester* v. *Paine*, 11 Ves. 194); an action for specific performance (see *Baxter* v. *Middleton*, 1898, 1 Ch. 313). A case where there are questions between co-defendants may be a *lis pendens*, as regards a purchaser from one of them (*Tyler* v. *Thomas*, 25 Beav. 47; see *Bellamy* v. *Sabine*, 1 De G. & J. 566). When debts are charged upon real estate, a creditor's action to administer real and personal estate, if registered as a *lis pendens*, will give the plaintiff priority over the assign of any defendant entitled to real estate under the will, except when such assign had a right to suppose that such defendant was dealing with the property to pay debts (*Price* v. *Price*, 35 Ch. D. 304). When debts are not charged, registration of such an action will give priority, when, and only when, the real estate sought to be charged is sufficiently indicated; the above exception, however, applying in this case also (*Ib.* 305).

What is not *lis pendens*.

In the following cases the proceeding was held not to be a *lis pendens*. An action relating to money secured on the land (*Worsley* v. *Scarborough*, 2 Atk. 392; see, however, *Norris* v. *Stuart*, 16 Beav. 359). A partnership action, as against the real estate of one of the partners (*Ex p. Thornton*, 2 Ch. 176). A suit for a divorce is not a *lis pendens*, as regards the property included in the marriage settlements, until decree (*Wigney* v. *Wigney*, 7 P. D. 228). After decree and before execution there is no *lis pendens* (*Kinsman* v. *Kinsman*, 1 R. & M. 617; *Worsley* v. *Scarborough*, 3 Atk. 392), unless the decree is only for an account, and is not final (*Worsley* v. *Scarborough*, *sup.*). The doctrine of *lis pendens* does not apply to personal property other than chattel interests in land (*Wigram* v. *Buckley*, 1894, 3 Ch. 483; see *Berry* v. *Gibbons*, 8 Ch. 747).

Satisfaction.

Satisfaction may be entered as to a registered *lis pendens* under the Crown Debts and Judgments Act, 1860, s. 2; and the court may order the vacating of the registration of a *lis pendens* where the suit has determined, or where the court is satisfied that the litigation is not being prosecuted *bonâ fide* (the Lis Pendens Act, 1867, s. 2). Thus registration was vacated where plaintiff did not appear at trial (*Reilly* v. *Richardson*, 43 S. J. 457). An order under the section may be made upon separate motion (*Clutton* v. *Lee*, 7 Ch. D. 541, n.; *Pooley* v. *Bosanquet*, *Ib.*; *Jervis* v. *Berridge*, 23 W. R. 43), or may be included in the judgment dismissing the action (*Baxter* v. *Middleton*, 1898, 1 Ch. 313; where the order was made, "unless an appeal is set down within a fortnight"). Registration against a person not party to the action may be vacated (*Schofield* v. *Solomon*, 52 L. T. 679; 54 L. J. Ch. 1101).

Palatine Courts.

With respect to land within the jurisdiction of a Palatine Court no *lis pendens* shall bind purchasers unless registered in the Palatine Court (Judgments Act, 1855, s. 3; see Land Charges Act, 1900, s. 5, and schedule).

III.—Judgments Act, 1864.

27 & 28 Vict. c. 112, ss. 4—7.

27 & 28 Vict. c. 112, s. 4.

Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale.

4. Every creditor (*g*) to whom any land of his debtor shall have been actually delivered in execution (*h*) by virtue of any such judgment (*i*), statute, or recognizance [*and whose writ or other process of execution shall be duly registered*], shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of the debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper (*k*); and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable.

Land Charges Act, 1900.

(*g*) The Land Charges Act, 1900 (*post*, p. 513), has repealed sects. 1—3 of the present act and also the words in the above section printed in italics. By sect. 2 of the Land Charges Act, 1900, no judgment can operate as a charge on land until a writ or order for enforcing it has been registered under sect. 5 of the Land Charges Act, 1888. Having regard to this provision and to the unrepealed words of the present section, "while the registry of such writ or process shall continue in force," it would seem that before a judgment creditor can obtain an order for sale under the section, he must still obtain and register a writ or order for enforcing his judgment.

Who is a creditor.

A plaintiff in an administration suit who had obtained an order for payment into court, and issued sequestration, was not a creditor within this section (*Johnson* v. *Burgess*, 15 Eq. 398).

Actual delivery necessary.

(*h*) A sale has been refused where there had been no delivery (*Re Cowbridge R. Co.*, 5 Eq. 413; see *Guest* v. *Cowbridge R. Co.*, 6 Eq. 619; *Re Newcastle*, 8 Eq. 700; *Kidd* v. *Tallentire*, 1877, W. N. 21).

Actual delivery in execution.

(*i*) As regards the question, what amounts to actual delivery in execution within the present section, it seems that the decisions under (the repealed) sect. 1 of the Judgments Act, 1864, would apply. That section provided that no judgment, statute or recognizance should affect land until such land should have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, statute or recognizance. And under that section the following were held to amount to actual delivery in execution, viz.:—The return of the sheriff to a writ of elegit, the land not having been entered on (*Champneys* v. *Burland*, 19 W. R. 148); delivery of the seisin before the return (*Re Hobson*, 55 L. T. 255); sequestration (*Re Rush*, 10 Eq. 442). But not (as regards freeholds) the mere issue of an elegit which cannot be executed, because the land is already taken under a prior elegit (*Re Cowbridge R. Co.*, 5 Eq. 413; *Hatton* v. *Haywood*, 9 Ch. 229), nor (as regards an equitable interest in leaseholds), the issue and registration of a *fi. fa.* (*Backhouse* v. *Siddle*, 38 L. T. 487).

Receivership order.

Further, as regards a receivership order, it was held that this amounted to actual delivery of the land in execution within sect. 1 of the Judgments Act, 1864 (*Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 293; *Ex p. Evans*, 13

27 & 28 Vict. c. 112, s. 4.

Ch. Div. 257; *Re Pope*, 17 Q. B. Div. 751), except in the case of a legal estate in remainder (*Re Harrison and Bottomley*, 1899, 1 Ch. 465; see *Jones* v. *Barnett*, 1900, 1 Ch. 370).

Receivership orders as to land, generally.

It has been laid down generally, in a case where a judgment was sought to be enforced against land, that the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law (*Re Shephard, Atkins* v. *Shephard*, 43 Ch. D. 135; *Levasseur* v. *Mason*, 1891, 2 Q. B. 79). There is no jurisdiction to appoint a receiver merely because it would be more convenient than the usual mode of execution (*Harris* v. *Beauchamp*, 1894, 1 Q. B. 801; see *Manchester Banking Co.* v. *Parkinson*, 22 Q. B. Div. 173). A receiver has been appointed—(1) where legal delivery in execution of land was impossible owing to a legal impediment, such as a legal mortgage (*Anglo-Italian Bank* v. *Davies, sup.*; *Smith* v. *Cowell*, 6 Q. B. Div. 75; *Chatterton* v. *Watney*, 17 Ch. Div. 261; *Cadogan* v. *Lyric Theatre*, 1894, 3 Ch. 338; see the cases where the legal estate was in trustees; *Wells* v. *Kilpin*, 18 Eq. 298; *Tillett* v. *Pearson*, 43 L. J. Ch. 93; 22 W. R. 209); (2) of a remainder in real estate (*Re Harrison and Bottomley*, 1899, 1 Ch. 465; see *Re Hamilton*, 31 Ch. Div. 294; *Cadman* v. *Cadman*, 33 Ch. Div. 400; and compare the cases where a receiver has been appointed of reversionary interests in personalty, *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Macnicoll* v. *Parnell*, 35 W. R. 773; *Tyrrell* v. *Painton*, 1895, 1 Q. B. 202; *Flegg* v. *Prentiss*, 1892, 2 Ch. 428; *Beamish* v. *Stephan*, 18 L. R. Ir. 319). See further, Kerr. 48 *et seq.*

A receivership order as regards land obtained by a judgment creditor has been held to constitute him a secured creditor in bankruptcy (*Ex p. Evans*, 13 Ch. Div. 252). See, as regards personal estate, *Re Potts*, 1893, 1 Q. B. 648; *Croshaw* v. *Lyndhurst Co.*, 1897, 2 Ch. 154.

Lands of a railway company.

(*k*) An order was made under this section for the sale of lands of a railway company (*Re Bishop's Waltham R. Co.*, 14 W. R. 1008); on appeal, the court expressed an opinion that the railway was not saleable, and directed inquiries as to the nature of the company's interest (*S. C.*, 2 Ch. 382). Superfluous lands belonging to a railway company have been ordered to be sold (*Re Calne R. Co.*, 9 Eq. 658; *Re Hull and Hornsea R. Co.*, 2 Eq. 262; *Ex p. Grissell*, 2 Ch. 385; *Re Ogilvie*, 7 Ch. 174; *Re Hull and Barnsley R. Co.*, 40 Ch. D. 119). Debenture holders have not under the Railway Cos. Act, 1867, s. 23, a charge on surplus land in priority to creditors selling under the present section (*Re Hull and Barnsley R. Co., sup.*). As to schemes of arrangement by railway companies and the restraining of actions and executions in such a case, see Railway Cos. Act, 1867; *Re Cambrian R. Co.* (3 Ch. 278); *Re Potteries, &c. R. Co.* (5 Ch. 67).

Practice.

The application for a sale should be made by originating summons (R. S. C. Ord. 55, r. 9B). If made by petition, only the costs of a summons will be allowed (*Re Harrison and Bottomley*, 1899, 1 Ch. 465; *Re Martin and Varlow*, 43 W. R. 247). Where the land had been delivered in execution the court refused to appoint a receiver until sale (*Re Nixon*, 1886, W. N. 191).

Inquiries.

Inquiries were dispensed with where sufficient evidence was adduced at the hearing of the petition (*Re Bithray*, 61 L. T. 383; 38 W. R. 60; *Re Calne R. Co.*, 9 Eq. 658). For general form of order with inquiries, see Seton, 6th ed. 2062 *et seq.*; *Re Cowper* (60 L. T. 95; 37 W. R. 330); *Re Holder* (1890, W. N. 55); *Howson* v. *Trant* (21 W. R. 781). As to inquiries where an official liquidator petitioned for sale of the lands of a contributory, see *Re Kirby* (14 L. T. 615); and as to inquiries in other cases, see *Ex p. Clark* (6 N. R. 335).

As to service on other judgment creditors, see sect. 5, *infra*.

Where there are other creditors, notice of sale to be served upon them.

5. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner)

shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities. 27 & 28 Vict. c. 112, s. 5.

The priorities of judgment creditors *inter se* are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff (*Guest* v. *Cowbridge R. Co.*, 6 Eq. 619).

6. Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon. Parties claiming interest through debtor bound by order for sale.

7. This act shall not extend to Ireland. Extent of act.

IV.—The Land Charges Registration and Searches Act, 1888.

51 & 52 Vict. c. 51.

Part I.—Introductory.

1. This act may be cited as the Land Charges Registration and Searches Act, 1888. 51 & 52 Vict. c. 51, s. 1. Short title.

2. This act shall come into operation on the first day of January one thousand eight hundred and eighty-nine, which day is in this act referred to as the commencement of this act: Provided that any rules under this act may be made, and any other thing for the purpose of bringing this act into operation may be done, at any time after the passing thereof, but any such rules or thing shall not take effect until the commencement of this act. Commencement.

3. This act shall not extend to Scotland or Ireland. Extent.

4. In this act: Interpretation.

"Land" includes lands, messuages, tenements, and hereditaments corporeal and incorporeal of any tenure.

"Purchaser for value" includes a mortgagee or lessee, or other person who for valuable consideration takes any interest in land or in a charge on land, and "purchase" has a meaning corresponding with purchaser.

51 & 52 Vict. c. 51, s. 4.

"Person" includes a body of persons corporate or unincorporate.

"Prescribed" means prescribed by any general rules made in pursuance of this act.

"Act of Parliament" includes local and personal act.

"Land charge" means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any act of parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an act of parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot (*l*).

24 & 25 Vict. c. 133.
46 & 47 Vict. c. 61.

50 & 51 Vict. c. 57.

"Deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887.

"Judgment" does not include an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment.

(*l*) The charge arising under the Public Health Act, 1875, s. 257, for repayment of expenses incurred by a local authority is not a "land charge" within this act, and need not be registered (*R.* v. *Land Registry*, 24 Q. B. Div. 178).

Part II.—Registration of Writs and Orders affecting Land.

Register of writs and orders affecting land.

5.—(1.) There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land (*m*).

(2.) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

(3.) The registration of a writ or order in pursuance of this act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4.) Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary,

registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other act. 51 & 52 Vict. c. 51, s. 5.

(*m*) The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof (S. L. A. 1890, s. 19, *post* see *Cook* v. *Cook*, 15 P. D. 116).

Protection of purchasers against non-registered writs and orders.

6. Every such writ and order as is mentioned in section five, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this act.

Provided that—

* * * *

(b) where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration.

This section has been extended to Crown judgments by sect. 3 of the Land Charges Act, 1900 (*post*, p. 513); and by sect. 5 of the same act proviso (a), which was temporary, has been repealed.

As to registering a *lis pendens*, see *ante*, p. 499.

Part III.—Registration of Deeds of Arrangement.

Register of deeds of arrangement affecting land.

7. A register (in this act called the register of deeds of arrangement affecting land) shall be kept at the Office of Land Registry, and deeds of arrangement may be registered therein, in the prescribed manner, in the name of the debtor.

Registration of deeds of arrangement.

8. A deed of arrangement may be registered in the register of deeds of arrangement affecting land on the application of a trustee of the deed, or of a creditor assenting to or taking the benefit of the deed, and the registration may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Protection of purchasers against unregistered deeds of arrangement.

9. Every deed of arrangement, whether made before or after the commencement of this act, shall be void as against a person who, after the commencement of this act, becomes a purchaser for value of any land comprised therein or affected thereby, unless and until such deed is registered in the register of deeds of arrangement affecting land: Provided that nothing in this section shall affect any deed of arrangement made before the commencement of this act until the expiration of one year from the commencement of this act if registered within that year.

Part IV.—Registration of Land Charges.

51 & 52 Vict. c. 51, s. 10.

Registry of land charges.

10. A register, in this act called the register of land charges, shall be kept at the Office of Land Registry, and land charges may be registered therein in the prescribed manner:—

(1.) In the case of freehold land, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge:

(2.) In the case of copyhold land, in the name of the tenant on the court rolls at the time of the creation of the land charge.

Provided that where the person by or on behalf of whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or a life at a rent or to a term of years the land charge shall be registered also in the name of that person.

Expenses.

11. The expenses incurred by the person entitled to a land charge created before the commencement of this act in causing the charge to be registered in the register of land charges shall be deemed to form part of such land charge, and shall be recoverable by him accordingly on the day for payment of any part of such land charge next after such expenses are incurred.

Protection of purchasers against unregistered charges.

12. A land charge created after the commencement of this act shall be void as against a purchaser for value of the land charged therewith, or of any interest in such land, unless and until such land charge is registered in the register of land charges in the manner mentioned in this act.

Non-registered land charge existing at commencement of this act.

13. After the expiration of one year from the first assignment by act *inter vivos*, occurring after the commencement of this act, of a land charge created before the commencement of this act, the person entitled thereto shall not be able to recover the same, or any part thereof, as against a purchaser for value of the land charged therewith or of any interest in such land, unless such land charge is registered in the registry of land charges in the manner mentioned in this act prior to the completion of the purchase.

Vacation of entry.

14. The registration of a land charge may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Part V.—Supplemental.

Index to registers.

15. An alphabetical index in the prescribed form shall be kept at the Office of Land Registry of all entries made in any register kept at that office pursuant to this act.

16. Any person may search in any register or index kept in pursuance of this act on paying the prescribed fee. 51 & 52 Vict. c. 51, s. 16.

Searches.

See, generally, as to searches for judgments, writs, or orders, Elphinstone and Clark on Searches.

17. The provisions as to searches in the Central Office, requisitions, certificates, officers, clerks, persons, and for the protection of solicitors, trustees, agents, and other persons in a fiduciary position contained in the second section to the Conveyancing Act, 1882, except so much of those provisions as relates to the making of general rules, shall apply to searches in any register or index kept in pursuance of this act in the register of *lis pendens*, the register of deeds of arrangement affecting land, and the register of land charges, in the same manner as if this act had been described in Part I. of the First Schedule to the Conveyancing and Law of Property Act, 1881. Official searches. 45 & 46 Vict. c. 39. 44 & 45 Vict. c. 41.

18. The Lord Chancellor may at any time after the passing of this act, and from time to time, with the concurrence of the Commissioners of her Majesty's Treasury as to fees, make such general rules as may be required for carrying this act into effect. General rules.

The following rules have been issued:—

Rule 1.—The several registers established by the act shall contain the following particulars respectively, or such other particulars as the registrar shall from time to time determine:—

1. The register of writs and orders shall contain: (*a*) The name, address, and description of the person whose land is affected. (*b*) The date and nature of the writ or order, and the court, and the action or matter, by and in which the writ or order was issued or made. (*c*) The date of registration, and of any renewal of registration. (*d*) The name and address of the applicant or of the solicitor (if any) making the application.
2. The register of deeds of arrangement shall contain: (*a*) The name, address, and description of the person whose land is affected. (*b*) The date of the deed and the names of the parties, provided that where the creditors are numerous it shall not be necessary to specify more than three. (*c*) The date of registration. (*d*) The name and address of the applicant or of the solicitor (if any) making the application.
3. The register of land charges shall contain: (*a*) The name, address, and description, and capacity (that is to say, whether—(i.) beneficially entitled to the first estate of freehold; (ii.) tenant on the court rolls; or (iii.) beneficially entitled to a lease for lives or a life at a rent or for years) of the person in whose name the registration is made. (*b*) The date of the charge, the statute under which it is made, and the parish in which the land charged is situated. (*c*) The date of registration. (*d*) The name and address of the applicant or of the solicitor (if any) making the application.

Rule 2.—Every application for registration shall, unless made by a solicitor, be supported by the statutory declaration of the applicant as to the truth of the particulars set forth in it.

Rule 3.—The alphabetical index shall consist of the registers themselves, all entries in such registers being made alphabetically in the manner now used in the register of judgments in the Central Office of the High

51 & 52 Vict. c. 51, s. 18.

Court of Justice, or in such other manner as the registrar shall from time to time determine.

Rule 4.—Application for registration, searches (official and otherwise), and official certificates shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the schedule hereto, or in such other forms as the registrar shall from time to time determine.

Rule 5.—Forms shall be sold at the office of Land Registry.

Rule 6.—Certificates of official searches shall be marked with the stamp of the Search Department of the Land Registry, and shall be issued as soon as possible after receipt of the applications.

Rule 7.—In any case of modification or cancellation of entries on the register, such evidence in respect thereof as the registrar shall from time to time think necessary, shall be required.

Rule 8.—These rules may be cited as the Land Charges Rules, 1889.

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For the forms, see W. N. 12 Jan. 1889; and the fees, see W. N. 8 Sept. 1900.

V.—The Land Charges Act, 1900.

63 & 64 Vict. c. 26.

An Act to amend the Law relating to Charges on Land and to matters connected therewith. [30th July, 1900.]

63 & 64 Vict. c. 26, s. 1.

Transfer to Land Registry Office of business relating to the registry of judgments.

1.—(1.) The business of the registrar of judgments hitherto conducted in the Central Office of the Supreme Court shall be conducted in the Office of Land Registry, and the Lord Chancellor may by order provide for transferring to the office of Land Registry such officers as may be required for conducting that business, and such books and papers as may be needed in connexion therewith, and for carrying out any arrangements incidental to or consequential on the transfer, and for abolishing the office of registrar of judgments.

(2.) Provided that nothing in this section shall apply to the registry of Scotch and Irish judgments established under the Judgments Extension Act, 1868, and the Inferior Courts Judgments Extension Act, 1882, or any Act amending the same.

31 & 32 Vict. c. 54.

45 & 46 Vict. c. 31.

(3.) This section shall come into operation on such day as the Lord Chancellor at any time after the passing of this Act may by order direct.

Under order dated the 3rd August, 1900, this section came into operation on the 1st Sept. 1901; and there were directed to be transferred to the Office of the Land Registry: (1) All registers and applications for registration relating to English judgments, *lis pendens*, Crown debts, executions and annuities; (2) All day books and account books; (3) All certificates of official searches; (4) All *præcipes* for ordinary searches from the 1st day of January, 1900 (L. R. Current Index, 1900, p. xcii.).

The duties of the registrar of judgments are referred to in R. S. C., Ord. 61, r. 22. They included the registration of annuities under the Judgments Act, 1855, s. 12. As to an unregistered annuity, see *Greaves* v. *Tofield*, 14 Ch. D. 563.

63 & 64 Vict. c. 26, s. 2.

Closing of register of judgments.

51 & 52 Vict. c. 51.

2.—(1.) A judgment or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under section five of the Land Charges Registration and Searches Act, 1888.

(2.) This section shall apply to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date, in like manner as it applies to a judgment.

(3.) Except under an order of the High Court, no entry shall be made in any register kept under sections nineteen and twenty-one of the Judgments Act, 1838, section eight of the Judgments Act, 1839, the Law of Property Amendment Act, 1860, the Judgments Act, 1864, or the Crown Suits, &c. Act, 1865.

1 & 2 Vict. c. 110.
2 & 3 Vict. c. 11.
23 & 24 Vict. c. 38.
27 & 28 Vict. c. 112.
28 & 29 Vict. c. 104.

(1) *Previous Law as to Registration of Judgments, &c.*....509.
(2) *Present Law*...510.
(3) *Methods of enforcing Judgments against Land*...510.
(4) *Crown Debts*...511.
(5) *Priority of Judgments in Administration*...512.

(1) Previous law as to registration of judgments and writs.

The words of this section read together with the repeal contained in sect. 5 render it necessary to state in outline the legislation in relation to the registration of judgments and writs.

Prior to the Judgments Act, 1838, judgments, in order to affect lands as to *bonâ fide* purchasers, had to be docketed under 4 & 5 Will. & M., c. 20, made perpetual by 7 & 8 Will. 3, c. 36, s. 3. These dockets were closed, and judgments docketed directed to be registered under Judgments Act, 1838 (Judgments Act, 1839, ss. 1, 2; see *Bedford* v. *Forbes*, 1 Carr. & K. 33).

Dockets. 1692 to 1838.

By the Judgments Act, 1838, s. 11, the sheriff was empowered under a writ of elegit to deliver in execution to the judgment creditor the whole of the judgment debtor's lands. By sect. 13, judgments were made a charge on land. But, as against purchasers, mortgagees or creditors (see as to creditors, *Simpson* v. *Morley*, 2 K. & J. 71), no judgments could affect any land until registered as prescribed by sect. 19. It was necessary to repeat the registration every five years (Judgments Act, 1839, s. 4; Judgments Act, 1855, s. 6). Where these conditions were not complied with a purchaser was not bound even though he had notice (Judgments Act, 1840, s. 2; Judgments Act, 1855, ss. 4, 5). And even where judgments were duly registered, they did not affect purchasers and mortgagees without notice further than a judgment of one of the superior courts would have done before the Judgments Act, 1838, where such judgment had been docketed according to the then law (Judgments Act, 1839, s. 5). See *Westbrook* v. *Blythe*, 3 E. & B. 737; *Robinson* v. *Woodward*, 4 De G. & Sm. 562; *Hughes* v. *Lumley*, 4 E. & B. 274; *Benham* v. *Keane*, 1 J. & H. 685; 3 D. F. & J. 318. See further as to notice, Judgments Act, 1840, s. 2; Judgments Act, 1855, ss. 4, 5; *Nortcliffe* v. *Warburton*, 10 W. R. 635; *Lee* v. *Green*, 6 D. M. & G. 155; *Freer* v. *Hessey*, 22 L. J. Ch. 597.

1838 to 1860.

As to registration and re-registration under above acts, see, further, *Beavan* v. *Oxford*, 3 Sm. & G. 11; 6 D. M. & G. 492; *Ex p. Ness*, 5 C. B. 155; *Shaw* v. *Neale*, 6 H. L. C. 581; *Re Kensington*, *Bacon* v. *Ford*, 29 Ch. D. 527.

63 & 64 Vict. c. 26, s. 2.

As to entering satisfaction to registered judgments, see 23 & 24 Vict. c. 115, s. 2; R. S. C., Ord. 61, rr. 26, 27; Cent. Off. Practice Rules, 17; Daniell, Ch. Forms. And as to vacating registration, see *Wells* v. *Gibbs*, 3 Beav. 399; *Ex p. Holden*, 13 C. B. N. S. 641.

1860 to 1864.

By the Law of Property Amendment Act, 1860, ss. 1 and 2, no judgments entered up after 23rd July, 1860, could, as against purchasers or mortgagees, whether with notice or not, affect land, unless (1) execution had been issued and registered in the name of the creditor, and unless (2) such execution had been put in force within three months from the registration (see *Appleton* v. *Sturgis*, 10 W. R. 312; *Wallis* v. *Morris*, 12 W. R. 997).

1864 to 1888.

By the Judgments Act, 1864, no judgment, statute or recognizance entered up after 29th July, 1864, could affect land until such land had been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, statute or recognizance (sect. 1). Every writ or other process by virtue whereof any land should have been actually delivered in execution was to be registered in the name of the debtor instead of the creditor, and no other or prior registration of such judgment, statute or recognizance was to be necessary for any purpose (sect. 3). A sale could be obtained under sect. 4 (*ante*, p. 501) by a judgment creditor to whom land had been actually delivered in execution.

Under this statute it was held, that where land had been actually delivered in execution, it was unnecessary to register the judgment, writ, or other process, except to obtain a sale (*Re Pope*, 17 Q. B. Div. 743).

1888 to 1900.

Finally, by the Land Charges Act, 1888, s. 6 (*ante*, p. 505), writs and orders affecting land and every delivery in execution in pursuance thereof were made void as against purchasers for value (which included mortgagees), unless registered under that act.

(2) Present law.

By sect. 5 of the present act (see schedule), the above-mentioned provisions as to judgments contained in sect. 19 of the Judgments Act, 1838, in the Judgments Acts, 1839, 1840 and 1855, in the Law of Property Amendment Act, 1860, and in sects. 1, 2 and 3 of the Judgments Act, 1864, have been repealed. And by sects. 2 and 3 of the present act the provisions as to registration contained in sects. 5 and 6 of the Land Charges Act, 1888, have been given a wider operation. The material statutory provisions now in force as to the effect of judgments in relation to land are contained in (1) sects. 11 and 13 of the Judgments Act, 1838 (*ante*, pp. 483, 489); (2) sect. 4 of the Judgments Act, 1864 (*ante*, p. 501); (3) sects. 5 and 6 of the Land Charges Act, 1888 (*ante*, p. 504); and (4) the present act.

(3) Present methods of enforcing judgments against land.

According to the present law, a judgment for payment of money can be enforced by the creditor against the land of the debtor in the following ways:—

(1) Out of the rents and profits; by seizure under a writ of elegit (sect. 11 of the Judgments Act, 1838, *ante*, p. 483); or by obtaining an order for a receiver (*Cadogan* v. *Lyric Theatre*, 1894, 3 Ch. 68; see note on Receivership orders under sect. 4 of the Judgments Act, 1864, *ante*, p. 502); or, if the judgment is for payment within a limited time, by a writ of sequestration (R. S. C., Ord. 43, r. 6; *Willcock* v. *Terrell*, 3 Ex. D. 323; *Re Rush*, 10 Eq. 442). To protect his title as against a subsequent purchaser for value, the creditor must register the writ or order under sects. 5 and 6 of the Lands Charges Act, 1888. He must also, in the case of land in Yorkshire, register the writ or order under the Yorkshire Registries Act, 1884, ss. 4 and 14, in the county registry.

(2) When a writ or order for the purpose of enforcing the judgment has been obtained (and, *semble*, has been registered under the Lands Charges Act, 1888) and the land has been "actually delivered in execution," but not before, the creditor may obtain a sale under sect. 4 of the Judgments Act, 1864 (*ante*, p. 501).

(3) When a writ or order for the purpose of enforcing the judgment has been obtained and registered under the Lands Charges Act, 1888, but not before (sect. 2 of the Land Charges Act, 1900), the charge created by sect. 13 of the Judgments Act, 1838, will arise, and may be enforced as above mentioned (see *ante*, p. 491). For this purpose actual delivery in execution is no longer necessary. 63 & 64 Vict. c. 26, s. 2.

(4) Where owing to a prior elegit (*Re Cowbridge R. Co.*, 5 Eq. 413; see *Guest* v. *Cowbridge R. Co.*, 6 Eq. 619), or to a prior legal mortgage (*Beckett* v. *Buckley*, 17 Eq. 435), the land cannot be delivered, a judgment creditor who has issued an elegit may bring an action for redemption to remove the legal difficulty (*Thornton* v. *Finch*, 4 Giff. 515; see *Neate* v. *Marlborough*, 3 My. & Cr. 416; *Godfrey* v. *Tucker*, 33 Beav. 280; *Barnes* v. *Thrupp*, 6 W. R. 48; 3 Jur. N. S. 1242), and thus enable himself subsequently either to foreclose (*Beckett* v. *Buckley*, 17 Eq. 435), or (after obtaining actual delivery in execution) to sell under sect. 4 of the Judgments Act, 1864 (*Ib.*; *Re Cowbridge R. Co.*, 5 Eq. 417). In the redemption action he might possibly obtain a sale under sect. 25 of the Conv. Act, 1881. As to tacking against a judgment creditor who is redeeming, see *Champneys* v. *Burland* (19 W. R. 148).

As to making judgment creditors of the mortgagor parties to a foreclosure action, see *Mildred* v. *Austin* (8 Eq. 220); *Re Bailey* (17 W. R. 393); *Cork* v. *Russell* (13 Eq. 210).

As to enforcing judgments generally, see R. S. C., Ord. 42.

(4) Crown debts.

By 33 Hen. 8, c. 39, and 13 Eliz. c. 4, certain liabilities in respect of Crown debts were imposed on the lands of Crown debtors.

Who are accountants to the Crown.

A recognizance by a guardian is not a debt due to the Crown (*Ex p. Usher*, 1 Rose, 366). The exact form of the bond under 33 Hen. 8, c. 39, was not material (*R.* v. *Ellis*, 4 Exch. 652). A bond entered into by the committee of a lunatic's estate has the same force as a bond under 33 Hen. 8, c. 39 (*R.* v. *Chambers*, 11 M. & W. 776; 2 Coop. temp. Cottenham, 69, n.). 33 Hen. 8, c. 39.

13 Eliz. c. 4.

The statute 13 Eliz. c. 4, enumerates a great many officers of the Crown and other persons. Money "imprest for the use of the Crown" under that statute is money advanced to be employed for the use of the Crown (6 Price, 424). The following persons have been held accountants to the Crown under that statute:—A deputy commissary-general to the forces abroad (*R.* v. *Rawlings*, 12 Price, 834; *R.* v. *Fernandez*, *Ib.* 862). A commissioner directed by statute to pay money into the bank subject to the orders of the King (*Wilde* v. *Fort*, 4 Taunt. 334). An agent for a fire insurance office in respect of money received for duty (*R.* v. *Wrangham*, 1 Tyr. 383). A receiver of customs is not within the statute (6 Geo. 4, c. 105, s. 13; *Ib.* c. 106, s. 7). Nor is a collector of assessed taxes (*Casberd* v. *Ward*, 6 Price, 411). As to bonds by receivers of customs, see Customs Consolidation Act, 1876, ss. 165—167; and as to bonds by tax collectors, see Taxes Management Act, 1880, ss. 74—77, 118, 119. A clerk of the patents under 3 & 4 Will. 4, c. 84, was held accountable for moneys received by him (*A.-G.* v. *Edmunds*, 6 Eq. 381). Any person receiving money of the Crown becomes an immediate debtor to the Crown (*Re West London Bank*, 38 Ch. D. 367).

When lien of Crown attaches.

Before this act a bond under 33 Hen. 8, c. 39, bound all lands of the obligor over which he had a disposing power at the time he entered into the bond, even as against a subsequent purchaser for value (*Ellis* v. *R.*, 6 Exch. 921). As to its effect against estates tail, see *Anderson's case* (7 Rep. 21); *Cecil's case* (*Ib.* 19). The lien of the Crown under 13 Eliz. c. 4, attached from the time when the owner of the lands became an accountant, so that a sale after acceptance of office might be defeated by a subsequent debt to the Crown (*Nicholls* v. *Howe*, 2 Vern. 389; *R.* v. *Sarum*, Moore, 126; 25 Geo. 3, c. 35). And a purchaser, without notice, could not use an attendant term as a protection against the Crown (*R.* v. *Smith*, Sugd. V. & P. 673, 778, 1098, 11th ed.; *How* v. *Nichol*, Pr. Ch. 125; see *R.* v.

63 & 64 Vict. c. 26, s. 2.

St. John, 2 Price, 317; *R.* v. *Hollier*, 2 Price, 394); except where the term never was held in trust for the Crown debtor (*R.* v. *Lamb*, 13 Price, 649; M'Clel. 402).

In the case of debtors to the Crown by simple contract the lien of the Crown as against purchasers for value only attached from the time of the debt being put on record (*Casberd* v. *Ward*, 6 Price, 411). So also in the case of a bond not within 33 Hen. 8, c. 39 (*A.-G.* v. *Andrew*, Hard. 23).

What land may be taken under an extent.

The following among other interests in land may be taken under an extent:—Freeholds (*Hatton's case*, 10 Rep. 55); leaseholds (*Fleetwood's case*, 8 Rep. 171); rent-charges (*Lillingston's case*, 7 Rep. 37); an equity of redemption (*R.* v. *Coombes*, 1 Price, 207; *Fector* v. *Philpot*, 12 Price, 197); lands held on trust for the debtor (*A.-G.* v. *Sands*, Hard. 495; *Devonshire's case*, 11 Rep. 92; 13 Eliz. c. 4, s. 5); lands *bonâ fide* settled before the lien of the Crown attached, but with a power of revocation (*Coke's case*, Godb. 289). As to the liability of the heir of a Crown debtor, see Dyer, 67. Copyholds cannot be taken under an extent (*R.* v. *Budd*, Parker, 190); nor property which had been *bonâ fide* assigned to other creditors prior to the time when the debt to the Crown was incurred (*Spears* v. *Lord Advocate*, 6 Cl. & Fin. 180, 189; see *Scott* v. *Scholey*, 8 East, 467; *R.* v. *Sanderson*, 1 Wight. 51; *R.* v. *Lee*, 6 Price, 369). As to the priority of the Crown under an extent, see *A.-G.* v. *Leonard*, 38 Ch. D. 622.

As to how far possible Crown debts were an objection to title, see *Poole* v. *Shergold* (1 Cox, 160); *Wilde* v. *Forte* (4 Taunt. 334).

On the subject of Crown debts, see West on Extents, 8vo., 1817; Manning's Practice of the Court of Exchequer, 8vo., 1827; 5 Jarm. Convey. by Sweet, pp. 64 f, 79; Butl. Co. Litt. 209 a, 18th ed.; Fisher's Digest, tit. Extent.

Old mode of searching for Crown debts.

Before the Judgments Act, 1839, searches for Crown liabilities were made at the Exchequer Office, and amongst the bonds of the receiver-general at the Tax Office (2 Real Prop. Rep. 12). By the Judgments Act, 1839, s. 8, it was enacted as to Crown debts that no judgment, statute, recognizance, inquisition, obligation, or specialty, under 33 Hen. 8, c. 39, or acceptance of office, should affect land as to purchasers or mortgagees, unless registered in the Common Pleas. The act also contained provisions for re-registration in the case of ordinary judgments.

22 & 23 Vict. c. 35, s. 22.

With respect to Crown judgments, &c. obtained on or before 5th July, 1865, the provisions as to re-registration in the Judgments Act, 1839, as amended by the Judgments Act, 1855, were extended to every such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office, as is by sect. 8 of the Judgments Act, 1839, required to be registered (Law of Prop. Amendt. Act, 1859, s. 22).

By 28 & 29 Vict. c. 104, ss. 48, 49, Crown judgments, &c. did not affect land as to purchasers or mortgagees, unless some writ or process of execution in pursuance of such judgment, &c. had been registered before conveyance and payment of the purchase-money.

Satisfaction of Crown debts.

23 & 24 Vict. c. 115, s. 1, provided for the entry of satisfaction of all bonds and other securities given to the Crown. As regards the evidence of release of land from Crown debts, special provision is made by the Judgments Act, 1839, ss. 10, 11, and 23 & 24 Vict. c. 115.

Present law.

It will be observed that liabilities to the Crown are included in the provisions of sects. 2 and 3 of the present act.

(5) Priority of judgment debts in administration.

As regards the preference or priority of payment (in administration) of debts owing on judgments recovered against a deceased person, it was decided before the above-mentioned act, 4 & 5 Will. & M. c. 20, that payment by an executor of a simple contract debt before a judgment debt of which he had no notice, was a devastavit (*Littleton* v. *Hibbens*, Cro. Eliz. 793). By 4 & 5 Will. & M. c. 20, judgments not docketed were not to have any preference. By the Judgments Acts, 1838 and 1839, the docket was closed and registration substituted, but no provision was made as to the preference of judgment debts in administration. After those acts it

was held that the old law was thereby revived, and that an administrator had committed a devastavit by paying a simple contract debt before a judgment debt, though he had no notice of the latter (*Fuller* v. *Redman* (No. 1), 26 Beav. 600). This decision led to the passing of sects. 3 and 4 of the Law of Property Amendment Act, 1860, which provided that without registration and re-registration no judgment should have any preference against heirs, executors, or administrators in their administration of estates. And under sect. 3 it was held that an unregistered judgment was not entitled to any priority over simple contract debts (*Van Gheluwe* v. *Nerinckx*, 21 Ch. D. 189; *Re Turner*, *Turner* v. *Waller*, 12 W. R. 337; 33 L. J. Ch. 232; *Kemp* v. *Waddingham*, L. R. 1 Q. B. 358; see *Evans* v. *Williams*, 2 Dr. & Sm. 224). Registration, however, was not necessary to give priority in the case of judgments against executors and administrators (*Jennings* v. *Rigby*, 33 Beav. 198; *Re Williams*, 15 Eq. 270). 63 & 64 Vict. c. 26, s. 2.

By sub-sect. 3 of the present section no entry is to be made in the Register of Judgments kept under sect. 19 of the Judgments Act, 1838 (see R. S. C., Ord. 61, r. 1), except under an order of the court; and by sect. 5 of the present act, sects. 3 and 4 of the Law of Property Amendment Act, 1860, have been repealed. In the result, it would seem that the old law has been revived, and that payment by an executor or administrator out of legal assets of a simple contract debt before a judgment debt, even where he had no notice of the latter, may be a devastavit (see *Fuller* v. *Redman* (No. 1), 26 Beav. 600). Consider Interpretation Act, 1889, s. 38, sub-s. 2 (a); which, however, does not seem to apply in the present case.

Amendments of 51 & 52 Vict. c. 51.

3. Section six of the Land Charges Registration and Searches Act, 1888, shall apply to every writ and order affecting land issued or made by any court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of this act, and to every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto.

7 Anne, c. 20, not to apply to certain charges.

4. From and after the passing of this act the Middlesex Registry Act, 1708, shall not apply to any instrument made after the passing of this act and capable of registration under this act or the Land Charges Registration and Searches Act, 1888.

By sect. 6 of the Land Registry (Middlesex Deeds) Act, 1891, it is provided that it shall not be necessary for the validity of any judgment, statute or recognizance that it should be registered under the Middlesex Registry Act, 1708.

Repeal.

5. As from the commencement of this act the enactments specified in the schedule to this act are hereby repealed to the extent mentioned in the third column of that schedule.

Extent, commencement, short title, and construction.

6.—(1.) This act shall not extend to Scotland or Ireland.

(2.) This act shall, except as otherwise expressly provided, come into operation on the first day of July one thousand nine hundred and one.

63 & 64 Vict. c. 26, s. 6.

51 & 52 Vict. c. 51.

(3.) This act may be cited as the Land Charges Act, 1900, and shall be construed as one with the Land Charges Registration and Searches Act, 1888.

SCHEDULE.

Section 5.

Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
1 & 2 Vict. c. 110.	The Judgments Act, 1838..	Section nineteen, and section twenty-one, from the words "Provided always" to "one shilling."
2 & 3 Vict. c. 11.	The Judgments Act, 1839..	Sections two, three, five, six, eight, and nine, and section four, except so far as it applies to lis pendens.
3 & 4 Vict. c. 82.	The Judgments Act, 1840..	Section two.
18 & 19 Vict. c. 15.	The Judgments Act, 1855..	Section two, from "But no judgment" to the end of the section; section three, except so far as it relates to lis pendens; and sections four to eight.
23 & 24 Vict. c. 38.	The Law of Property Amendment Act, 1860.	Sections one to five.
27 & 28 Vict. c. 112.	The Judgments Act, 1864..	Sections one, two, and three, and, in section four, the words "and whose writ or other process of execution shall be duly registered."
28 & 29 Vict. c. 104.	The Crown Suits, &c. Act, 1865.	Sections forty-eight and forty-nine.
51 & 52 Vict. c. 51.	The Land Charges Registration and Searches Act, 1888.	Proviso (*a*) of section six.

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I.—THE REAL PROPERTY ACT, 1845.

8 & 9 VICT. c. 106.

An Act to amend the Law of Real Property.

[4th August, 1845.]

[*Sect.* 1 *repealed so much of* 7 *&* 8 *Vict. c.* 76, *as abolished contingent remainders. As to these remainders, see now sect.* 8, *post, p.* 520, *and the Contingent Remainders Act,* 1877, *post, p.* 521.] 8 & 9 Vict. c. 106.

2. After the said first day of October, one thousand eight hundred and forty-five, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. The immediate freehold of corporeal tenements to lie in grant as well as in livery.

A remainder, reversion, and incorporeal hereditaments were not the subjects of a feoffment, for a feoffment operates on the possession which the owners of such estates had not to convey; hence remainders, reversions and incorporeal hereditaments were said to lie in *grant*, which was the mode of conveyance at the common law of those estates which did not lie in livery or of which livery could not be given. The object proposed by this section was to impart to *corporeal* hereditaments, that is, to hereditaments which lie in livery only, the capacity of being transferred by deed. Object of this section.

Prior to the passing of 4 & 5 Vict. c. 21, the usual mode of conveying corporeal hereditaments was by lease for a year and re-lease, the lease being executed for the purpose of giving to the purchaser that seisin without which the re-lease would have been ineffectual. The lease was rendered unnecessary by 4 & 5 Vict. c. 21. This section in effect substituted a grant for a re-lease (see Williams on Real Property, pp. 189, 196, 14th ed.). 4 & 5 Vict. c. 21.

8 & 9 Vict. c. 106, s. 2.

Conv. Act, 1881.

Immediate freehold.

The word "grant" is not required in a deed of grant (Conv. Act, 1881, s. 49, *post*).

By the term *immediate freehold* is meant the first of all the estates of freehold; for example, when A. is tenant for life, remainder to B. for life, in tail or in fee, B. has an *estate of freehold*, but A. has the *immediate freehold* (1 Preston's Convey. 48).

The latter part of the section relating to stamp duties was repealed by 13 & 14 Vict. c. 97, s. 6, and is accordingly omitted.

Feoffments, partitions, exchanges, leases, assignments and surrenders required (subject to certain exceptions) to be by deed.

3. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant (*a*), shall be void at law, unless evidenced by deed, and a partition and an exchange (*b*) of any tenements or hereditaments not being copyhold, and a lease, required by law to be in writing (*c*), of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments (*d*), and a surrender in writing (*e*) of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed: provided always, that the said enactment so far as the same relates to a release (*f*) or a surrender shall not extend to Ireland.

(*a*) By the custom of gavelkind an infant on attaining the age of fifteen years may alien lands by feoffment, livery of seisin being made in person and not by attorney (Robinson on Gavelkind, 248—250, 3rd ed.; see *Re Maskell and Goldfinch*, 1895, 2 Ch. 525).

Partition.

(*b*) At common law coparceners might have made partition of things lying in livery or grant by parol without deed, and tenants in common might have made partition of things lying in livery by parol without deed, if they afterwards perfected the partition by livery of seisin (Litt. s. 250; Co. Litt. 169 a). So, too, joint tenants for years might have made partition by parol without deed (Co. Litt. 187 a). But joint tenants of freeholds, whether corporeal or incorporeal, and tenants in common of incorporeal hereditaments, could not have made partition without deed (Co. Litt. 169 a). Since the Statute of Frauds (29 Car. 2, c. 3), a writing was in all cases necessary, but a deed was required only in cases in which it was necessary before that statute (1 Martin's Conv. by Davidson, 417, 418; 1 Byth. Conv. by Jarman, 193). As to the partitions of copyholds, see the Copyhold Act, 1894, s. 87; *Jope* v. *Marshead*, 6 Beav. 213; *Dillon* v. *Coppin*, 4 Beav. 217, n.; *Bolton* v. *Ward*, 4 Hare, 530.

Exchange.

An exchange since the Statute of Frauds (29 Car. 2, c. 3), must, if it relate to land for a larger interest than a term of three years, be in writing, and if the things whereof the exchange is made lie in grant, *i.e.*, if they consist of reversions, rents or other incorporeal hereditaments, or if they lie in several counties, it must be by deed (Co. Litt. 51 b).

Leases.

(*c*) By the Statute of Frauds every lease of corporeal hereditaments for a term exceeding three years from the making thereof, and for a less term where the rent did not amount to two-thirds of the value, was required to be in writing (29 Car. 2, c. 3, ss. 1, 2). But as a lease for years of corporeal hereditaments might be created by a writing not under seal, questions frequently arose whether an instrument relating to the creation of such an interest was an actual demise or an agreement for a future demise (see 5 Davidson's Conv. 7—13, 3rd ed.; 1 Platt on Leases, 579—611).

8 & 9 Vict. c. 106, s. 3.

Result of present section.

The result of the present section was that in all cases where writing had been previously required a lease was void at law unless made by deed. Even at law, however, the courts held (overruling *Stratton* v. *Pettit*, 16 C. B. 420) that an instrument void as a lease might be good as an agreement (*Bond* v. *Rosling*, 1 Best & Sm. 371; 30 L. J. Q. B. 227; see *Rollason* v. *Leon*, 7 H. & N. 73; *Adams* v. *Hagger*, 4 Q. B. Div. 480); so that an action could be brought against the intended tenant either for not accepting a lease (*Ib.*), or for not complying with a stipulation contained in the agreement (*Martin* v. *Smith*, L. R. 9 Ex. 50; *Adams* v. *Clutterbuck*, 10 Q. B. D. 403); or against the intended landlord for having no title to grant a lease (*Stranks* v. *St. John*, L. R. 2 C. P. 376). And in equity specific performance could be obtained of an agreement which was void at law as a lease (*Parker* v. *Taswell*, 2 De G. & J. 559). As regards the estate taken by a person entering under an instrument void under this act as a lease, it was settled at law (before the Jud. Act, 1873) that he held as tenant from year to year upon the terms of the instrument, so far as applicable to such a tenancy; the tenancy being determinable, during the term mentioned in the instrument, by the usual half-year's notice, but expiring without notice at the end of such term (*Tress* v. *Savage*, 4 El. & Bl. 36; see *Lee* v. *Smith*, 9 Exch. 662; *Wood* v. *Beard*, L. R. 2 Ex. D. 37). Since the Jud. Act, 1873, it has been held that a tenant holding under an agreement for a lease of which specific performance would be decreed, holds on the same terms and has the same rights and liabilities as if a lease had been granted (*Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Swain* v. *Ayres*, 21 Q. B. Div. 289; *Lowther* v. *Heaver*, 41 Ch. Div. 264; *Manchester Co.* v. *Coombs*, 1901, 2 Ch. 617; see *Warren* v. *Murray*, 1894, 2 Q. B. 648). But in such a case, if the value of the property exceed 500*l.*, the county court, having no jurisdiction to order specific performance, cannot order payment of rent (*Foster* v. *Reeves*, 1892, 2 Q. B. 255).

This provision as to leases did not apply to agreements for the lease of tolls under the Turnpike Roads Act, 1822, s. 57 (*Shepherd* v. *Hodsman*, 18 Q. B. 316).

Cases of agreements to let under 7 & 8 Vict. c. 76, s. 4.

By 7 & 8 Vict. c. 76, s. 4 (in force from and after the 31st of December, 1844, and repealed by the present Act from the 1st of October, 1845), it was enacted, that no lease in writing of any freehold, copyhold or leasehold land should be valid, unless the same should be made by deed, but that any agreement in writing to let any such lands should be valid and take effect as an agreement to execute a lease (see *Burton* v. *Revell*, 16 M. & W. 307; *Arden* v. *Sullivan*, 19 L. J. Q. B. 268).

A lease of incorporeal hereditaments must be under seal (*Gardiner* v. *Williamson*, 2 B. & Ad. 336; see *Bird* v. *Higginson*, 3 Ad. & El. 83; *Holford* v. *Pritchard*, 3 Exch. 793).

Assignments.

(*d*) The Statute of Frauds required that all assignments of leases should be by deed or note in writing, signed by the party assigning or his agent (29 Car. 2, c. 3, s. 3).

Where a person holding for a term of less than a year let by parol for the remainder of his term, the parol lease was held not to be an assignment but to bind the parties, who intended to create the relation of landlord and tenant, and to pass the interest by lease (*Pollock* v. *Stacey*, 9 Q. B. 1035; see *Debenham* v. *Digby*, 21 W. R. 359).

Surrenders.

(*e*) The Statute of Frauds required that every surrender should be by deed or note in writing duly signed (29 Car. 2, c. 3, s. 3). This section refers to a surrender *in writing*, and does not include a surrender by operation of law. As to what is a surrender by operation of law, see *Lyon* v. *Read* (13 M. & W. 305, 306); *Kingston's case* (2 Smith, L. C. 917, 9th ed.); *Wallis* v. *Hands* (1893, 2 Ch. 75); *Knight* v. *Williams* (1901, 1 Ch. 257); and cases, *ante*, p. 281.

(*f*) The word "release" appears to be inserted by mistake instead of "lease." Every lease in Ireland required by law to be in writing must be by deed (*Gilman* v. *Crowley*, 7 I. C. L. R. (N. S.) 557).

8 & 9 Vict. c. 106, s. 4.

Feoffments not to operate by wrong, nor exchanges or partitions to imply any condition, or give and grant any covenant.

4. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, shall not have any tortious operation (*g*); and an exchange or a partition of any tenements or hereditaments, made by deed, executed after the said first day of October, one thousand eight hundred and forty-five, shall not imply any condition in law; and the word "give" or the word "grant," in a deed executed after the same day, shall not imply any covenant in law, in respect of any tenements or hereditaments (*h*), except so far as the word "give" or the word "grant" may, by force of any act of parliament, imply a covenant (*i*).

Tortious operation of feoffment.

(*g*) A feoffment had the effect of barring or destroying contingent remainders depending upon particular estates (*Archer's case*, 1 Rep. 66 b). A feoffment also destroyed powers appendant and powers in gross, but not powers collateral. A feoffment was the only conveyance by which a tenant for years, by elegit, statute merchant or staple, or a copyholder could create an estate of freehold by dissoisin (Co. Litt. 49; 2 Sand. on Uses, 14, 15). Since this act a feoffment in fee simple, made by a tenant for life, will merely convey his life interest, and will not be a cause of forfeiture; and a feoffment by a lunatic or idiot will be void and not merely voidable, as formerly (see Shelford's Lunacy, 335, 336, 2nd edit.).

Covenant implied by words "grant," "give,"

(*h*) As to the conditions implied on exchanges and partitions, see 4 Cruise, Dig. tit. 32, c. 6, 20. The operation of the words "grant" and "give" in creating an implied warranty of title in conveyances of estates in fee simple, in gifts in tail, in leases for life, and in leases for years, is discussed in Butler's note to Co. Litt. 384 a (see 4 Cruise, Dig. tit. 32, c. 24; and see 1 Davidson, Conv. 70, 103, 3rd ed.; *Doe* v. *Prince*, 20 L. J. C. P. 223).

"demise."

An action of covenant will lie by the lessee against the lessor upon the word "demise" in a lease, that word importing a covenant in law on the part of the lessor that he has a good title, and that the lessee shall quietly enjoy during the term (*Burnett* v. *Lynch*, 5 B. & C. 609; *Walker* v. *Bartlett*, 18 C. B. 845; *Mathew* v. *Blackmore*, 1 H. & N. 766). But there is no implied covenant if there is an express covenant for quiet enjoyment (*Line* v. *Stephenson*, 5 Bing. N. C. 183; *Merrill* v. *Frame*, 4 Taunt. 329; *Hinde* v. *Gray*, 1 M. & G. 195; *Granger* v. *Collins*, 6 M. & W. 458; *Lessenbury* v. *Evans*, 3 M. & G. 210; *Dennett* v. *Atherton*, L. R. 7 Q. B. 316). In a contract for the demise of land, a promise of quiet enjoyment during the term is implied by law (*Hall* v. *City of London Co.*, 2 Best & S. 737). Where land is demised by *parol* without any actual covenant, the law implies a covenant for quiet enjoyment during the term, but not a covenant for good title (*Bandy* v. *Cartwright*, 8 Exch. 913; see *Robinson* v. *Kilvert*, 41 Ch. Div. 96).

Where the defendant executed a written agreement not under seal to let lands to the plaintiff, he had impliedly agreed to grant a valid lease (*Stranks* v. *St. John*, L. R. 2 C. P. 376).

As to the covenants implied under sect. 7 of the Conveyancing Act, 1881, see that section set out, p. 560, *post*.

Exception as to acts of Parliament.

(*i*) In the conveyance of lands to be made by the promoters of the undertaking under the Lands Clauses Consolidation Act, or the special act, the word "grant" implies certain covenants by them for title, except so far as the same shall be limited by express words contained in any such conveyance (Lands Clauses Consolidation Act, 1845, s. 132).

The words "grant, bargain and sell," operated as covenants for title in deeds of bargain and sale of lands lying in the East and North Ridings of Yorkshire by stat. 6 Ann. c. 62, s. 30; 8 Geo. 2, c. 6, s. 35. Both the last-mentioned acts have been repealed by the Yorkshire Registries Act, 1884.

8 & 9 Vict. c. 106, s. 5.

Strangers may take immediately under an indenture, and a deed purporting to be an indenture shall take effect as such.

5. Under an indenture, executed after the first day of October, one thousand eight hundred and forty-five, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture; also, a deed, executed after the said first day of October, one thousand eight hundred and forty-five, purporting to be an indenture, shall have the effect of an indenture, although not actually indented.

It was necessary to name as parties to an indenture all persons who are intended to take an immediate estate or benefit by it (Co. Litt. 231 a). This rule did not extend to remainders (Co. Litt. 231 a, 259 b), nor, it was said, to uses or the benefit of a trust (2 Prest. Conv. 394). This section does not enable the benefit of a covenant to be taken by a party not existing at the date of the deed (*Kelsey* v. *Dodd*, 52 L. J. Ch. 34, 39).

Before this act a practical distinction between an indenture and a deed poll was, that no person could take an immediate estate or benefit under an indenture, unless he was named as a party to it; but any person could take an immediate estate or benefit under a deed poll, inasmuch as it is addressed to all the world (Co. Litt. 26 a, 231; Burton's Real Prop. 442, n.; 2 Prest. Conv. 394 *et seq.*; 1 Martin's Conv. 324). Another practical distinction between a deed poll and an indenture was, that a covenant entered into by a deed poll with any covenantee named in the deed was valid; but a covenant in an indenture entered into with a person not a party could not be sued on by that person (*Greene* v. *Hoare*, Salk. 197; *Berkley* v. *Hardy*, 5 B. & C. 353; *Southampton* v. *Browne*, 6 B. & C. 718; see, in the case of a composition deed, *Isaacs* v. *Green*, L. R. 2 Ex. 352, and cases there quoted). But a person not a party to a deed might covenant with one who was, and would be bound by executing the deed (*Salter* v. *Kidgly*, Carth. 76; 2 Prest. Conv. 415).

Contingent and other like interests, also rights of entry, made alienable by deed, saving estates in tail; and as regards married women enjoining conformity to 3 & 4 Will. 4, c. 74.

4 & 5 Will. 4, c. 32.

6. After the first day of October, one thousand eight hundred and forty-five, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments (*k*) of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry (*l*), whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but no such disposition shall, by force only of this act, defeat or enlarge an estate tail, and every such disposition by a married woman shall be made conformably to the provisions, relative to dispositions by married women, of an act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple Modes of Assurance" (*m*), or, in Ireland, of an act passed in the fourth and fifth years of the reign of his said late Majesty, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance, in Ireland."

(*k*) The alienation of interests of this description under the law as it existed previously to the abolition of fines and recoveries, has been already

8 & 9 Vict. c. 106, s. 6.

considered (see *ante*, p. 278). As to the alienation of the interest of a yearly tenant, see *Alcock* v. *Moorhouse* (9 Q. B. Div. 371). As to alienation of supposed rights, see 32 Hen. 8, c. 9; *Doe* v. *Evans* (1 C. B. 717, and the cases there cited). As to a *spes successionis*, see *Re Parsons, Stockley* v. *Parsons*, 45 Ch. D. 51, 57.

(*l*) It has been said that this means a right of entry in the nature of an estate or interest—that is, where a person by lapse of time has lost everything except his right of entry—but that the section does not include a right of entry for forfeiture (*Hunt* v. *Remnant*, 9 Exch. 640; *Hunt* v. *Bishop*, 8 Exch. 680). The reason being that it was at the election of the person entitled to enter whether he would take advantage of the breach (*Jenkins* v. *Jones*, 9 Q. B. Div. 131). As to the transfer of rights of re-entry for forfeiture, see Conv. Act, 1881, s. 10, sub-s. 1, *post*.

Prior to this act, all dealings with a right of entry, except by release to the person in possession, were dealings with a pretenced right within the meaning of 32 Hen. 8, c. 9, and so void and penal under that statute. Since the present act, if such a right is not fictitious in fact, it is not "pretenced" within that statute, and may be properly dealt with (*Jenkins* v. *Jones*, 9 Q. B. Div. 135). In order to recover the penalty under 32 Hen. 8, c. 9, it must be proved, not only that the title is fictitious, but that at the time of the dealing the defendant knew that it was so (*Kennedy* v. *Lyell*, 15 Q. B. D. 491).

(*m*) See *ante*, p. 313.

Capacity of married women to disclaim estates or interests by deed extended to England.

7. After the first day of October, one thousand eight hundred and forty-five, an estate or interest in any tenements or hereditaments in England, of any tenure, may be disclaimed by a married woman by deed; and every such disclaimer shall be made conformably to the said provisions of the said Act for the abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.

See *ante*, p. 313.

Contingent remainders protected as from 31st December, 1844, against the premature failure of a preceding estate.

8. A contingent remainder, existing at any time after the thirty-first day of December, one thousand eight hundred and forty-four, shall be, and, if created before the passing of this act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender or merger, of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened.

Destruction of contingent remainders.

This section of the act does not alter the rules of law as to the creation of contingent remainders (see 2 Bl. Comm. 164, 170; Watk. on Conv. tit. Remainder). In consequence of the rule that a remainder must vest in the grantee during the existence of the particular estate, or the very instant it determines, contingent remainders might be defeated by destroying or determining the particular estate on which they depended, before the contingency happened whereby they became vested (1 Real Prop. Rep. 66, 135). Therefore, when there was tenant for life, with divers remainders in contingency, he might not only by his death, but by alienation, surrender, or other methods, have destroyed and determined his own life estate before any of those remainders vested; the consequence of which was, that he utterly defeated them all. As, if there were tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son was born, surrendered his life estate, he by that means defeated the remainder in tail to his son: for his son not being *in esse* when

the particular estate determined, the remainder could not then vest; and, as it could not vest then by the rules of law it never could vest at all. In these cases, therefore, it was necessary to have trustees appointed to preserve the contingent remainders; in whom there was vested an estate in remainder for the life of the tenant for life, to commence wh n his estate determined. If, therefore, his estate for life determined otherwise than by his death, the estate of the trustees, for the residue of his natural life, would then have taken effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency (2 Black. Com. 171). The above clause will supersede the necessity of a limitation of estates to trustees during the life of the tenant for life, to support the contingent remainders expectant upon the determination of the life estate by forfeiture, surrender or merger.

8 & 9 Vict. c. 103, s. 8.

Section supersedes necessity of trustees to preserve contingent remainders.

See *Egerton* v. *Massey* (3 C. B. N. S. 338; 27 L. J. C. P. 10), as to the destruction of a contingent remainder by merger.

The act only applies to the three cases of forfeiture, surrender or merger. If at the time when the particular estate would naturally have expired, the contingent remainder be not ready to come into immediate possession, it will still fail as before (Williams' Real Prop. 296, 14th ed.).

Contingent remainders of copyholds were never liable to destruction by the sudden termination of the particular estate on which they depend. But there is no distinction between freeholds and copyholds in those cases where the particular estate expires naturally and regularly before the happening of the contingency (Scriv. Cop. 60, 6th ed.). Quasi-contingent remainders in copyholds were protected from destruction by the estate of the lord of the manor (*Pickersgill* v. *Grey*, 30 Beav. 352).

Contingent remainders in copyholds.

By the Contingent Remainders Act, 1877, it is enacted that every contingent remainder created by any instrument executed after the 2nd of August, 1877, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

40 & 41 Vict. c. 33.

Equitable contingent remainders (*e.g.*, arising by a limitation of an equity of redemption) were not subject to the old rule which made legal contingent remainders liable to be defeated by the failure of the particular estate (*Astley* v. *Micklethwait*, 15 Ch. D. 59). In the case of a will coming into operation before the Contingent Remainders Act, 1877, the legal estate taken under a direction to pay debts prevented an equitable contingent remainder from failing (*Re Brooke, B.* v. *B.*, 1894, 1 Ch. 43). Where, after the act, an equitable contingent remainder became clothed with the legal estate, it was not defeated by the failure of the prior life interest (*Re Freme, Freme* v. *Logan*, 1891, 3 Ch. 167).

Equitable remainders.

9. When the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the said first day of October, one thousand eight hundred and forty-five, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations

When the reversion on a lease is gone the next estate to be deemed the reversion.

8 & 9 Vict. c. 106, s. 9.

on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

This section of the act is retrospective in its operation (*Upton* v. *Townend*, 17 C. B. 542).

It sometimes happened, where the immediate reversion on a lease was a term, or other particular estate, that it became merged in some other estate in the same land; and, where that was the case, not only the benefit of the covenants, but the rent and all remedies for it, were lost (3 Real Prop. R. 49). The object of this section is to prevent such consequence, and to preserve covenants of, and remedies against, a lessee, and the obligations on the lessor which are incident to the immediate reversion (*Webb* v. *Russell*, 3 T. R. 678; *Wootley* v. *Gregory*, 2 Yo. & J. 536; *Burton* v. *Barclay*, 7 Bing. 745; *Thorne* v. *Woolcombe*, 3 B. & Ad. 586; 2 Platt on Leases, 393—399).

The disclaimer of a trustee in bankruptcy under the act of 1869 is a surrender within this section (*Smalley* v. *Hardinge*, 7 Q. B. Div. 524; see *Re Roberts, Ex p. Brook*, 10 Ch. Div. 110). As to the effect of a disclaimer under the act of 1883, see *Re Morgan* (22 Q. B. Div. 592), and cases there quoted.

The above section only applied to the case of surrender or merger of the immediate reversion. As to the severance of the reversion, see now Conv. Act, 1881, s. 10, sub-s. 1, *post*.

Landlord and Tenant Act, 1730.

Before the present statute the Landlord and Tenant Act, 1730, s. 6 (which is still in operation), enabled a lessee to surrender his lease for the purpose of taking a new lease without a surrender of any sub-leases; and preserved to the lessee the same remedies against the sub-lessee, and to the original lessor the same remedies for rents reserved by the new lease (so far as not exceeding the rents reserved in the original lease) as if such original lease were still on foot. See *Ecc. Commrs.* v. *Treemer*, 1893, 1 Ch. 166.

Act not to extend to Scotland.

10. This act shall not extend to Scotland.

II.—The Satisfied Terms Act, 1845.

8 & 9 Vict. c. 112.

An Act to render the Assignment of Satisfied Terms unnecessary.

[8th August, 1845.]

8 & 9 Vict. c. 112, s. 1.

On 31st December, 1845, satisfied terms of years attendant on inheritance, &c. of land, to

Whereas the assignment of satisfied terms has been found to be attended with great difficulty, delay, and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate: be it therefore enacted, that every satisfied term of years which, either by express declaration or by construction of law, shall upon the thirty-first day of December, one thousand eight hundred and forty-five,

8 & 9 Vict. c. 112, s. 1.

be attendant upon the inheritance or reversion of any lands (*n*), shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said thirty-first day of December, one thousand eight hundred and forty-five, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term (*o*).

cease, except, &c.

(*n*) The subject of attendant terms is fully explained in the Second Rep. Real Prop. Comm. pp. 7—14; and see Williams, Real Prop. 434, 14th ed.; Sugd. V. & P. 616 *et seq.*, 14th ed.; Davidson, Conv. Prec. 20, 15th ed. As to terms attendant by implication or construction of law, see Sugd. V. & P. 625; *Belaney* v. *Belaney* (2 Ch. 138).

When is term satisfied.

A term does not become satisfied within this act except the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person, or so long as there remains any useful purpose beneficial to the owner of the term, and consistent with the trust on which at the date of the transaction the term was held (*Anderson* v. *Pignet*, 8 Ch. 188, 189).

Cases under the act.

An agreement to assign an attendant term to a trustee for a mortgagee has been held to prevent the term ceasing as a satisfied term under this act (*Shaw* v. *Johnson*, 1 Dr. & Sm. 412); but not the mere delivery to the mortgagee of the deed of assignment to a trustee for the mortgagor (*Re Sleeman*, 4 Ir. Ch. Rep. 563; *Corry* v. *Cremorne*, 12 Ir. Ch. Rep. 136). A mortgage term was held not to cease under this section when the mortgage was paid off by, and a trust of the term declared in favour of, a person who had not the inheritance, but was believed at the time to have (*Doe* v. *Jones*, 13 Q. B. 774; *Anderson* v. *Pignet*, 8 Ch. 189). Terms were held to have ceased under this act in *Doe* v. *Price* (16 M. & W. 609); *Doe* v. *Moulsdale* (*Id.* 689).

The exception in the section: nature of the protection.

(*o*) The object of the act appears to be to merge all attendant terms, but to preserve to the persons entitled the protection which a term would have afforded to them, where, upon the 31st December, 1845, it was attendant by express declaration. But even this is a limited protection; for it gives, not such protection as a further assignment of it for a purchaser would confer, but such protection as it would have afforded if it had continued to subsist but had not been assigned or dealt with after the 31st December, 1845. This protection will of course extend to a new purchaser, although the term assigned to attend was left undisturbed (Sugd. V. & P. 497, 14th ed.; *Freer* v. *Hesse*, 4 De G. M. & G. 495; see also Sugd. V. & P. 623, 624, 14th ed., as to the nature of the protection afforded by an attendant term).

The proper way of testing the right of a person to the protection of such a term is to consider whether, if the act had not been passed, equity would restrain him from setting up the term (*Cottrell* v. *Hughes*, 15 C. B. 532). So where C. being, under a deed of settlement, tenant for life, with remainder to such of his children as he should appoint, but covenanting that he was seised in fee, sold the estate in 1840 to the defendant, who had no notice of the settlement, and the residue of two terms attendant on the inheritance was assigned to a trustee for the defendant to attend the inheritance: the terms were a protection against the settlement (*Ib.*). But where a term of 500 years, which was in fact satisfied and attendant on the inheritance, was assigned by the tenant for life, under a settlement to a

8 & 9 Vict. c. 112, s. 1.

trustee with a declaration of trust for certain parties: such parties, having had notice that the term was satisfied, could not set up against the parties claiming under the settlement, the term which had been assigned by a person who had no right to deal with it except to the extent of his own interest (*Plant* v. *Taylor*, 7 H. & N. 211).

In *Bass* v. *Wellsted* (12 Jur. 347) a question was raised, but not decided, as to the protection against dower by a term since the above act.

Presuming surrender of terms.

A term assigned to attend the inheritance will not be presumed to have been surrendered, unless there has been a dealing with the estate in such a manner as reasonable men would not have dealt with it unless the term had been put an end to (*Garrard* v. *Tuck*, 8 C. B. 231). As to presuming the surrender of terms, see also *Cottrell* v. *Hughes*, 15 C. B. 532 (where the decision in *Doe* v. *Hilder* (2 B. & Ald. 782) was doubted); *Doe* v. *Plowman* (2 B. & Ald. 573); *Doe* v. *Langdon* (12 Q. B. 711); *Hele* v. *Bexley* (17 Beav. 28); Sugd. V. & P. Appendix 26, 11th ed.; Dart, V. & P. 363.

Satisfied terms now subsisting, &c. to cease on becoming attendant upon inheritance, &c. of lands.

2. Every term of years now subsisting or hereafter to be created, becoming satisfied after the said thirty-first day of December, one thousand eight hundred and forty-five, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.

See *Anderson* v. *Pignet* (8 Ch. 180), *ante*, note to the preceding section.

Construction of act.

3. In the construction and for the purposes of this act, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary land as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share thereof respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Not to extend to Scotland.

4. This act shall not extend to Scotland.

III.—Law of Property Amendment Act, 1859.

22 & 23 Vict. c. 35.

An Act to further amend the Law of Property and to relieve Trustees. [13th August, 1859.]

§§ 1, 2. *Licences given to lessees*...525.
§ 3. *Apportionment of conditions of re-entry*...526.
§§ 10, 11. *Partial release of land from rent-charges and judgments*...527.
§ 12. *Execution of powers*...529.
§ 13. *Sale of land and timber by trustees*...529.
§ 21. *Assignment of personalty*...530.
§ 24. *Fraudulent concealment of deeds by sellers of land*...530.
§ 25. *Interpretation*...531.
§§ 27, 28. *Liability of representatives in respect of leases and rent-charges*...532.
§ 29. *Distribution of assets by representatives after notice*...534.

As to the remaining sections:—

§§ 4 *to* 9 *have been repealed by the Conv. Act*, 1881; §§ 14 *to* 18 (*Sale of lands to pay debts, &c.*) *are inserted*, ante, *p.* 411; §§ 19, 20 (*Inheritance*), ante, *p.* 377; §§ 22 (*Crown debts*) *is referred to*, ante, *p.* 512; § 23 (*Trustees' receipts*) *is inserted*, ante, *p.* 416; § 26 (*Payment under powers of attorney*) *has been replaced by* § 23 *of the Trustee Act*, 1893 (*post*); § 30 (*Advice of court*) *has been repealed by the Trustee Act*, 1893; § 31 (*Indemnity of trustees*) *has been replaced by* § 24 *of that act* (*post*); § 32 (*Trustees' investments*) *has been repealed by the Trustee Investment Act*, 1889 (*see now Trustee Act*, 1893, §§ 1 *to* 9, *post*).

22 & 23 Vict. c. 35, s. 1.

Restriction on effect of licence to alien.

1. Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence), and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, underlease, or other matter not specifically authorized or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done.

Covenants and condi-

Before this act, when, under a condition restraining assignment without licence, a licence had been once given, the condition was deter-

22 & 23 Vict. c. 35, s. 1.

tions not to assign or underlet without licence.

mined (*Dumpor's case*, 4 Co. 119 b); and the law was the same with respect to a covenant to the like effect, although there seems to be no reason why such a covenant or condition should not be held to run with the land, and be binding on such persons as might become assigns with the consent of the landlord (see *Weatherall* v. *Geering*, 12 Ves. 511; 3 Real Prop. Rep. 49). As to covenants and conditions not to assign or underlet without licence, see further Woodfall, 16th ed. 269, 699; *Varley* v. *Coppard*, L. R. 7 C. P. 505). Such covenants run with the land where assigns are named (*Williams* v. *Earle*, L. R. 3 Q. B. 739. See *West* v. *Dobb*, L. R. 5 Q. B. 460).

Dumpor's case.

So in the case of a lease to several lessees, upon condition that they or any of them should not assign without the lessor's licence, an alienation with licence by one of the lessees determined the condition as to all. And a condition not to alien the land or any part thereof without licence was determined as to the whole by the lessor's licence to alien part only (*Dumpor's case*, 4 Co. 119 b). The doctrine of *Dumpor's case* was disapproved by distinguished judges, but never overruled (*Brummell* v. *Macpherson*, 14 Ves. 175; see Dyer, 152, pl. 7; see further the note to *Dumpor's case*, 1 Smith, L. C.; 1 Wms. Saund. 445 *et seq.* (ed. 1871); *Saunders* v. *Merryweather*, 13 W. R. 814). It does not appear to have been expressly decided that this doctrine applied to any other covenant or condition than that against alienation; but it would seem to have been equally applicable on principle to all covenants and conditions by which the licence or consent of the lessor was made requisite for doing any particular act (see 3 Real Prop. Rep. 50; and Lord *Eldon's* remarks in *Macher* v. *The Foundling Hospital*, 1 Ves. & B. 191). The doctrine had been restricted from applying to licences granted to tenants of Crown lands by the Crown Lands Act, 1845, s. 5.

The rule laid down in *Dumpor's case*, so far as relates to conditions contained in leases, has been done away with by sects. 1 and 2 of this act.

As to waiver, see the Law of Prop. Amdt. Act, 1860, s. 6, *post*, p. 536.

Restricted operation of partial licences.

2. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without licence, and a licence at any time after the passing of this act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners of the other shares or interest in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence.

See the note to sect. 1, *ante*.

Apportionment of conditions of re-entry in certain cases.

3. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or

other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him. 22 & 23 Vict. c. 35, s. 3.

Apportionment of conditions of re-entry.

The rule of law was, that conditions were entire and could not be apportioned by the act of the parties (Co. Litt. 215 a; *Dumpor's case*, 4 Rep. 119 b; see *Weatherall* v. *Geering*, 12 Ves. 511). And accordingly before this act it was held that the severance of the reversion, as by assignment of the reversion in part of the premises, destroyed the whole condition of re-entry for non-payment of rent (*Knight's case*, 5 Rep. 55 b). Where, however, the assignment was of part (in time) of the reversion of the whole (in space) of the premises, the assignee could avail himself of a condition of re-entry (*Wright* v. *Burroughes*, 3 C. B. 685). Notwithstanding the destruction of the condition of re-entry, the lessor (or, under 32 Hen. 8, c. 34, s. 1, his assignee, see *Hastings* v. *N. E. R. Co.*, 1898, 2 Ch. 674; *Rogers* v. *Hosegood*, 1900, 2 Ch. 395; *Scaltock* v. *Harston*, 1 C. P. D. 106; *Hooper* v. *Clark*, L. R. 2 Q. B. 200) could either sue on a covenant in the lease to pay rent (*Twynam* v. *Pickard*, 2 B. & Ald. 105; see Shepp. T. 176; whether the action was founded on privity of estate or of contract only, *Swansea* v. *Thomas*, 10 Q. B. D. 48); or could distrain for the rent (*Neal* v. *Mackenzie*, 1 M. & W. 758; see *Jacob* v. *Kirk*, 2 M. & Rob. 221). The act 32 Hen. 8, c. 34, applied only to leases by deed (*Manchester Co.* v. *Coombs*, 1901, 2 Ch. 614).

Apportionment of rent.

This section prevents the destruction of a condition of re-entry by the severance of the reversion in cases where the rent is legally apportioned. Upon the question of apportionment of rent the following distinctions have been laid down:—Rent may be apportioned in the following amongst other ways. By law, as upon the death intestate of an owner of freeholds and leaseholds comprised in one lease. Or by act of the parties, as (1) upon a grant or devise of the reversion in part of the land (*West* v. *Lascelles*, Cro. Eliz. 851; but in such cases, before payment can be enforced, the apportioned amount must be fixed, either by the consent of the lessee or by a jury, *Bliss* v. *Collins*, 5 B. & Ald. 876; *Swansea* v. *Thomas*, 10 Q. B. D. 51); or (2) upon grant or devise of part of the rent (*Bliss* v. *Collins*, 5 B. & Ald. 882; *Ards* v. *Watkin*, Cro. Eliz. 637, 651); or (3) upon a surrender to the lessor of part of the land (Co. Litt. 148; see *Baynton* v. *Morgan*, 22 Q. B. Div. 74); or (4) upon an eviction of the lessee from part of the land by title paramount to the lessor (*Neal* v. *Mackenzie*, 1 M. & W. 747; see *Doe* v. *Meyler*, 2 Maul. & S. 276; *Stevenson* v. *Lambard*, 2 East, 575; *Tomlinson* v. *Day*, 2 Brod. & B. 680; Co. Litt. 148 b). If, however, the lease be bad as to part of the land by act of the lessor, there will be no apportionment, and no rent will be payable in respect of any of the land (*Neal* v. *Mackenzie*, 1 M. & W. 747).

Conv. Act, 1881.

As to the apportionment of rent and of covenants, whether by the lessor or lessee, and of conditions contained in leases made after 1881, see Conv. Act, 1881, ss. 10, 11 and 12 (*post*, pp. 567, 568).

Statutory provisions for apportionment of rent.

Statutory provisions have been made for the apportionment of rent where land is taken for certain public purposes (see the Lands Clauses Consn. Act, 1845, s. 119; the School Sites Act, 1849; Church Building Act, 1854).

As to the apportionment of rent service, see further, Woodfall, 16th ed. 430. And as to the apportionment of rent-charges, see the note to sect. 10, *infra*.

Release of part of land charged not

10. The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-

22 & 23 Vict. c. 35, s. 10. to be an extinguishment.

charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditament released without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release.

Release of rent-charges.

Before this act a person having a rent-charge, by releasing his right in part of the land charged, extinguished the whole rent (18 Vin. Abr. 504). On a release since this act of part of the land subject to a rent-charge, without the concurrence of the persons interested in the remainder, the remainder will be subject only to a proportionate part of the whole rent-charge (*Booth* v. *Smith*, 14 Q. B. D. 318). A person having a rent-charge may release part of it to the tenant of the land, and reserve part (Co. Litt. 148 a; 3 Vin. Abr. 10, 11).

Extinguishment of rent-charges.

If a man, having a rent-charge issuing out of lands, purchases any part of them, the rent-charge is extinct in the whole (Litt. s. 222; Co. Litt. 147 b; 1 Roll. Abr. 234; see Gilb. on Rents, 152); unless the grantor, by his deed reciting such purchase, grants that he may distrain for such rent-charge in the residue of the land, for this amounts to a new grant (Co. Litt. 147 b). A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues, notwithstanding the devise is expressly made over and above the rent-charge (*Dennet* v. *Pass*, 1 Bing. N. C. 388), although it is otherwise where part of the lands out of which the rent issues descends on the grantee (1 Roll. Abr. 236, pl. 5).

Eviction by title paramount.

If part of the land out of which a rent-charge is reserved is evicted by a title paramount, the rent will be apportioned (*Hartly* v. *Maddocks*, 1899, 2 Ch. 199). If a suit is due in respect of land which descends to parceners, and they make partition, and one is distrained for the whole, she may compel the others to contribution. The same doctrine will apply to co-feoffees of the land, or of different parts of the land (Stat. Marlbridge, c. 9; 2 Coke, Inst. 119; see Co. Litt. 146, 148, 149; Com. Dig. Suspension, E. G.; Bac. Abr. Rent, M. 1, 2; *Averall* v. *Wade*, Lloyd & G. temp. Sugd. 252).

Apportionment of rent-charges.

As to the apportionment of a rent-charge charged on lands devised to trustees, see *Mills* v. *Cobb* (L. R. 2 C. P. 95). Two properties must contribute to a rent-charge charged on both in proportion to the actual income *de anno in annum*, and not in proportion to the capitalized value (*Ley* v. *Ley*, 6 Eq. 174).

For conditions of sale apportioning a rent-charge, where the property charged is sold in lots, see 1 Prideaux, Conv. 71, 13th ed.

As to the meaning of "rent-charge" and the property out of which a rent-charge can issue, see *ante*, pp. 115—117.

Release of part of land charged not to affect judgment.

11. The release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release.

Under the old law the release from a judgment of part of the land charged therewith discharged the whole (see *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444). Where a tenant by elegit took a conveyance of part of the lands extended, in satisfaction of part of his debt, his tenancy by elegit on the rest was extinguished (*Hele* v. *Bexley*, 17 Beav. 14). See also as a release from a judgment, *Moscrop* v. *Sandeman* (9 Jur. N. S. 1146). A

provision similar to the above section was applied to Ireland by 11 & 12 Vict. c. 48, s. 72. 22 & 23 Vict. c. 35, s. 11.

Mode of execution of powers.

12. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

At common law signing is not essential to the validity of a deed, though sealing is. And, accordingly, the common form of attestation to a deed used to be "sealed and delivered by the party in the presence of us." It was decided, however, in *Wright* v. *Wakeford* (17 Ves. 454; 4 Taunt. 213), where a power was required to be executed with a consent testified by writing under hand and seal attested by two or more credible witnesses, and the attestation clause did not express that the witnesses attested the signing as well as the sealing and delivery of the deed; that the power was not well executed. *Preston's Act* (54 Geo. 3, c. 168) was passed to cure the defect thus arising as to all instruments intended to exercise powers and executed before the 30th July, 1814. The above section was passed to provide a further remedy. See, further, Sugden, Powers, 234 *et seq.*, 8th ed.; Farwell, 2nd ed. 134.

Wright v. *Wakeford.*

Preston's Act.

Appointments by will.

By Wills Act, 1837, s. 10 (*ante*, p. 450, where see note), an appointment by will is to be executed like other wills, and to be valid although other required solemnities are not observed. A power to appoint by writing "purporting to be a will" was executed by a document signed but not attested (*Re Broad, Smith* v. *Draeger*, 1901, 2 Ch. 86; compare *Gullan* v. *Grove*, 26 Beav. 64).

Sale under power not to be avoided by reason of mistaken payment to tenant for life.

13. Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the court shall direct, and the settlement

22 & 23 Vict. c. 35, s. 13.

of the said principal moneys and interest, under the direction of the court, upon such parties as in the opinion of the court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly the court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him.

Before this act, trustees having a power of sale only could not sell the estate separate from the timber standing upon it, though the tenant for life was without impeachment of waste, and might have cut the timber previously to the sale (*Cholmeley* v. *Paxton*, 3 Bing. 207; 5 Bing. 48; *S. C.* nom. *Cockerell* v. *Cholmley*, 10 B. & C. 564; 3 Russ. 565; 1 Russ. & M. 418; 1 Cl. & Fin. 60). See *Re Llewellin*, *Llewellin* v. *Williams* (37 Ch. D. 317), where the price of uncut timber sold (with the land) by a tenant for life not impeachable for waste was treated as capital money under the S. L. Act, 1882. And compare sect. 35 of that act (*post*), dealing with the power of a tenant for life impeachable for waste to cut and sell timber.

Sales of timber apart from land can be authorized under sect. 16 of the S. E. Act, 1877 (*post*).

As to sales of land and minerals separately, see sect. 44 of the Trustee Act, 1893 (*post*), and *Re Rutland*, *Rutland* v. *Bristol*, 1900, 2 Ch. 206, where *Cockerell* v. *Cholmley* (*sup.*) is discussed.

Assignment to self and others.

21. Any person shall have power to assign personal property now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

See note to sect. 50 of the Conv. Act, 1881, *post*, p. 595.

Punishment of vendor, &c. for fraudulent concealment, of deeds, &c. or falsifying pedigree.

24. Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser [*or* mortgagee], or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this act, conceal any settlement, deed, will, or other instrument material to the title or any incumbrance from the purchaser [*or* mortgagee], or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanour, and being found guilty shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both as the court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was con-

cealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of her Majesty's attorney-general, or in case that office be vacant of her Majesty's solicitor-general; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the attorney-general or the solicitor-general (as the case may be) shall direct. 22 & 23 Vict. c. 35, s. 24.

This section of the act shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in this section (Law of Property Amendment Act, 1860, s. 8). Where no title is to be shown before a stipulated date, the section does not apply to the concealment of any earlier matter (*Smith* v. *Robinson*, 13 Ch. D. 148).

Interpretation of terms.

25. In the construction of the previous provisions in this act the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed, re-assigned, or released on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge, or charge as aforesaid is made or transferred:

The term "judgment" shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of judgments.

See Judgments Act, 1838, s. 18, *ante*, p. 497.

As to liability of executor or administrator in respect of rents, covenants or agreements.

27. Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the as-

22 & 23 Vict. c. 35, s. 27.

signment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

Liability of representatives in respect of leases of deceased.

Where the representative of a lessee has not entered, he can only be sued as representative (*Rendall* v. *Andrae*, 61 L. J. Q. B. 630). Where the representative has entered, he may be sued either as representative or as assign of the lease (*Re Bowes, Strathmore* v. *Vane*, 37 Ch. D. 131). If the representative be sued as such, and he puts in a proper plea, he is only liable to the extent of the assets of the deceased (*Ib.*). If he be sued as assign, he is liable *de bonis propriis* (Wms. Exors. 9th ed. 1637). His liability, however, as regards rent may be limited to the letting value of the holding (*Rendall* v. *Andrae*, 61 L. J. Q. B. 633; *Re Bowes, Strathmore* v. *Vane*, *sup.*); but as regards a covenant to repair cannot be so limited (*Rendall* v. *Andrae*, *sup.*). See further, as to the liability of the representative of a lessee, the notes to *Jevens* v. *Harridge* and *Dean of Bristol* v. *Guyse*, 1 Wms. Saund. 1, 124.

Operation of section.

The above section deals with the liability of the representative "as such" in respect of the leases of the deceased. Where the assets of the testator are administered out of court, the representative acting in the manner pointed out in the section does not remain liable in respect of subsequent claims under the leases. The lease must be assigned to "a purchaser": where it is assigned to a legatee the executor is not protected (*Dodson* v. *Sammell*, 1 Drew. & Sm. 579; compare *Smith* v. *Smith*, *ib.* 387). The section applies in the case of leases granted or assigned to the deceased before the passing of the act (*Ib.*; *Re Green*, 2 D. F. & J. 121).

Administration out of court.

Administration in court.

Where the assets are administered in court, and the representative keeps back nothing which ought to be disclosed to the court, an order directing the administration and application of the assets is of itself a complete and perfect indemnity to the representative (*Dodson* v. *Sammell*, 1 Drew. & Sm. 577); who will be protected from any future proceedings (*Bennett* v. *Lytton*, 2 J. & H. 157; *Waller* v. *Barrett*, 24 Beav. 419; *Dean* v. *Allen*, 20 Beav. 4; *Smith* v. *Smith*, 1 Drew. & Sm. 387). It was formerly the practice of the court to order part of the assets to be carried over as an indemnity fund in respect of the liability under the leases of the deceased (see the forms, Seton, 5th ed. 1281; omitted in 6th ed., see p. 1525). But it was decided that a landlord had no independent equity to require such a fund to be carried over (*King* v. *Malcott*, 9 Ha. 692). And

Indemnity fund.

having regard to this decision, and to the rule that the order of the court indemnifies the representative, it was said by *Kindersley*, V.-C., that it was unnecessary to carry over a fund (*Dodson* v. *Sammell*, 1 Drew. & Sm. 579). An indemnity fund formerly set apart in respect of leaseholds was paid out without the consent of the ground landlord (*Ib.*; *Sowdon* v. *Marriott*, 21 W. R. 808; *contra*, *Bunting* v. *Marriott*, 9 W. R. 264). So where all a testator's leases had been sold or surrendered (*Reilly* v. *Reilly*, 34 Beav. 406). 22 & 23 Vict. c. 35, s. 27.

Although the representative does not remain liable, the right of the lessor to follow assets is not prejudiced. As to the right to follow assets, see Wms. Exors., 9th ed., 801, 1897; and as to compelling a legatee to refund, see *Ib.* 1313. See also *Re Mouatt, Kingston Co.* v. *Mouatt*, 1899, 1 Ch. 831. The right to follow where real assets had been aliened was dealt with in *Spackman* v. *Timbrell*, 8 Sim. 253 (*ante*, p. 392), and *Kinderley* v. *Jervis*, 22 Beav. 1 (*ante*, p. 400); see *Re Cary and Lott*, 1901, 2 Ch. 470. The same right where personal assets had been aliened was dealt with in *Dilkes* v. *Broadmead*, 2 D. F. & J. 566; in which case a purchaser for value without notice acquired a good title as against the creditors of the deceased to identified personal assets. The power of an executor, who is also residuary legatee, to alien personal assets to a purchaser for value without notice, is discussed in *Graham* v. *Drummond*, 1896, 1 Ch. 968. As to a purchaser with notice, see *Re Troughton, Rent Co.* v. *Troughton*, 1894, W. N. 154. Right to follow assets.

As to the liability of a representative in respect of the leases of the deceased, see generally, Wms. Exors., 9th ed., 1631 *et seq.*

28. In like manner, where any executor or administrator, liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased As to liability of executor, &c. in respect of rents, &c. in conveyances on rent-charge.

22 & 23 Vict. c. 35, s. 28.

into the hands of the person or persons to or among whom the said assets may have been distributed.

Liability of representatives in respect of rent-charges.

Where a rent-charge is secured by covenant, the representative is liable as such to its payment. Where there is no covenant, the representative may be liable for arrears which have accrued during the life of the deceased (see *Leving's case*, quoted in *Thomas* v. *Sylvester*, L. R. 8 Q. B. 370). But as regards instalments accruing after the death, the representative does not seem to be liable, except he becomes *terre tenant* for a freehold interest; in which case his liability would be for the full amount of the rent-charge irrespective of his receipt of rents and profits (*Pertwee* v. *Townsend*, 1896, 2 Q. B. 129).

Operation of section.

As regards the operation of the above section, it seems clear that so far as the freeholds of a deceased person are concerned, an administrator could never before the Land Transfer Act, 1897, have sold them; and apparently could never have obtained the benefit of this section. An executor, where the will contained a charge of debts, might in some cases have sold (see *ante*, pp. 413, 415 *et seq.*). But the proceeds of the sale did not become part of the residuary personal estate of the deceased which alone could be distributed under the section.

Now, by the Land Transfer Act, 1897, sect. 2, sub-sect. 2, executors and administrators have power to sell the freeholds of a deceased person. And it seems that the last-mentioned act may have enlarged the operation of the above section.

As to distribution of the assets of testator or intestate after notice given by executor or administrator.

29. Where an executor or administrator shall have given such or the like notices as in the opinion of the court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively.

Proceedings by an executor or administrator.

A prudent and reasonable executor or administrator ought to advertise for creditors as soon as possible after the death, and his conduct in this respect will be had regard to on an application for relief under sect. 3 (*post*) of the Judicial Trustee Act, 1896 (*Re Kay, Mosley* v. *Kay*, 1897, 2 Ch. 522). If any difficulty arises, he can also apply by summons for an order determining the questions (R. S. C. Ord. 55, r. 3); or for an order for administration (r. 4); which, however, the judge is not bound to order (r. 10).

Notices.

The practice as to notices given by the Chancery Division in administration actions is laid down in R. S. C. Ord. 55, rr. 45—47. In administration actions, it is unnecessary to repeat notices which have been already

issued under this section (*Cuthbert* v. *Wharmby*, 1869, W. N. 12). In an action seeking to make an executor liable who has issued notices, the court of first instance is by this section clothed with the duty of forming its own opinion as to the sufficiency of the notices: and *qu.* whether an appeal will lie (see *Re Bracken, Doughty* v. *Townson*, 43 Ch. Div. 1). Where executors had issued notices, but had not inserted any notice in the Gazette or a London paper, they were insufficient (*Wood* v. *Weightman*, 13 Eq. 434). But there is no absolute rule as to the insertion in a London paper, or as to the length of the notice; the court will regard the circumstances of each case (*Re Bracken, Doughty* v. *Townson, sup.*). **22 & 23 Vict. c. 35, s. 29.**

An executor who distributes assets, after taking the steps pointed out by sect. 29, is in the same position as if the estate had been administered under the court; as to which see note to sect. 27, *ante*, p. 532 (*Clegg* v. *Rowland*, 3 Eq. 368; *Re Frewen, Frewen* v. *Frewen*, 60 L. T. 953, which see as to notice to the executor; *Hunter* v. *Young*, 4 Ex. Div. 256, in which last case the executor was held not a necessary party to an action by a creditor to compel a legatee to refund; and see *Re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 447). The section is not confined to claims by creditors, but protected an administratrix from a claim by next of kin (*Newton* v. *Sherry*, 1 C. P. Div. 246). **Protection afforded to an executor.**

As to the bearing of this section on the position of a personal representative conveying the real estate of a person dying after 1897, see *Re Cary and Lott*, 1901, 2 Ch. 463, quoted *ante*, p. 424.

The mere sending in a claim in answer to advertisements does not keep the creditor's right alive (*Re Stephens, Warburton* v. *Stephens*, 43 Ch. D. 44).

Executors who have distributed assets under this section will be protected as regards those assets from liability on shares held by their testator (*Russell's case*, 15 S. J. 790; see *Cole's case*, 15 S. J. 711); but not where they had notice of the liquidator's claim (*Markwell's case*, 21 W. R. 135; see *Re Troughton, Rent Co.* v. *Troughton*, 1894, W. N. 154). They may, however, be placed on the list of contributories, on the ground that further assets may come to their hands (*Russell's case, sup.*). **Liability on shares.**

An executor who paid a legacy without providing for a contingent liability on shares was made liable (*Taylor* v. *Taylor*, 10 Eq. 477); but was entitled to make legatees refund (*Jervis* v. *Wolferstan*, 18 Eq. 18; *Whittaker* v. *Kershaw*, 45 Ch. Div. 320).

In administration actions a fund was set aside to meet possible calls (*Re Muggeridge, Muggeridge* v. *Sharp*, 10 Eq. 443); but under the circumstances this was not considered necessary in the case of shares in a chartered banking company (*Re Griffiths, Tate* v. *Rolls*, 1880, W. N. 159). As to the possible extent of a deceased shareholder's liability, see *Baird's case*, 5 Ch. 725.

33. This act shall not extend to Scotland. **Act not to extend to Scotland.**

IV.—Law of Property Amendment Act, 1860.

23 & 24 Vict. c. 38, ss. 6, 7, 15.

§ 6. *Waiver of covenants, &c.*...536.
§ 7. Scintilla juris...536.
§ 15. *Extent of act*...536.

As to the remaining sections:—

§§ 1—5 (*Registration of judgments*) *have been repealed by the Land Charges Act*, 1900; § 8 *is referred to* ante, *p.* 531; § 9 *has been repealed by the Trustee Act*, 1893; § 10 *empowered the making of orders as to the investment of cash in court* (*see now R. S. C. Ord.* 22, *r.* 17); §§ 11 *and* 12 (*Trustees' investments*) *have been repealed* (*actually or in effect*) *by the Trustee Investment Act*, 1889 (*see now Trustee Act*, 1893, *ss.* 1—9, *post*); § 13 (*Limitation of claims to estates of intestates*) *is inserted* ante, *p.* 191; § 14 (*Accounts of debts*) *has been repealed by the Statute Law Revision Act*, 1883, *and the Chancery* (*Ireland*) *Act*, 1867.

23 & 24 Vict. c. 38, s. 6.

Restriction of effect of waiver.

6. Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

As to waiver of forfeiture, see the notes to *Duppa* v. *Mayo* (1 Wms. Saund. 443 *et seq.*, ed. 1871).

Provision for cases of future and contingent uses.

7. Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses, and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere.

As to the doctrine of scintilla juris, see Sugden, Powers, 18 *et seq.*, 8th ed.

Act not to extend to Scotland, &c.

15. This act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland.

V.—Lord Cranworth's Act as to Trustees and Mortgagees.

23 & 24 Vict. c. 145.

An Act to give to Trustees, Mortgagees and others certain Powers now commonly inserted in Settlements, Mortgages, and Wills.

[28th August, 1860.]

23 & 24 Vict. c. 145, s. 1.

Whereas it is expedient that certain powers and provisions which it is now usual to insert in settlements, mortgages, wills, and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument: be it enacted as follows:

Part I.

Powers of Trustees for Sale, &c., and Trustees of renewable Leaseholds.

Trustees empowered to sell may sell in lots, and either by auction or private contract.

1. In all cases where by any will, deed, or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange.

Parts I. and II. of this act have been respectively repealed by S. L. Act, 1882, *s.* 64, *and Conv. Act,* 1881, *s.* 71 (post, *p.* 604), *but in neither case does the repeal affect "the operation, effect, or consequence" of any instrument executed before the commencement of the repealing act* (*see* Re Solomon and Meagher, 40 *Ch. D.* 508). *The subject-matters of sects.* 1 *and* 2, *and also of Part II. of the present act, have respectively been further dealt with by sect.* 13 *of the Trustee Act,* 1893 (post), *and sect.* 19 et seq. *of the Conv. Act,* 1881 (post, p. 575); *but the last-mentioned provisions are not retrospective. Sect.* 9 *of the present act contains power to raise by mortgage money required for equality of exchange, and for renewing leases. The subject-matter of sects.* 8 *and* 9, *so far as regards renewable leases, is dealt with in sect.* 19 *of the Trustee Act,* 1893 (post); *which provisions are retrospective. Under the above circumstances sects.* 8 *and* 9 *have been omitted; but with this exception, Parts I. and II. of the present act have been retained.*

23 & 24 Vict. c. 145, s. 2.

Sale may be made under special conditions, and trustees may buy in, &c.

2. It shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to resell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the person making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other hereditaments or otherwise.

Trustees exercising power of sale, &c. empowered to convey.

3. For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use, or otherwise, as may be necessary.

Moneys arising from sales, &c. to be laid out in other lands;

4. The money so received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in England or Wales or in Ireland (as the case may be), or of lands of a leasehold or copyhold or customary tenure which, in the opinion of the persons making the purchase, are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed or other instrument of settlement in which the power of sale or exchange was contained; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold or copyhold or customary tenure shall be settled and assured upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations, as shall as nearly as may be correspond with and be similar to the aforesaid uses, trusts, intents and purposes, powers, provisoes, and declarations, but not so as to increase or multiply charges,

and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years; and any such purchase as aforesaid may be made subject to any special conditions as to title or otherwise: provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years. 23 & 24 Vict. c. 145, s. 4.

5. Provided nevertheless that it shall be lawful for the persons exercising any such power as aforesaid, if they shall think fit, to apply any money to be received upon any sale or for equality of exchange as aforesaid, or any part thereof, in lieu of purchasing lands therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject. or in payment of incumbrances.

6. No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, and no land situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales; and no money arising from any such sale or exchange of lands in Ireland shall be laid out in the purchase of lands or hereditaments situate elsewhere than in Ireland, and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland. Money arising from sales, &c. not to be laid out, nor lands exchanged, elsewhere than in the country in which lands sold or exchanged is situated.

7. Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof, in case such purchase and settlement as aforesaid were then actually made. Until purchase of lands, &c. money to be invested at interest.

As to sects. 8 and 9, see note, *ante*, p. 537.

10. No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, or other instrument, or if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any No sale, &c. to be made without consent of tenant for life, &c.

23 & 24 Vict. c. 145, s. 10.

person where it appears from the will, deed or other instrument, to have been intended that such sale, exchange or purchase, should be made by the person or persons making the same without the consent of any other person.

Part II.

Powers of Mortgagees (p).

Powers incident to mortgages.

11. Where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge; namely,

To sell.

1st. A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property from time to time, in like manner:

To insure.

2nd. A power to insure and keep insured from loss or damage by fire the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for any such insurance to the principal money secured at the same rate of interest:

To appoint receiver.

3rd. A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

(*p*) In the case of a mortgage before 1881, these powers may be exercised since 1881 (*Re Solomon and Meagher*, 40 Ch. D. 508).

Receipts for purchase-money sufficient discharges.

12. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

Notice to be given before sale; but purchaser relieved from

13. No such sale as aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has

been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given: but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person selling. 23 & 24 Vict. c. 145, s. 13. inquiry as to circumstances of sale.

14. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows: first, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal moneys then due in respect of such charge; and the residue of such money shall be paid to the person entitled to the property subject to the charge, his heirs, executors, administrators, or assigns, as the case may be. Application of purchase-money.

15. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of, except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser by such deed. Conveyance to the purchaser.

An equitable mortgage, by deed, of freeholds can, under this section, convey the legal estate in the fee (*Re Solomon and Meagher*, 40 Ch. D. 508). And where leaseholds are mortgaged by demise, the mortgagee can, under this section, convey to a purchaser the reversion left in the mortgagor (*Hiatt* v. *Hillman*, 19 W. R. 694; compare *Re Hodson and Howes*, 35 Ch. Div. 668, a case under the Conv. Act, 1881).

As to the effect of this section where the mortgagor has registered with an indefeasible title under the Land Registry Act, 1862, see *Re Richardson* (12 Eq. 398; 13 Eq. 142).

16. At any time after the power of sale hereby conferred shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered or assigned to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of, and where the legal estate shall be outstanding in a trustee the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the Owner of charge may call for title deeds and conveyance of legal estate.

23 & 24 Vict. c. 145, s. 16.

charge could have called for such a conveyance if the charge had not been made.

Appointment of receiver.

17. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment is made within ten days after such requisition, they may in writing appoint any person he may think fit.

Receiver deemed to be the agent of the mortgagor.

18. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

Powers of receiver.

19. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property, of which he is appointed receiver by action, suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

Receiver may be removed.

20. Every receiver appointed as aforesaid may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

Receiver to receive a commission not exceeding five per cent.

21. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five per centum on such gross amount.

Receiver to insure, if required.

22. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge (whether affixed to the freehold or not) which is in its nature insurable.

23. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof, and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns.

23 & 24 Vict. c. 145, s. 23.

Application of moneys received by him.

24. The powers and provisions contained in this part of this act relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

This part to relate to charges by way of mortgage only.

[*Part III. of the present act* (*sects.* 25 *to* 30), *which contained provisions as to the investment of trust funds and the appointment and powers of trustees and executors, has been repealed by sect.* 71 *of the Conv. Act,* 1881, *but new provisions dealing respectively with the same subject-matter as the repealed sections will be found in the Trustee Act,* 1893, *ss.* 1, 10, 20, 21, *and in sect.* 43 *of the Conv. Act,* 1881. *The new provisions are in every case retrospective, and may be cumulative* (*see* Re Lloyd, 1888, *W. N.* 20). *Part III. of the present act has accordingly been omitted.*]

Part IV.

General Provisions.

31. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

Tenants for life, &c. may execute powers, notwithstanding incumbrances.

Part IV. of the present act has been repealed by sect. 64 of the S. L. A. 1881, but has been retained in connection with Parts I. and II. (see note *ante*, p. 537).

32. None of the powers or incidents hereby conferred or annexed to particular offices, estates, or circumstances, shall take effect or be exerciseable if it is declared in the deed, will, or other instrument creating such offices, estates, or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of

Powers, &c. hereby given may be negatived by express declaration.

23 & 24 Vict. c. 145, s. 32.

the powers or incidents hereby conferred or annexed are contained in such deed, will, or other instrument, such powers or incidents shall be exerciseable or shall take effect only subject to such variations or limitations.

No persons other than those entitled under the settlement, &c. to be affected.

33. Nothing in this act contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any persons soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will, or other instrument under which such trustees or other persons are empowered to act had contained express powers for such trustees or other persons so to deal with or affect such estates or rights.

Commencement of act.

34. The provisions contained in this act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of this act, or under a will or codicil confirmed or revived by a codicil executed after that date.

Extent of act.

35. This act shall not extend to Scotland.

VI.—The Vendor and Purchaser Act, 1874.

37 & 38 Vict. c. 78, ss. 1—3, 4, 5, 7—10.

37 & 38 Vict. c. 78, s. 1.

Forty years substituted for sixty years as the root of title.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

In the case of a sale of leaseholds the deed creating the term, even where dated more than forty years before contract, must be abstracted and produced; but dealings prior to the necessary commencement of title need not be abstracted, unless under special circumstances (*Williams* v. *Spargo*, 1893, W. N. 100; see *Re Stamford and Knight*, 1900, 1 Ch. 287). If the title is a possessory one, forty years' possession must be proved (*Jacobs* v. *Revell*, 1900, 2 Ch. 858).

Rules for regulating obligations

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the

obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

37 & 38 Vict. c. 78, s. 2.

and rights of vendor and purchaser.

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold;

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions;

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents;

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser;

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

The first rule controls the right of a litigant in an action for specific performance to production of deeds, where there is merely a general denial of the title of the other party; but the rule does not prevent the title being shown to be bad *aliunde* (*Jones* v. *Watts*, 43 Ch. Div. 574). An agreement to grant a right of way for a term is within the rule (*S. C.*). The rule does not prevent a lessee being affected with constructive notice of his lessor's title (*Patman* v. *Harland*, 17 Ch. D. 353). In connection with this rule, see Conv. Act, 1881, s. 3 (1), *post*, p. 554, and s. 13 (1), *post*, p. 568.

Under the second rule, it was held that a recital in a deed more than twenty years old that the vendor was seised in fee simple prevented a purchaser from demanding any abstract of prior title (*Bolton* v. *School Board for London*, 7 Ch. D. 766). So a recital that a sale was made in pursuance of a trust for sale precluded a requisition as to whether it was a valid exercise of that trust (*Re Marsh and Granville*, 24 Ch. D. 11).

Under the fifth rule it was held, where a mortgage comprised land and policies, and the mortgagee sold the land and retained the policies, that the purchaser was entitled to have the mortgage deed, the rule referring only to a retainer of land (*Re Williams and Newcastle*, 1897, 2 Ch. 144).

Trustees may sell or buy subject to this section (Trustee Act, 1893, s. 15, *post*). As to covenants for production, see Conv. Act, 1881, s. 9, *post*, p. 583.

[*Sect.* 3 *has been replaced by sect.* 15 *of the Trustee Act*, 1893.]

Legal personal representative may

4. The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall

37 & 38 Vict. c. 78, s. 4.

convey legal estate of mortgaged property.

have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.

This section has been repealed by the Conv. Act, 1881, s. 30 (2), *post*, p. 585.

Bare legal estate in fee simple to vest in executor or administrator.

5. Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like chattel real in the legal personal representative from time to time of such trustee.

Sect. 5 was, as to England, repealed and re-enacted in a limited form by the Land Transfer Act, 1875, s. 48. The last-named section has been repealed by the Conv. Act, 1881, s. 30 (2); which see, *post*, p. 585. Sect. 5 has been repealed, as to Ireland, by the Conv. Act, 1881, s. 73, *post*, p. 605.

As to what was a bare trustee within the section, see *Christie* v. *Ovington* (1 Ch. D. 279); *Re Cunningham and Frayling* (1891, 2 Ch. 567); *Morgan* v. *Swansea Authority* (9 Ch. D. 582).

Married woman who is a bare trustee, may convey, &c.

6. When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole.

A married woman who was a trustee for sale was held (after order for sale and payment of purchase-money into court) to be a bare trustee within this section (*Re Docwra, Docwra* v. *Faith*, 29 Ch. D. 693). See now sect. 16 of the Trustee Act, 1893 (*post*), and cases there quoted.

Protection and priority by legal estates and tacking not to be allowed.

7. After the commencement of this act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this act.

This section was repealed as to England by the Land Transfer Act, 1875, s. 129; and as to Ireland by the Conv. Act, 1881, s. 73. See *Robinson* v. *Trevor*, 12 Q. B. D. 423.

Non-registration of will in Middlesex, &c. cured in certain cases.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by someone deriving title under

him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law. 37 & 38 Vict. c. 78, s. 8.

Wills must be registered in Middlesex within six months from the death (7 Anne, c. 20, ss. 1 and 8; see the Land Registry (Middlesex Deed) Act, 1891; *Re Cooper, Cooper* v. *Vesey*, 20 Ch. Div. 611). As to Yorkshire, see now the Yorkshire Regis. Act, 1884, ss. 4 and 14; and before that act, 8 Geo. II. c. 6, and 6 Anne, c. 35; *Chadwick* v. *Turner*, 1 Ch. 310.

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract,) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

Cases under this section.

In an action for specific performance of a contract as to real estate an ordinary form of relief is as follows:—The court (1) makes a declaration establishing the contract; (2) directs a reference as to title; and (3) gives directions consequent on the result of the reference (Seton, 6th ed. 2206, 2226, 2239).

Questions between lessor and lessee arising on a contract to grant a lease have been treated as falling within the act (*Re Lander and Bagley*, 1892, 3 Ch. 41; see *Re Anderton and Milner*, 45 Ch. D. 476; *Re Stephenson and Cox*, 36 S. J. 287). A question as to a voluntary gift, which was held not to be within the act, was yet determined under it, counsel admitting a contract for nominal consideration (*Re Salisbury*, 23 W. R. 824).

According to the words of this section the parties cannot, upon an application under it, question either the existence or the validity of the contract, *e.g.*, on the ground of fraud (*Re Hargreaves and Thompson*, 32 Ch. Div. 459; see *Re Davis and Cavey*, 40 Ch. D. 608; *Re Sandbach and Edmondson*, 1891, 1 Ch. 102). But it is only the existence and validity of the contract, in its inception, which cannot be questioned; and therefore questions as to rescission can be dealt with (*Re Jackson and Wooaburn*, 37 Ch. D. 47). Questions of construction arising on the contract as it stands should be decided, although grounds may exist for an action for rescission (*Re Hughes and Ashley*, 1900, 2 Ch. 595; *Re Wallis and Barnard*, 1899, 2 Ch. 515; see *Re Lander and Bagley*, 1892, 3 Ch. 50, where a question of construction was decided, the result of the decision being to show that there was a valid subsisting agreement).

An application under this section cannot be treated as if an action had been brought (*Re Hargreaves and Thompson*, 32 Ch. D. 456). But whatever could be done in chambers upon reference as to title where the contract had been established can be done (*Re Burroughs, Lynn and*

37 & 38 Vict. c. 78, s. 9.

Sexton, 5 Ch. Div. 604). And accordingly the same kind of evidence can be used (*Ib.*). The section, however, was not intended to enable the court to try in this way disputed questions of fact (*Ib.* 603; *Re Popple and Barratt*, 25 W. R. 248; *Re Gray and the Metropolitan R. Co.*, 44 L. T. 567); but was intended to enable either vendor or purchaser to obtain a decision upon some isolated point (*Re Hargreaves and Thompson*, 32 Ch. Div. 459; *Re Wallis and Barnard*, 1899, 2 Ch. 515); *e.g.*, any short point of law or construction arising upon the abstract or upon the purchaser's requisitions (*Re Popple and Barratt, sup.*). The court has authority not only to decide the questions asked, but also to make an order which will be just, as the natural consequence of the decision (*Re Hargreaves and Thompson*, 32 Ch. Div. 457); and on deciding a question in favour of the vendor the court may declare the title too doubtful to be forced on the purchaser (*Re Hollis Hospital and Hague*, 1899, 2 Ch. 555; *Re Thackwray and Young*, 40 Ch. D. 34; *Re Marshall and Salt*, 1900, 2 Ch. 202; see *Re Wallis and Barnard*, 1899, 2 Ch. 521; *Mogridge* v. *Clapp*, 1892, 3 Ch. 396).

Questions in respect of requisitions and objections.

Under this section the court has dealt with the following (among other) questions in respect of requisitions and objections, *e.g.*, Whether a requisition as to the completeness of the abstract should be answered (*Re Ford and Hill*, 10 Ch. Div. 365); what documents should be comprised in the abstract (*Re Stamford Co. and Knight*, 1900, 1 Ch. 287); whether vendor's refusal to answer requisitions was unreasonable (*Re Glenton and Saunders*, 53 L. T. 434).

Also whether an annual payment sold was properly described as "a rent-charge" and was charged on water rates (*Re Gerard and Beecham*, 1894, 3 Ch. 295); whether land was "adjoining" to an existing churchyard (*Re Bateman and Parker*, 1899, 1 Ch. 599); whether land sold as "building land" was part of a disused burial ground (*Re Ponsford and Newport Board*, 1894, 1 Ch. 454; *Re Eccl. Commrs. and New City, &c. Co.*, 1895, 1 Ch. 702).

Also whether succession duty was payable (*Re Cooper and Allen*, 4 Ch. D. 802; *Re Warner*, 17 Ch. D. 711); and by whom (*Re Kidd and Gibbon*, 1893, 1 Ch. 695); whether a purchaser was entitled to have a deed stamped (*Whiting to Loomes*, 17 Ch. Div. 10); who should pay for registry searches (*Re Murray and Heggarty*, 15 L. R. Ir. 510); for searches for documents (*Re Stuart and Olivant*, 1896, 2 Ch. 328; *Re Duthy and Jesson*, 1898, 1 Ch. 419); for production of documents (*Re Willett and Argenti*, 60 L. T. 735); for procuring concurrence of mortgagees (*Re Sander and Walford*, 1900, W. N. 183); or for certificates or abstracts of deeds (*Re Moody and Yates*, 30 Ch. Div. 344; *Re Johnson and Tustin*, *Ib.* 42).

Also whether the vendor was bound to apply for the discharge of incumbrances under sect. 5 of the Conv. Act, 1881 (*Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788); whether a purchaser was entitled to evidence that a debenture charge had not attached (*Re Horne and Hellard*, 29 Ch. D. 736); what was sufficient evidence of performance of covenants (*Ringer to Thompson*, 45 L. T. 580); or that no common rights existed (*Re Bridges and McRae*, 30 W. R. 539); whether there was a presumption of enfranchisement of copyholds (*Re Lidiard*, 42 Ch. D. 254); what fine was payable on a sale of copyholds under the S. L. A., 1882 (*Re Naylor and Spendla*, 34 Ch. D. 217).

Also whether notice of a trust entitled the purchaser to require the trust title to be proved (*Re Harman and Uxbridge Co.*, 24 Ch. D. 720; *Re Blaiberg and Abrahams*, 1899, 2 Ch. 340); whether trustees had been properly appointed (*Re Walker and Hughes*, 24 Ch. D. 698; *Re Glenny and Hartley*, 25 Ch. D. 611; *Re Coates to Parsons*, 34 Ch. D. 370); or had effectually disclaimed (*Re Lord and Fullerton*, 1896, 1 Ch. 228).

Also whether a lease has been properly granted (*Hallett to Martin*, 24 Ch. D. 624); whether a power of sale and exchange authorized a partition (*Re Frith and Osborne*, 3 Ch. D. 618); whether powers of sale were exercisable when given by mortgages (*Re Rumney and Smith*, 1897,

2 Ch. 351; *Re Irish Society and O'Keefe*, 7 L. R. Ir. 136); or by wills (*Re Sudeley and Baines*, 1894, 1 Ch. 334; *Re Dyson and Fowke*, 1896, 2 Ch. 720; *Re Tweedie and Miles*, 27 Ch. D. 315); or by sect. 14 of the Law of Prop. Amend. Act, 1859 (*Re Adams and Perry*, 1899, 1 Ch. 554). 37 & 38 Vict. c. 78, s. 9.

Also whether a mortgaged estate passed under a devise (*Re Packman and Moss*, 1 Ch. D. 214); questions on the construction of wills (*Re Brown and Sibly*, 3 Ch. D. 156; *Re Coleman and Jarrom*, 4 Ch. D. 165; *Re White and Hindle*, 7 Ch. D. 201; *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Re Sturge and G. W. Ry. Co.*, 19 Ch. D. 444).

Also whether a post-nuptial settlement was valid (*Re Foster and Lister*, 6 Ch. D. 87); whether a title under a voluntary settlement was good in the case of a settlor's subsequent bankruptcy (*Re Carter and Kenderdine*, 1897, 1 Ch. 776); whether a bankrupt could dispose of after-acquired freeholds (*Re New Land Association and Gray*, 1892, 2 Ch. 138), or leaseholds (*Re Clayton and Barclay*, 1895, 2 Ch. 212); whether an adjudication in bankruptcy required registration in Middlesex (*Re Calcott and Elvin*, 1898, 2 Ch. 460); whether the trustee of a bankrupt could exercise a power of appointment (*Nichols to Nixey*, 29 Ch. D. 1005).

Also questions under the Companies Act, 1862 (*Re Bowling and Welby*, 1895, 1 Ch. 663); under the Fines and Recoveries Act, 1833 (*Re Dudson*, 8 Ch. D. 628); under the M. W. P. A., 1882 (*Re Harkness and Allsopp*, 1896, 2 Ch. 358; *Re Brooke and Fremlin*, 1898, 1 Ch. 647); under the S. L. Acts (*Re Earle and Webster*, 24 Ch. D. 144; *Re Hale and Smyth*, 55 L. T. 151; *Re Strafford and Maples*, 1896, 1 Ch. 235; *Re Pocock and Prankerd*, *ib.* 302; *Re Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712; *Re Fisher and Grazebrook*, 1898, 2 Ch. 660; *Re Mundy and Roper*, 1899, 1 Ch. 275; *Re Newell and Nevill*, 1900, 1 Ch. 90); under the Conv. Act, 1881 (*Re Higgins and Percival*, 59 L. T. 213); or under the Land Transfer Act, 1897 (*Re Pawley and London, &c. Bank*, 1900, 1 Ch. 58; *Re Cary and Lott*, 1901, 2 Ch. 463; *Re Cohen's Executors and London C.C.*, 1902, 1 Ch. 187).

Also whether the rule against perpetuities applied to common law conditions (*Re Hollis Hospital and Hague*, 1899, 2 Ch. 540).

Also whether the concurrence was necessary: of the Charity Commissioners (*Re Royal Society and Thompson*, 17 Ch. D. 407; *Finnis to Forbes*, 24 Ch. D. 591; *Re Corporation of Clergy Sons and Skinner*, 1893, 1 Ch. 178; *Re Mason's Orphanage and L. and N. W. Ry.*, 1896, 1 Ch. 54, 596); or of incumbrancers and trustee in bankruptcy of life tenant (*Re Bedingfield and Herring*, 1893, 2 Ch. 332); or of *cestui que trusts* (*Re Cooke*, 4 Ch. D. 454); or of the husband of a married woman (*Re Thompson and Curzon*, 29 Ch. D. 177).

Also whether the receipt of a married woman for legacy discharged property (*Re Coward and Adam*, 20 Eq. 179); whether the joint receipt of different mortgagees was a good receipt (*Re Parker and Beech*, 56 L. T. 95); whether trustees must receive money personally (*Re Bellamy*, 24 Ch. D. 387; *Re Flower*, 27 Ch. D. 592).

Also whether a good title could be made by the following persons:—An infant selling gavelkind lands (*Re Maskell and Goldfinch*, 1895, 2 Ch. 525); an heir (*Re Morton and Hallett*, 15 Ch. Div. 143); a devisee (*Osborne to Rowlett*, 13 Ch. D. 774); an executor selling freeholds (*Re Tanqueray-Willaume*, 20 Ch. Div. 465), or leaseholds (*Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze*, 1894, 2 Ch. 101); an administrator (*Re Clay and Tetley*, 16 Ch. Div. 3; *Re Adams and Kensington*, 27 Ch. D. 394); trustees (*Re Wright and Marshall*, 28 Ch. D. 93); *Patten to Edmonton*, 48 L. T. 870: as to which case see *Power* v. *Banks*, 1901, 2 Ch. 496; *Re Arbib and Class*, 1891, 1 Ch. 601); a compounding debtor (*Re Kearley and Clayton*, 7 Ch. D. 615); the survivor of two trustees of a bankrupt (*Re Waddell*, 2 Ch. D. 172); or of two liquidators of a company (*Re Metropolitan Bank and Jones*, *ib.* 366).

Claims for compensation.

The court has also decided claims for compensation: *e.g.*, whether compensation was payable before completion (*Aspinalls to Powell*, 60 L. T. 595; *Re Herbalt and Chaytor*, 57 L. J. Ch. 421; *Re Orange and Wright*, 52 L. T. 606), or after completion (*Re Turner and Skelton*, 13 Ch. D. 130;

37 & 38 Vict. c. 78, s. 9.

Re Leyland and Taylor, 1900, 2 Ch. 625). As to reference to chambers, see *Aspinalls to Powell* (60 L. T. 595).

Other questions: *e.g.* as to completion.

The court has also decided other questions: *e.g.*, what should be the form of conveyance (*Re Pigott and G. W. R. Co.*, 18 Ch. D. 146); whether particular covenants should be inserted (*Re Agg-Gardner*, 25 Ch. D. 600; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Gray and Metropolitan R. Co.*, 44 L. T. 567; *Re Sawyer and Baring*, 51 L. T. 356; *Re Mordy and Cowman*, *ib.* 721; *Re Lander and Bagley*, 1892, 3 Ch. 41; *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Re Wallis and Barnard*, 1899, 2 Ch. 515; *Re Hughes and Ashley*, 1900, 2 Ch. 595); who had the right to deeds (*Re Doherty*, 15 L. R. Ir. 247; *Re Williams and Newcastle*, 1897, 2 Ch. 144); whether a purchaser was entitled to damages for non-repair paid to the vendor by a former tenant (*Re Edie and Brown*, 58 L. T. 307); whether a vendor having sold by auction building land subject to restriction could afterwards sell unsold lots not so subject (*Re Birmingham Land Co. and Allday*, 1893, 1 Ch. 342).

as to contracts.

The court has also decided whether a right of way was included in the contract (*Re Lavery and Kirk*, 33 S. J. 127; *Re Hughes and Ashley*, 1900, 2 Ch. 525); the effect of a plan annexed to particulars as regards a right of way (*Re Lindsay and Forde*, 72 L. T. 832); what was the effect of conditions restricting title and objections thereto (*Re National Provincial Bank and Marsh*, 1895, 1 Ch. 190; *Re Scott and Alvarez*, 1895, 1 Ch. 596; 1895, 2 Ch. 603; *Re Cox and Neve*, 1891, 2 Ch. 109; *Re Davys and Saurin*, 17 L. R. Ir. 334); the effect of a condition on the costs of pending litigation (*Re Spindler and Mear*, 1901, 1 Ch. 908); whether a purchaser was bound by a condition of sale alleged to be misleading (*Re Marsh and Granville*, 24 Ch. Div. 11; *Re Sandbach and Edmondson*, 1891, 1 Ch. 99); to what a condition as to misdescription applied (*Re Beyfus and Masters*, 39 Ch. Div. 110); whether under the conditions the vendor had the right to rescind (*Re Jackson and Oakshott*, 14 Ch. D. 851; *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Dames and Wood*, 29 Ch. D. 626; *Re Jackson and Woodburn*, 37 Ch. D. 44; *Re Arbib and Class*, 1891, 1 Ch. 601; *Re Deighton and Harris*, 1898, 1 Ch. 458); or the purchaser to repudiate the contract (*Re Gloag and Miller*, 23 Ch. D. 320), *e.g.* on the ground of onerous covenants (*Re White and Smith*, 1896, 1 Ch. 637; *Re Haedicke and Lipski*, 1901, 2 Ch. 666); what price was payable under the contract (*Re Popple and Barratt*, 25 W. R. 248); whether any, and what, interest was payable (*Re Pigott and G. W. R. Co.*, 18 Ch. D. 146; *Riley to Streatfield*, 34 Ch. D. 386; *Re Golds and Norton*, 52 L. T. 321; *Re Hetling and Merton*, 1893, 3 Ch. 269; *Re London and Tubbs*, 1894, 2 Ch. 524; *Re Wilsons and Stevens*, 1894, 3 Ch. 546; *Re Strafford and Maples*, 1896, 1 Ch. 235; *Re Woods and Lewis*, 1898, 2 Ch. 211); and the court has ordered the return of interest paid under protest (*Re Young and Harston*, 31 Ch. Div. 168).

Orders under section: for return of deposit;

The section provides that the judge shall make such order as to him shall appear just; accordingly the court has upon a purchaser's summons ordered a return of the deposit with interest (*Re Cosh and Metropolitan District R. Co.*, 13 Ch. D. 607; *Re Hargreaves and Thompson*, 32 Ch. Div. 454; *Re Smith and Stott*, 48 L. T. 512; *Re Haedicke and Lipski*, 1901, 2 Ch. 666; see, however, *Re Davis and Cavey*, 40 Ch. D. 608, where a return was claimed on the ground of misrepresentation in particulars); and has, in addition, ordered payment by the vendor of the purchaser's costs of investigating the title (*Re Higgins and Hitchman*, 21 Ch. D. 95; *Re Ebsworth and Tidy*, 42 Ch. Div. 53; *Re Bryant and Barningham*, 44 Ch. Div. 218; *Re Hare and O'Moore*, 1901, 1 Ch. 93); and such costs may be charged on the vendor's interest on the property (*Re Yielding and Westbrook*, 31 Ch. D. 344). Similarly, on a vendor's summons, the court has ordered rescission and a return of the deposit (*Re Higgins and Percival*, 59 L. T. 213; *Re Walker and Oakshott*, 1901, 2 Ch. 383); and see the conditional order for return of deposit in *Re Beyfus and Masters*, 39 Ch. D. 112.

as to costs of investigating title.

37 & 38 Vict. c. 78, s. 9.

Damages for delay in completion cannot be recovered under this act (*Re Wilson and Stevens*, 1894, 3 Ch. 546).

Damages.

Orders have frequently been made under the acts declaring that the vendor has or has not shown a good title (Seton, 6th ed, 2264 *et seq.*; but see *Re Wallis and Barnard*, 1899, 2 Ch. 520). The order may direct a reference to chambers as to the form of the conveyance (*Re Monckton and Gilzean*, 27 Ch. D. 564), or as to the amount of compensation (*Aspinalls to Powell*, 60 L. T. 595).

Form of order.

Parties.

In actions for specific performance the general rule is that the parties to the contract, or their representatives, are the necessary and sufficient parties to the action (Fry, 3rd ed. 73, 83). On a summons under this section the only persons between whom the court can decide anything are, it has been said, the vendor and the purchaser (*Re Naylor and Spendla*, 31 Ch. Div. 220; *Re Bartlett and Berry*, 76 L. T. 751); but other parties (*e.g.*, a lord of the manor) may come in and be bound (*Ib.*). The court may direct other parties to be served, see *Re Tippett and Newbould*, 37 Ch. Div. 446; a case in which the summons was subsequently by amendment made an originating summons on a question of construction. No decision will bind any party not before the court, *e.g.*, the Crown in respect of duty (*Re Cooper and Allen*, 4 Ch. D. 827); nor will it prevent subsequent litigation against the same purchaser in respect of the same title (*Osborne to Rowlett*, 13 Ch. D. 781).

Hearing of summons.

A summons may be adjourned into court without discussion (*Re Jackson and Woodburn*, 37 Ch. Div. 47; see however, *Re Coleman and Jarrom*, 4 Ch. D. 168), or for further argument. An adjournment may be ordered either at the request of one of the parties (*Re Warner*, 17 Ch. D. 712), or at the discretion of the judge (*Re Cooper and Allen*, 4 Ch. D. 805); and the adjournment may be on part only of the summons (*Re Tippett and Newbould*, 37 Ch. D. 445). The judgment may be given in court if the purchaser desires it (*Re Coleman and Jarrom*, 4 Ch. D. 168). In a proper case the summons may be stayed as frivolous or vexatious (*Re Bartlett and Berry*, 76 L. T. 751).

Appeals.

For the practice as to appeals from orders made in chambers under this act, see Annual Practice, note to sect. 50 of Jud. Act, 1873, and to sect. 1 of the Jud. Act, 1894. The time within which an appeal can be brought is fourteen days (*Re Blyth and Young*, 13 Ch. D. 416; *Re Ricketts and Avent*, 1890, W. N. 16). As to the time from which this period is calculated, see R. S. C. Ord. 58, r. 15. When an order dismissing an application contains a declaration as such, or as an expression of opinion so as to bind the rights of the parties, it is not a simple refusal of the application within that rule (*Re Clay and Tetley*, 16 Ch. Div. 3).

Review.

As to reviewing a decision under this section, see *Re Scott and Alvarez*, 1895, 1 Ch. 596.

Costs.

As a general rule the costs will follow the event (*Re Davis and Cavey*, 40 Ch. D. 609; *Re Starr-Bowkett Society and Sibun*, 42 Ch. D. 386; *Re Johnson and Tustin*, 30 Ch. Div. 49). If the question submitted is whether a good title can be made, and the title, even though not one which a conveyancer would recommend a purchaser to accept, is yet held good, the purchaser should pay the costs (*Osborne to Rowlett*, 13 Ch. D. 798; *Re Tanqueray-Willaume*, 20 Ch. Div. 483). But no order was made as to costs where the difficulty arose from conflicting decisions (*Osborne to Rowlett*, 13 Ch. D. 774), nor where there was a fair point for discussion (*Re Coward and Adams*, 20 Eq. 179; *Re Cosh and Metropolitan R. Co.*, 13 Ch. D. 613; *Finch* v. *Jukes*, 1877, W. N. 211; see *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788). The vendor was ordered to pay costs where he rescinded after summons issued (*Re Spindler and Mear*, 1901, 1 Ch. 908). Costs given against the vendor may be charged on his interest in the property (*Re Yielding and Westbrook*, 31 Ch. D. 345; *Re Higgins and Percival*, 59 L. T. 214).

Enforcement of order.

Where a respondent has not complied with an order made under this section, a further application should be made in chambers to enforce the order (*Thompson* v. *Ringer*, 44 L. T. 507); where *Bacon*, V.-C., dismissed

37 & 38 Vict. c. 78, s. 9. a subsequent action for specific performance on the ground that this had not been done.

10. This act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

VII.—The Conveyancing Acts, 1881, 1882, 1892.

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

44 & 45 Vict. c. 41.

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes. [22nd August, 1881.]

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I.—Preliminary.

44 & 45 Vict. c. 41, s. 1. 1.—(1.) This act may be cited as the Conveyancing and Law of Property Act, 1881.

Short title; commencement; extent. (2.) This act shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-one.

(3.) This act does not extend to Scotland.

The words printed in italics in the following sections, 2, 14, 25, 30, 48, 68, 69, 70, 71, 72, and schedules 1 and 2 have been repealed by the S. L. R. Acts, 1894 and 1898.

44 & 45 Vict. c. 41, s. 2.

Interpretation of property, land, &c.

2. In this act—

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest:

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

(iv.) Manor includes lordship, and reputed manor or lordship:

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

(vi.) Mortgage includes any charge on any property for securing money or money's worth (*a*); and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor (*b*), or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

44 & 45 Vict. c. 41, s. 2.

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares:

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy (*c*).

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court "*of Justice*" is referred to as the court.

(*a*) *E.g.*, the lien of a company on the shares of a shareholder (*Everitt* v. *Automatic Weighing Machine Co.*, 1892, 3 Ch. 506).

(*b*) *E.g.*, a second mortgagee (*Teevan* v. *Smith*, 20 Ch. Div. 730).

(*c*) "Bankruptcy" includes liquidation in the case of a company (*Horsey Estate, Ltd.* v. *Steiger*, 1899, 2 Q. B. 79).

II.—Sales and other Transactions.

Contracts for Sale.

Application of stated conditions of sale to all purchases.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion (*d*).

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement (*e*).

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed,

will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise (*f*). 44 & 45 Vict c. 41, s. 3.

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase (*g*).

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date (*h*).

(6.) On a sale of any property, the expenses of the production and inspection of all acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested, or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser (*i*).

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

44 & 45 Vict. c. 41, s. 3.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this act.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the court.

(*d*) The "leasehold reversion" referred to in this sub-section is the reversion to that leasehold interest out of which the term of years is derived (*Gosling* v. *Woolf*, 1893, 1 Q. B. 39). See, in connection with this section, V. & P. Act, 1874, s. 2, rule 1 (*ante*, p. 545), and sect. 13 (*post*, p. 568).

(*e*) On an enfranchisement, it was said that the copyholder is not entitled to an acknowledgment of the right to production of the documents of title of the manor (*Re Agg-Gardner*, 25 Ch. D. 600).

(*f*) This sub-section was not intended to repeal the doctrines or qualify the principles on which before the act the courts granted or refused specific performance (*Nottingham Co.* v. *Butler*, 15 Q. B. D. 272). Accordingly, it does not preclude a purchaser who has discovered *aliunde* a defect prior to the stipulated commencement of title, and which was known to the vendor, from refusing to complete (*S. C.*, 16 Q. B. Div. 778); and see *Waddell* v. *Wolfe*, (L.R. 9 Q. B. 515); *Smith* v. *Robinson* (13 Ch. D. 148). For the effect of a condition against investigating or objecting to prior title, see *Re National Provincial Bank and Marsh*, 1895, 1 Ch. 190.

(*g*) This sub-section applies only to a payment of money, and not to a rent of a peppercorn, or in kind (*Re Moody and Yates*, 30 Ch. Div. 344). As to the effect of breaches after contract and before completion, see *Lawrie* v. *Lees* (14 Ch. Div. 249; 7 App. Cas. 19). No assumption as to performance of covenants was required from a purchaser where "the contrary" appeared (*Re Highett and Bird*, 1902, 2 Ch. 214).

(*h*) The production of a receipt signed by the ground landlord is not sufficient within this sub-section (*Re Higgins and Percival*, 59 L. T. 213).

(*i*) This sub-section does not interfere with the duty of the vendor to deliver a proper abstract of title, and only deals with the expenses of requisitions made on the footing of such an abstract (*Re Johnson and Tustin*, 30 Ch. Div. 42). Every document which forms a link in the vendor's title must be abstracted in chief at the vendor's expense (*Re Stamford Banking Co. and Knight*, 1900, 1 Ch. 287); but on a sale of a lease more than forty years old it was sufficient that a "link" more than forty years old appeared by way of recital (*Williams* v. *Spargo*, 1893, W. N. 100; see sub-sect. 3). Where there is a covenant to finish, to the satisfaction of a surveyor, a house contracted to be sold, the surveyor's certificate forms part of the vendor's title, and must be procured at his expense (*Re Moody and Yates*, 30 Ch. Div. 344). But when a proper abstract has been delivered, this sub-section applies to the production of all documents properly comprised therein (*Re Ebsworth and Tidy*, 42 Ch. D. 34). The purchaser bore the cost of production of deeds in the hands of a mortgagee (*Re Willett and Argenti*, 60 L. T. 735); and the cost of statutory declarations made by the vendor (*Re Edwards and Rudkin*, 58

L. T. 789); and the cost of searching for an underlease which was the root of the vendor's title (*Re Stuart and Olivant and Seadon*, 1896, 2 Ch. 328). But the vendor must bear the cost of obtaining the title deeds required to be handed over on completion (*Re Duthy and Jesson*, 1898, 1 Ch. 419). It has been held in Ireland that in the absence of stipulation the vendor bears the cost of registry searches (*Re Murray and Heggarty*, 15 L. R. Ir. 510). 44 & 45 Vict. c. 41, s. 3.

Completion of contract after death.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this act.

See sect. 30, *post*, p. 584, and the cases quoted under sect. 50 of the Trustee Act, 1893 (*post*).

Discharge of Incumbrances on Sale.

Provision by court for incumbrances, and sale freed therefrom.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount.

(2.) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(3.) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or

44 & 45 Vict. c. 41, s. 5.

transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this act, and to sales thereafter made.

The court has refused to compel a vendor to free land from a rent-charge under this section, where this would be a great hardship (*Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788). It is doubtful if this section applies to statutory rent-charges (*Ib.*). On a sale by a mortgagor part of the purchase-money was paid into court under this section, and the property vested in the purchaser (*Milford Haven Co.* v. *Mowatt*, 28 Ch. D. 402). An order was made under this section where the land was charged with legacies (*Archdale* v. *Anderson*, 21 L. R. Ir. 527). The court has decided interests *in futuro* in order to ascertain what sum should be set aside (*Re Freme*, 1895, 2 Ch. 256, 778). For form of order on sale by the court, see *Dickin* v. *Dickin* (30 W. R. 887); *Patching* v. *Bull* (46 L. T. 227; 30 W. R. 244); Seton, 6th ed. 1914.

General Words.

General words in conveyances of land, buildings, or manor.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof (*k*).

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages,

rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof. 44 & 45 Vict. c. 41, s. 6.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained (*l*).

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this act (*m*).

(*k*) To be "enjoyed" within this section an easement must be enjoyed under circumstances which would lead to an expectation that the enjoyment will be continued (*Birmingham Banking Co.* v. *Ross*, 38 Ch. Div. 307; *Burrows* v. *Lang*, 1901, 2 Ch. 506; *Godwin* v. *Schweppes*, 1902, 1 Ch. 933). The right to use a tramway was held to pass as a "right" enjoyed with the land conveyed (*Brazier* v. *Glasspool*, 1901, W. N. 237). The words "enjoyed with" would pass an easement which did not exist as of right at the time of the conveyance, but was *de facto* enjoyed (*Re Peck and School Board for London*, 1893, 2 Ch. 319; see the cases quoted as to rights of way, *ante*, p. 63).

Primâ facie the grant of land with a house on it gives under this section a full right to light to all windows, and the grantor cannot build so as to obstruct them. The onus is on the grantor to show any limitation of the right (*Broomfield* v. *Williams*, 1897, 1 Ch. 602; *Pollard* v. *Gare*, 1901, 1 Ch. 834). This sub-section was held to give a right to light on a sale by a mortgagee under his power of sale (*Born* v. *Turner*, 1900, 2 Ch. 211).

(*l*) The express grant of "appurtenances" would seem to amount to a contrary intention so far as regards anything not strictly appurtenant (*Birmingham Banking Co.* v. *Ross*, 38 Ch. Div. 308; see *Beddington* v. *Atlee*, 35 Ch. D. 331). Under a contract to sell hereditaments "with appurtenances," the purchaser will only be entitled to a conveyance in accordance with the contract; and if the conveyance is drawn in such a form as that the section would apply, the vendor is entitled to have a limitation inserted to prevent the section giving to the purchaser more than he is entitled to (*Re Peck and the School Board for London*, 1893, 2 Ch. 315; see *Re Hughes and Ashley*, 1900, 2 Ch. 595). The reference in the conveyance and plan to adjoining land as "building land" will not show a contrary intention excluding the grant of rights of light (*Broomfield* v. *Williams*, 1897, 1 Ch. 602). Contrary intention.

(*m*) Sub-sects. 1—3 only apply to conveyances since the act. As to the construction of similar words in conveyances before the act, see the cases quoted *ante*, p. 63. See also the cases as to implied grants of easements, quoted *ante*, pp. 63, 78, 100.

44 & 45 Vict. c. 41, s. 7.

Covenants for Title.

Covenants for title to be implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

On conveyance for value by beneficial owner.

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

The right to convey.

That, notwithstanding anything by the person who so conveys or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed,

Quiet enjoyment.

and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase

Freedom from incumbrance.

for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

44 & 45 Vict. c. 41, s. 7.

Further assurance.

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On conveyance of leaseholds for value, by beneficial owner.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

Validity of lease.

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On mortgage, by beneficial owner.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if

Right to convey.

Quiet enjoyment.

44 & 45 Vict. c. 41, s. 7.

default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and henceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

Freedom from incumbrance.

Further assurance.

On mortgage of leaseholds, by beneficial owner.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Validity of lease.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the

Payment of

person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them:

44 & 45 Vict. c. 41, s. 7.

Rent and performance of covenants.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely):

On settlement.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

For further assurance, limited.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the court, which covenant shall be deemed to extend to every such person's own acts only (namely):

On conveyance by trustee or mortgagee.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

Against incumbrances.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial

44 & 45 Vict. c. 41, s. 7.

owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8.) This section applies only to conveyances made after the commencement of this act.

It has been said that the covenants included by virtue of this section are express, not implied, covenants (*L. N. & W. R. Co.* v. *Boulton*, 62 L. T. 398). Damages were granted for breach of a covenant implied by virtue of this section (*May* v. *Platt*, 1900, 1 Ch. 616; *Turner* v. *Moore*, 1901, 2 Ch. 825). A. granted a lease to B. for ninety-nine years, and B. afterwards granted sub-leases by way of mortgage. B. subsequently surrendered the term to A. without disclosing the sub-leases. Afterwards A. for value conveyed the fee simple "as beneficial owner" to B., who subsequently conveyed to C. In an action by C. against A. for breach of his implied covenants for right to convey quiet enjoyment and freedom from incumbrances, A. was held liable (*David* v. *Sabin*, 1893, 1 Ch. 523).

The committee of a lunatic may be authorised to convey "as beneficial owner" (*Re Ray*, 1896, 1 Ch. 468). It seems that where a tenant for life selling under the S. L. Acts conveys "as beneficial owner," this section applies (*Ib.* 474, 475).

The contribution to the expense of paving a new street, apportioned under sect. 77 of the Metropolitan Management Act, 1862, is not a charge on the land, and therefore not an incumbrance within this section (*Egg* v. *Blayney*, 21 Q. B. D. 107). As to paving expenses under the Public Health Act, 1875, see *Re Bettesworth and Richer*, 37 Ch. D. 535; *Hornsey Local Board* v. *Monarch, &c. Society*, 24 Q. B. Div. 1). The words "beneficial owner" in a bill of sale introduce the covenants in clause C., and make the bill void under the Bills of Sale Act, 1882, s. 9 (*Ex p. Stanford, Re Barber*, 17 Q. B. D. 259). 44 & 45 Vict. c. 41, s. 7.

Execution of Purchase Deed.

Rights of purchaser as to execution.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2.) This section applies only to sales made after the commencement of this act.

See *Viney* v. *Chaplin*, 2 De G. & J. 468; *Re Bellamy and Metropolitan Board*, 24 Ch. Div. 398.

Production and Safe Custody of Title Deeds.

Acknowledgment of right to production, and undertaking for safe custody of documents.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at

44 & 45 Vict. c. 41, s. 9.

all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit

respecting the costs of the application, or any other matter connected with the application. 44 & 45 Vict. c. 41, s. 9.

(11.) An undertaking for safe custody of documents shall by virtue of this act satisfy any liability to give a covenant for safe custody of documents.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this act.

III.—Leases.

Rent and benefit of lessees covenants to run with reversion.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessees part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this act.

Where a lease is granted by the mortgagor under sect. 18 (*post*, p. 573), the mortgagee, on giving notice, has under this section the benefit of the lessee's covenants (*Municipal Society* v. *Smith*, 22 Q. B. D. 70). It is doubtful whether the section applies to an agreement for a lease (*Manchester Co.* v. *Coombs*, 1901, 2 Ch. 619). The effect on conditions generally and the lessee's covenants of dealings with the reversion depends in the case of leases granted since 1881 on sects. 10 and 12 of the present act. The same subject had been previously dealt with by 32 Hen. 8, c. 34, s. 1, and sect. 3 of the Law of Prop. Am. Act, 1859; see *ante*, p. 526.

Obligation of lessor's covenants to run with reversion.

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be

44 & 45 Vict. c. 41, s. 11.

annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this act.

The present section deals with the transfer (where the reversion is dealt with) of the burden of a lessor's covenants. Provision as to this had been previously made by 32 Hen. 8, c. 34, s. 2, which gave lessees the like remedy in respect of covenants against grantees of the reversion as they had against the lessor. As regards covenants to renew leases it has been held in Ireland that such a covenant entered into by A., holding a limited interest in land, does not bind the land beyond that interest; and if A.'s assign acquires the inheritance, it is not bound by the covenant (*Brereton* v. *Tuohey*, 8 Ir. C. L. R. 190; *Kent* v. *Stoney*, 9 Ir. Ch. R. 249; *Coey* v. *Pascoe*, 1899, 1 I. R. 125). And this has been followed in England (*Muller* v. *Trafford*, 1901, 1 Ch. 54).

Apportionment of conditions on severance, &c.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this act.

See note to sect. 10.

On subdemise, title to leasehold reversion not to be required.

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this act. 44 & 45 Vict. c. 41, s. 13.

The reversion the title to which cannot be called for is the leasehold reversion to the lease out of which the sub-lease is to be granted (*Gosling* v. *Woolf*, 1893, 1 Q. B. 39).

This section does not absolve an intending lessor from the duty of telling his intended lessee of any defect of title (*Cresswell* v. *Davidson*, 56 L. T. 812). See in connection with this section, V. & P. Act, 1874, s. 2, r. 1 (*ante*, p. 545), sect. 3, sub-sect. 1, of the present act, *ante*, p. 554, and sect. 4 of Conv. Act, 1882, *post*, p. 613.

Forfeiture.

Restrictions on and relief against forfeiture of leases.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach (*o*).

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit (*p*).

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns (*q*).

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any act of parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a

44 & 45 Vict. c. 41, s. 14.

breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased (*r*); or to a condition for forfeiture on the bankruptcy of the lessee (*s*), or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

(7.) *The enactments described in Part I. of the second schedule to this act are hereby repealed.*

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9.) This section applies to leases made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary.

(*o*) Before this act it was held, in the case of an agreement to grant a lease subject to usual covenants, that the proviso for re-entry in the lease should only extend to the non-payment of rent (*Hodgkinson* v. *Crowe*, 10 Ch. 622); and this section has made no difference (*Re Anderton and Milner*, 45 Ch. D. 476).

Sub-sect. (1). This section does not take away the lessor's right of re-entry, but merely affords the lessee a *locus pœnitentiæ* (*Cresswell* v. *Davidson*, 56 L. T. 811). It has been said that a notice under this section is a condition precedent to the bringing of an action (*North London Co.* v. *Jacques*, 49 L. T. 659; 32 W. R. 283; *Horsey* v. *Steiger*, 1899, 2 Q. B. 92; see *Scott* v. *Brown*, 51 L. T. 746). It is also a necessary preliminary to re-entry without action, *e.g.*, by obtaining peaceable possession (*Re Riggs*, 1901, 2 K. B. 20). The form of the notice should comply with the particulars mentioned in sub-sect. (1) (*North London Co.* v. *Jacques*, *sup.*; see *Jacques* v. *Harrison*, 12 Q. B. D. 136; *Greenfield* v. *Hanson*, 30 S. J. 650; *Cronin* v. *Rogers*, 1 Cab. & Ell. 348). The tenant should have full notice of what he is required to do (*Penton* v. *Barnett*, 1898, 1 Q. B. 281; *Horsey* v. *Steiger*, 1899, 2 Q. B. 91). And a notice was held bad where it referred to the wrong covenant (*Jacob* v. *Down*, 1900, 2 Ch. 156); also where it was not sufficiently specific (*Fletcher* v. *Nokes*, 1897, 1 Ch. 271); also where, there being several alleged breaches, the notice did not give sufficient particulars of one of the breaches, although it did of the others (*Re Serle*, *Gregory* v. *Serle*, 1898, 1 Ch. 652). But in another case, where several breaches were alleged, the notice was not invalid because it turned out the lessor could not rely on some of the breaches (*Pannell* v. *City of London Co.*, 1900, 1 Ch. 496). And where the notice referred to a continuing breach which was afterwards waived by a claim for rent up to a date later than the notice, a second notice in respect of the subsequent breach was not necessary (*Penton* v. *Barnett*, 1898, 1 Q. B. 276). In a case where compensation is not desired, it is not necessary that the notice should require compensation (*Lock* v. *Pearce*, 1893, 2 Ch. 271). The compensation is, it seems, to be measured by the same rule as damages in an action for breach (*Skinners' Co.* v. *Knight*, 1891, 2 Q. B. 545). The question what is a reasonable time must go to a jury (*Ib.*; see *Horsey* v. *Steiger*, 1899, 2 Q. B. 79). It was held that costs incurred by a lessor in employing solicitors and surveyors were not recoverable by him as compensation

under sub-sect. (1) (*Skinners' Co.* v. *Knight*, *sup.*); but payment by the lessee of such costs might be made a condition of relief under sub-sect. (2) (*Bridge* v. *Quick*, 61 L. J. Q. B. 375). See now Conv. Act, 1892, s. 2, sub.-s. (1), *post*, p. 616. 44 & 45 Vict. c. 41, s. 14.

As to service of the notice, see sect. 67, *post*, p. 602, and cases there quoted.

(*p*) Sub-sect. (2) extends to breaches committed before the act (*Quilter* v. *Mapleson*, 9 Q. B. D. 672). It does not apply to cases where, after giving a proper notice, the landlord has already entered (*Ib.* 675; *Rogers* v. *Rice*, 1892, 2 Ch. 170; *Lock* v. *Pearce*, 1893, 2 Ch. 274; *Jacques* v. *Harrison*, 12 Q. B. D. 136, 165; *Scott* v. *Brown*, 51 L. T. 746). Sub-sect. (2) gives jurisdiction to refuse relief against re-entry which is claimed on the ground of the absence of the notice mentioned in sub-sect. (1) (*Scott* v. *Brown*, 51 L. T. 746; see *Ruttledge* v. *Whelan*, 10 L. R. Ir. 263). As to its application to a breach of covenant by a previous holder of an under-lessee's interest, see *Fleetwood* v. *Hull* (23 Q. B. D. 35). And as to the terms on which relief will be granted, see *Quilter* v. *Mapleson* (9 Q. B. D. 672); *North London Land Co.* v. *Jacques* (49 L. T. 659; 32 W. R. 283); *Bond* v. *Freke* (1884, W. N. 47); *Mitchison* v. *Thomson* (1 Cab. & Ell. 72). Sub-sect. (2).

The lessee's application under sub-sect. (2) cannot be made by originating summons (*Lock* v. *Pearce*, 1893, 2 Ch. 271).

(*q*) Enforceable agreements for leases or under-leases are within this section (Conv. Act, 1892, s. 5, *post*, p. 618). See before that act *Swaine* v. *Ayres* (21 Q. B. D. 289); *Ayling* v. *Mercer* (1885, W. N. 166); *Strong* v. *Stringer* (61 L. T. 470). But not a tenancy at will (*Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220). As to a tenancy agreement, see *Charrington* v. *Camp*, 1902, 1 Ch. 386. The word "lessee" includes an assignee of a lease (*Cronin* v. *Rogers*, 1 Cab. & Ell. 348). Sub-sect. (3).

Sect. 14 does not apply as between a ground landlord and an under-lessee (*Cresswell* v. *Davidson*, 56 L. T. 811; *Burt* v. *Gray*, 1891, 2 Q. B. 98). Having regard to these decisions, sect. 4 of the Conv. Act, 1892 (which see, *post*, p. 618), was passed (*Nind* v. *Nineteenth Century Society*, 1894, 2 Q. B. 231).

(*r*) A condition against disposing of the land leased within this sub-section must be a condition which on its face is against disposing of the land leased. The words accordingly did not include a condition against executing an assignment for the benefit of creditors (*Gentle* v. *Faulkner*, 1900, 2 Q. B. 267). Sub-sect. (6) (i).

Having regard to this sub-section, cases of "assignment, underletting, parting with the possession or disposing," &c., are left to be dealt with according to the ordinary law (*Barrow* v. *Isaacs*, 1891, 1 Q. B. 430). Under such ordinary law it has been held that forgetfulness is no ground for relieving in respect of a breach of a covenant against underletting (*Barrow* v. *Isaacs*, *sup.*; *Eastern Telegraph Co.* v. *Dent*, 1899, 1 Q. B. 835). As to what amounts to a breach of a covenant against assigning, see Woodfall, 16th ed. pp. 269, 699; *Gentle* v. *Faulkner*, *sup.*; *Re Riggs*, *Ex p. Lovell*, 1901, 2 K. B. 16. As to exacting a fine for licence to assign where a lease contains a covenant of this nature, see Conv. Act, 1892, s. 3, *post*, p. 617.

(*s*) In the case of a forfeiture for bankruptcy, this sub-section only applies after a year from the bankruptcy where no sale has taken place (Conv. Act, 1892, s. 2, sub-s. (2), *post*, p. 616). Having regard to the definition of bankruptcy contained in sect. 2, sub-sect. (xv.) (*ante*, p. 554), the liquidation of a company was held within the word "bankruptcy" in the present sub-section (*Horsey* v. *Steiger*, 1899, 2 Q. B. 91). A condition in a lease for forfeiture on liquidation has been held broken by liquidation for the purpose of reconstruction (*Horsey* v. *Steiger*, *sup.*; *Fryer* v. *Ewart*, 1902, A. C. 187; see *Ex p. Gould*, *Re Walker*, 13 Q. B. D. 454). Sub-sect. (6) (ii).

Formerly a tenant might at an indefinite time after he was ejected have been relieved in Chancery against the mere non-payment of rent (*Bowser* v. *Colby*, 1 Hare, 125); and the grant of a new lease would have Sub-sect. (8).

44 & 45 Vict. c. 41, s. 14.

been ordered (*Taylor* v. *Knight*, 4 Vin. Abr. ch. pl. 31). By the Common Law Proc. Act, 1852, s. 210 (substantially re-enacting 4 Geo. 2, c. 28, s. 11), relief can only be given if the tenant comes within six months after execution executed. Sect. 211 makes relief in equity conditional on certain payments of rent and costs (see *Bowser* v. *Colby*, 1 Hare, 125), and by sect. 212 the tenant may stay ejectment on payment of rent and costs. It is also provided that upon equity granting relief the tenant shall hold according to the old lease without any new lease. By the C. L. P. Act, 1860, s. 1, power was given to the Common Law Courts to give relief in a summary way, as in the Court of Chancery, upon the same terms and with the same results.

Where proceedings for relief were commenced within six months of the landlord's resumption of possession, relief was granted to the tenant, notwithstanding that such resumption was peaceable (*Howard* v. *Fanshawe*, 1895, 2 Ch. 581). In the last case the original lease was held to continue under sect. 212 of the C. L. P. Act, 1852 (*Ib.*). Relief was refused after ejectment when asked by a mortgagee by subdemise in the absence of the lessee (*Hare* v. *Elmes*, 1893, 1 Q. B. 604; see *Newbolt* v. *Bingham*, 72 L. T. 852). As to the costs payable on relief being granted, see *Croft* v. *London and County Bank*, 54 L. J. Q. B. 277; *Howard* v. *Fanshawe*, *sup.*

IV.—Mortgages.

Obligation on mortgagee to transfer instead of re-conveying.

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this act, be bound to assign and convey accordingly.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary.

Where there were first and second mortgages, it was held, under this section, that the mortgagor could not require the first mortgagee to assign, without the consent of the second mortgagee (*Teevan* v. *Smith*, 20 Ch. Div. 724). After this decision, the 12th section of the Conv. Act, 1882 (*post*, p. 615), was passed.

The word "terms" in this section does not refer merely to the amount of principal, interest, and costs, but includes any other term, such as a trust. So a mortgagor who is a trustee cannot claim a simple transfer (*Alderson* v. *Elgey*, 26 Ch. D. 567). As to who are entitled to redeem, see Fisher on Mortgages, Seton, 6th ed. p. 1935. This section was held applicable to the lien of a company on the shares of a shareholder (*Everitt* v. *Automatic Weighing Machine Co.*, 1892, 3 Ch. 506).

Power for mortgagor to inspect title deeds.

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(2.) This section applies only to mortgages made after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary. 44 & 45 Vict. c. 41, s. 16.

A director of a mortgagor company was refused inspection of a subsidiary mortgage deed (*Burn* v. *London & S. Wales Co.*, 1890, W. N. 209). Apart from this section, the rule is, that after a mortgage has become absolute the mortgagor cannot see the title deeds in the hands of the mortgagee without paying him off (*Chichester* v. *Donegall*, 5 Ch. 502).

Restriction on consolidation of mortgages.

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this act.

The costs of foreclosing two mortgages cannot, in cases to which this section applies, be consolidated any more than the mortgages themselves, but must be apportioned between the two estates (*De Caux* v. *Skipper*, 31 Ch. Div. 635). As to the application of the section, see *Bird* v. *Wenn* (33 Ch. D. 217). An agreement in a memorandum of deposit binding the mortgagor to execute a legal mortgage in such form as the mortgagee might require did not entitle the latter to the insertion of a clause excluding this section (*Farmer* v. *Pitt*, 1902, 1 Ch. 954).

Leases.

Leasing powers of mortgagor and of mortgagee in possession.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this act, power to make from time to time any such lease as aforesaid.

(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

44 & 45 Vict. c. 41, s. 18.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connexion with building purposes (*t*).

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee: but the lessee shall not be concerned to see that this provision is complied with.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(14.) Nothing in this act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

(15.) Nothing in this act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted

or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this act had not been passed. 44 & 45 Vict. c. 41, s. 18.

(16.) This section applies only in case of a mortgage made after the commencement of this act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting (*tt*).

(*t*) See as to the "consideration" mentioned in sub-sect. 9, and sect. 55 (*post*), *Renner* v. *Tolley*, 1893, W. N. 90.

(*tt*) A lease by a mortgagor under this section has the same effect as if the mortgagees had joined (*Wilson* v. *Queen's Club*, 1891, 3 Ch. 525). Where a first mortgagee and the mortgagor in possession granted a lease, the lessee held under title derived from the mortgagor leasing under this section (as being the better title), and was bound by restrictive covenants binding on the mortgagor (*John Brothers Co.* v. *Holmes*, 1900, 1 Ch. 188). A lease of a mortgaged house with sporting rights over other parts of the mortgaged land may, under sub-sect. (1), be granted by a mortgagor in possession (*Brown* v. *Peto*, 1900, 2 Q. B. 653).

Where an agreement for a mortgage which was dated before the act stipulated for all clauses usual in mortgages, the mortgagee was not entitled to a clause excluding sect. 18, sub-sect. (1) (*Re Nugent and Riley*, 49 L. T. 132. See *Farmer* v. *Pitt*, 1902, 1 Ch. 954).

Sale; Insurance; Receiver; Timber.

Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) (*u*):

(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby (*x*); and

(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such

44 & 45 Vict. c. 41, s. 19.

insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof (*y*); and

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2.) The provisions of this act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this act.

(*u*) As to the appointment, powers, &c. of a receiver, see sect. 24, *post*, p. 579.

Like powers may be exercised in certain events by the owner of a rent-charge created under the Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 30 (4)).

(*x*) An equitable mortgagee selling under this section can only sell his interest under the mortgage (*Re Hodson and Howe*, 35 Ch. Div. 668; compare *Hiatt* v. *Hilman*, 19 W. R. 694, under 23 & 24 Vict. c. 145, s. 15, *ante*, p. 541).

This section does not give power to sell fixtures apart from the freehold (*Re Yates, Batcheldor* v. *Yates*, 38 Ch. Div. 112; see *Born* v. *Turner*, 1900, 2 Ch. 215). But a mortgagee selling part of the mortgaged property can give an implied easement of light over the unsold part (*Born* v. *Turner*, 1900, 2 Ch. 211). The power of sale given by this section is not incorporated in a bill of sale in the statutory form (*Calvert* v. *Thomas*, 19 Q. B. Div. 204); nor does it apply in the case of debentures of a joint-stock company (*Blaker* v. *Herts Co.*, 41 Ch. D. 399).

Apart from this act a mortgagee of stock or shares, who has the legal title, can without express power sell on default in payment after a reasonable time (*Deverges* v. *Sandeman*, 1902, 1 Ch. 579). Where such a mortgage is made, not by deed, sects. 19 and 20 of this act do not apply (*Ib.*).

(*y*) When a foreclosure action is pending, it is desirable that the appointment of a receiver should be made, not by the mortgagee but by the court (*Tillett* v. *Nixon*, 25 Ch. D. 238). As to whether a receiver can be appointed, under this section, of mortgaged book debts, see *Rutter* v. *Everett*, (1895, 2 Ch. 872). See further, as to the appointment of receivers, sect. 24, *post*, p. 579.

44 & 45 Vict. c. 41, s. 20.

Regulation of exercise of power of sale.

20. A mortgagee shall not exercise the power of sale conferred by this act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service (*z*); or

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

(*z*) A notice under sub-sect. (1) does not prevent a sale under sub-sects. (2) and (3), as soon as the conditions of those sub-sections are fulfilled (*Farrar* v. *Farrars, Limited*, 40 Ch. D. 395). As to notices, see sect. 67, *post*, p. 602.

A notice under sub-sect. (1), given by a mortgagee holding several mortgages executed by the same mortgagor, who has excluded sect. 17 of this act, does not affect the mortgagee's right to consolidate (*Griffith* v. *Pound*, 45 Ch. D. 553).

Conveyance, receipt, &c. on sale.

21.—(1.) A mortgagee exercising the power of sale conferred by this act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf (*a*).

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power (*b*).

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and

44 & 45 Vict. c. 41, s. 21.

the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof (*c*).

(4.) The power of sale conferred by this act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money (*d*).

(5.) The power of sale conferred by this act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

(*a*) This section does not enable an equitable mortgagee to convey the legal estate (*Re Hodson and Howe*, 35 Ch. Div. 668).

Sub-sect. (2). (*b*) Sub-sect. (2) absolutely protects a *bonâ fide* purchaser who has no notice of any irregularity in the sale, at all events when he has the legal estate (*Bailey* v. *Barnes*, 1894, 1 Ch. 25; see *Re Thompson and Holt*, 44 Ch. D. 492); but not a purchaser who has notice (*Bailey* v. *Barnes*, 1894, 1 Ch. 30; *Selwyn* v. *Garfit*, 38 Ch. Div. 273). Sub-sect. (2) does not preclude a purchaser from inquiring whether the power is exerciseable, or from proving that it was improperly exercised (*Life Interest Corporation* v. *Hand-in-Hand Society*, 1898, 2 Ch. 230). See, as to registering a title acquired under this sub-section, *Re Tritton* (1891, W. N. 194). The damages under this sub-section may be recovered by common law action in the county court when the amount is within the jurisdiction (*Ames* v. *Higdon*, 69 L. T. 292).

Sub-sect. (3). (*c*) A mortgagee with notice of a subsequent mortgage will be answerable if, on exercising his power of sale, he pays over the surplus to the wrong person (*West London Bank* v. *Reliance Society*, 29 Ch. Div. 962).

Sub-sect. (4). (*d*) On the construction of a mortgage dated before this Act, an express power of sale was not exerciseable by a transferee (*Re Rumney and Smith*, 1897, 2 Ch. 351).

Mortgagee's receipts, discharges, &c.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this act directed respecting money received by him arising from a sale under the power of sale conferred by this act; but with this variation, that the

costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale. 44 & 45 Vict. c. 41, s. 22.

The effect of this section is that trustees of funds which are mortgaged are, if acting *bonâ fide*, perfectly safe in paying over the money to the mortgagee, and are not concerned to inquire whether any money remains due on the mortgage (*Hockey* v. *Western*, 1898, 1 Ch. 356; see *Re Hancock*, *Hancock* v. *Berrey*, 59 L. T. 199). But they may refuse to pay over on reasonable grounds—*e.g.* where they know that there may be some dispute as to the amount due (*Ib.*), or where they have notice of subsequent incumbrancers (*Re Bell*, *Jeffery* v. *Sales*, 1896, 1 Ch. 1).

Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this act authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

Appointment, powers, remuneration, and duties of receiver.

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3.) The receiver shall have power to demand and recover all

44 & 45 Vict. c. 41, s. 24.

the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property (*e*).

(*e*) A mortgagor will be restrained from distraining for rent after a receiver has been appointed, even if such receiver has been negligent (*Bayly* v. *Went*, 51 L. T. 764). As to appointments by the court when this power could be exercised, see *Tillett* v. *Nixon* (25 Ch. D. 238).

The appointment of a receiver under the act determined the interest of a mortgagor in possession, and extinguished or suspended the interest of a tenant by elegit under a judgment obtained against such mortgagor (*Johns* v. *Pink*, 1900, 1 Ch. 296). After the appointment of a receiver the mortgagor cannot distrain without the receiver's authority

(*Woolston* v. *Ross*, 1900, 1 Ch. 788). In the case of a mortgage of book debts, the appointment of a receiver without notice being given to the debtors will not take the book debts out of the order and disposition of the mortgagor (*Rutter* v. *Everett*, 1895, 2 Ch. 872). The mere fact of a receiver having been appointed will not prevent an application by the mortgagee for judgment under R. S. C. Ord. XIV. (*Lynde* v. *Waithman*, 1895, 2 Q. B. 180; see *Poulett* v. *Hill*, 1893, 1 Ch. 277). 44 & 45 Vict. c. 41, s. 24.

The payment by a receiver appointed under this act of an instalment of a debt of the mortgagor payable by instalments would not, *semble*, keep the debt alive as against the estate of the mortgagor (*Re Hale, Lilley* v. *Foad*, 1899, 2 Ch. 107). For a case where it was held that the terms of the mortgage deed prevented the application of sub-sect. (2), see *Richards* v. *Kidderminster* (1896, 2 Ch. 212, 220). As to receivers appointed under this section, see, further, Kerr on Receivers, 4th ed. 41, 200.

Action respecting Mortgage.

Sale of mortgaged property in action for foreclosure, &c.

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within this section the court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this act.

(6.) *The enactment described in Part II. of the second schedule to this act is hereby repealed.* 15 & 16 Vict. c. 86, s. 48.

(7.) This section does not extend to Ireland.

The powers given by sub-sects. (1) and (2) are distinct (*Woolley* v. *Colman*, 21 Ch. D. 173). It has been said that the order for sale under sub-sect. (1) is a matter of right (*Clarke* v. *Pannell*, 29 S. J. 147). The discretion referred to in sub-sect. (2) must be exercised judicially (*Merchant Banking Co.* v. *London, &c.*, 55 L. J. Ch. 479). Where a mortgagee's notice to pay off had expired and his power of sale was exerciseable, and the Sale at request, of mortgagor;

44 & 45 Vict. c. 41, s. 25.

mortgagor commenced an action for sale or redemption, an order for sale was made on the application of the mortgagor, such sale to be conducted by himself out of court, and to take place within three months (*Brewer* v. *Square*, 1892, 2 Ch. 111). In a foreclosure action a sale was ordered at the request of the mortgagor upon his depositing 150*l.* in court to meet expenses of sale (*Weston* v. *Davidson*, 1882, W. N. 28). A sale has been ordered under sub-sect. (2), at the request of an equitable mortgagee by simple deposit (*Oldham* v. *Stringer*, 51 L. T. 895; 33 W. R. 251); and of a second mortgagee (*Saul* v. *Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831); and of a fourth mortgagee on a deposit in court being made (*Norman* v. *Beaumont*, 1893, W. N. 45). A sale may be ordered of so much only as will satisfy the plaintiff's claim (*Wade* v. *Wilson*, 22 Ch. D. 235). At the request of the mortgagee, orders for sale have been made without allowing time for redemption (*Wade* v. *Wilson*, *sup.*; *Oldham* v. *Stringer*, *sup.*); but such time will usually be given (*Green* v. *Biggs*, 52 L. T. 680). Three months have been given (*Ib.*, *Jones* v. *Harris*, 55 L. T. 884). Ten days where the security was clearly insufficient (*Charlewood* v. *Hammer*, 28 S. J. 710; see *Williams* v. *Owen*, 27 S. J. 256).

of mortgagee.

Sale out of court.

The sale may be ordered out of court, a reserve price being fixed and the purchase-money being paid into court (*Union Bank* v. *Ingram*, 20 Ch. D. 463; *Woolley* v. *Colman*, 21 Ch. D. 169; *Davies* v. *Wright*, 32 Ch. D. 220; see R. S. C. Ord. 51, r. 1a). But a sale out of court can only be ordered when all parties interested are before the court or bound by the order (R. S. C. Ord. 51, r. 1a); *e.g.*, a second mortgagee (*Brewer* v. *Square*, 1892, 2 Ch. 114). As to when a sale is "altogether out of court," see *Cumberland Banking Co.* v. *Maryport Co.* (1892, 1 Ch. 92).

Conduct of sale.

The conduct of the sale has been given to the mortgagor (*Woolley* v. *Colman*, *sup.*; *Davies* v. *Wright*, *sup.*; *Brewer* v. *Square*, *sup.*; see *Christy* v. *Van Tromp*, 1886, W. N. 111). Where the mortgagor requests a sale he should give security for costs where the conduct is to be by the mortgagee (*Davies* v. *Wright*, 32 Ch. D. 220; see *Weston* v. *Davidson*, 1882, W. N. 28); and the mortgagor has been ordered to give security where he has the conduct himself (*Woolley* v. *Colman*, 21 Ch. D. 169; *Brewer* v. *Square*, 1892, 2 Ch. 111; but see *Davies* v. *Wright*, *sup.*). When the mortgagee requests the sale and the conduct is given to the mortgagor, the mortgagor need not give security (*Davies* v. *Wright*, *sup.*). The conduct has been given to a fourth mortgagee on giving security (*Norman* v. *Beaumont*, 1893, W. N. 45).

At what time sale will be ordered.

A sale may be ordered on an interlocutory application (*Woolley* v. *Colman*, 21 Ch. D. 173); or upon motion for judgment (*Wade* v. *Wilson*, 22 Ch. D. 235); or at any time before a foreclosure decree has become absolute (*Union Bank* v. *Ingram*, 20 Ch. D. 463); as when application for final order is made (*Weston* v. *Davidson*, 1882, W. N. 28).

Sale refused.

A sale has been refused when in an action for foreclosure alone it was asked for in the absence of the mortgagor, and without notice to him (*South Western Bank* v. *Turner*, 47 L. T. 433; 31 W. R. 113); also when asked by a second mortgagee in a case where the value was clearly insufficient for the first mortgage (*Merchant Banking Co.* v. *London*, &c., 55 L. J. Ch. 479; see *Provident Clerks' Assoc.* v. *Lewis*, 62 L. J. Ch. 89; 67 L. T. 644, where see also for other reasons); also when the order asked for would necessarily include property not subject to the mortgage (*Gibbs* v. *Hayden*, 47 L. T. 184; 30 W. R. 725). This section does not enable the court, at the instance of debenture holders, to order a sale of an undertaking of a public character (*Blaker* v. *Herts*, &c. *Co.*, 41 Ch. D. 406).

V.—Statutory Mortgage.

Form of statutory mortgage in schedule.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the third

schedule to this act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto. 44 & 45 Vict. c. 41, s. 26.

(2.) There shall be deemed to be included, and there shall by virtue of this act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money:

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct.

This section does not impose any personal liability on an assignee of the equity of redemption (*Re Errington, Ex p. Mason*, 1894, 1 Q. B. 11).

Forms of statutory transfer of mortgage in schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the third schedule to this act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there

44 & 45 Vict. c. 41, s. 27.

shall also be deemed to be included, and there shall by virtue of this act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

Implied covenants, joint and several.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

Form of re-conveyance of statutory mortgage in schedule.

29. A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the third schedule to this act, with such variations and additions, if any, as circumstances may require.

VI. Trust and Mortgage Estates on Death.

Devolution of trust and mortgage estates on death.

30.—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives,

as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers (*f*). 44 & 45 Vict. c. 41, s. 30.

(2.) *Section four of the Vendor and Purchaser Act*, 1874, *and section forty-eight of the Land Transfer Act*, 1875, *are hereby repealed* (*f*). 37 & 38 Vict. c. 78. 38 & 39 Vict. c. 87.

(3.) This section, *including the repeals therein*, applies only in cases of death after the commencement of this act.

The operation of sub-sect. (1) of this section (which has not been expressly repealed) appears not to be affected by sect. 1, sub-sect. (1), of the L. T. Act, 1897. The language of the two enactments should be compared. The power (referred to in the present sub-section) of one of several joint personal representatives to deal with property of the deceased (see as to chattels real, *Simpson* v. *Gutteridge*, 1 Madd. 609; *Cole* v. *Miles*, 10 Hare, 139) has been expressly excluded in the case of real estate vesting under the last mentioned act (L. T. Act, 1897, s. 2, sub-s. (2)).

The wording of this section raises some difficulty as to where the legal estate is when there is no personal representative (*Re Pilling*, 26 Ch. D. 432); see the form of vesting order adopted under the Trustee Acts given in note to sect. 26 of the Trustee Act, 1893, *post*. Copyholds were held to be within the section (*Re Hughes*, 1884, W. N. 53; see, however, *Re Mills*, 40 Ch. Div. 18); but they have now been excluded (Copyholds Acts, 1887, s. 45, and 1894, s. 88). This section does not enable a personal representative to execute a trust for sale where before the act the heir could not have done so (*Re Ingleby*, 13 L. R. Ir. 326; see *Re Pixton and Tong*, 1897, W. N. 178).

When a testator devised freeholds absolutely and afterwards sold them but received a reconveyance to secure part of the purchase-money, the devisee did not take the mortgage money notwithstanding that the legal estate under this section vested in the executor (*Re Clowes*, 1893, 1 Ch. 214). But a devise by a mortgagee in possession was held to pass the mortgage debt (*Re Carter*, *Dodds* v. *Pearson*, 1900, 1 Ch. 801).

(*f*) By sect. 4 of the V. & P. Act, 1874, the personal representative of a mortgagee of freeholds, or of copyholds to which the latter had been admitted, was enabled to convey the estate. By sect. 5 of the V. & P. Act, 1874 (re-enacted in a limited form by sect. 48 of the L. T. Act, 1875), freeholds held by a bare trustee vested in his personal representative. As to what was a bare trustee within the sections, see *Cunningham* v. *Frayling* (1891, 2 Ch. 567).

[*Sects.* 31—38 *were repealed and in effect re-enacted by the Trustee Act*, 1893, *ss.* 10, 37, 11, 13, 20, 21, 22, post.]

VIII.—Married Women.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it **Power for court to bind interest of**

44 & 45 Vict. c. 41, s. 39.

appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

married woman.

(2.) This section applies only to judgments or orders made after the commencement of this act.

This section does not give the court power to remove restraint generally, but only to make binding any particular disposition made by a married woman if the court thinks it is for her benefit (*Re Warren*, 49 L. T. 696; 52 L. J. Ch. 928). What binds the property is the order of the court, not the disposition of the married woman (*Paget* v. *Paget*, 1898, 1 Ch. 476). A strong case must be made before the jurisdiction will be exercised (*Re Little, Harrison* v. *Harrison*, 40 Ch. Div. 424). As to considering the benefit of the husband and children, see *Re Wood, Wood* v. *Kimber* (29 S. J. 183). The court requires to be satisfied that the application is in accordance with the married woman's free will (*Re Currey, Gibson* v. *Way*, 56 L. T. 80; *Musgrave* v. *Sandeman*, 48 L. T. 215); but will not always require a separate examination (*Harris* v. *Harford*, 1888, W. N. 190; see *Hodges* v. *Hodges*, 20 Ch. D. 755). Where money is raised under this section to pay the debts of the husband, and the wife is under the circumstances entitled to an indemnity from him, the order may conveniently express this, but it is not essential (*Paget* v. *Paget*, 1898, 1 Ch. 470). Where on a decree *nisi* being made the wife agreed to the annulment of the marriage settlement (whereby she was restrained from anticipation), and the decree was subsequently made absolute, the agreement was held invalid and this section did not apply (*Thomson* v. *Thomson*, 1896, P. 263).

Orders made.

Orders have been made binding the property of married women in the following cases:—Where a married woman was harassed by creditors (*Hodges* v. *Hodges*, 20 Ch. D. 749; *Re Little, Re Harrison*, 36 Ch. D. 701; *Re C.'s Settlement*, 56 L. T. 299; 56 L. J. Ch. 556; see *Re Wilson-Stewart, Keown-Boyd* v. *Gilmour*, 75 L. T. 381). To pay the debts of a married woman, the balance of the capital being invested in an annuity for her life (*Latham* v. *Latham*, 1889, W. N. 171). To pay the debts of the husband (*Paget* v. *Paget*, 1898, 1 Ch. 470; see *Re S. G.* v. *C.*, 1893, W. N. 127). To enable land of the married woman to be sold (*Re Tippet and Newbould*, 37 Ch. D. 444; *Bates* v. *Kesterton*, 1896, 1 Ch. 159). To carry into effect a sale under the Settled Estates Act, 1877 (*Re Landfield, Landfield* v. *Landfield*, 46 L. T. 227; 30 W. R. 377; see *Re Segrave*, 17 L. R. Ir. 373); or a scheme for partition and re-settlement (*Re Currey, Gibson* v. *Way*, 56 L. T. 80); or an exchange for the purpose of quieting the title (*Re Currey, Gibson* v. *Way*, 32 Ch. D. 365); or a sale by a tenant for life free from a jointure of the married woman (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 345). To enable a profitable investment to be continued, which otherwise would have been unauthorised (*Re Wright*, 15 L. R. Ir. 331). To enable money to be raised for emigration (*Re Flood*, 11 L. R. Ir. 355; or for stocking a farm for a son (*Re Sawyer*, 1896, 1 Ir. R. 40). With a view to a mortgage (*Ex p. Thompson*, 1884, W. N. 28). To enable a married woman to carry out a compromise (*Sedgwick* v. *Thomas*, 48 L. T. 100; *Musgrave* v. *Sandeman*, *id.* 215; *Tamplin* v. *Miller*, 30 W. R. 422; *Harris* v. *Harford*, 1888, W. N. 190). To enable income to be applied in paying premiums on policies on the husband's life and interest on mortgages (*Re Milner*, 1891, 3 Ch. 547). The restraint was released on terms in *Re a Marriage Settlement* (30 S. J. 702).

Order refused.

An application under this section has been refused where the order might have caused a forfeiture (*Re Jordan, Kino* v. *Picard*, 54 L. T. 127; 55 L. J. Ch. 330); also where it was asked to enable a married woman to obtain a personal benefit by releasing a power of appointment (*Re Little, Harrison* v. *Harrison*, 40 Ch. Div. 418); or to enable funds in court to be paid out to trustees of a settlement with a view to reinvestment, so as to produce a larger income (*Re Blundell*, 1901, 2 Ch. 221);

or to pay debts incurred through extravagance, or due to money-lenders (*Re Pollard*, 1896, 1 Ch. 901; 2 Ch. 552; see, however, *Paget* v. *Paget*, 1898, 1 Ch. 47); or to pay the husband's debts under the circumstances (*Re S. G.* v. *C.*, 1893, W. N. 127). See also *Re Warren* (49 L. T. 696; 52 L. J. Ch. 928); *Thomson* v. *Thomson* (1896, P. 263). 44 & 45 Vict. c. 41, s. 39.

The application under the section should, in general, be made by summons, not by petition (*Re Lillwall*, 30 W. R. 243; *Latham* v. *Latham*, 1889, W. N. 171); but *semble* may be made on petition (*Re Blundell*, 1901, 2 Ch. 221). Orders have been made at the trial of an action (*Sedgwick* v. *Thomas*, 48 L. T. 100); on a petition to sanction the compromise of an action (*Harris* v. *Harford*, 1888, W. N. 190); on a petition under the Settled Estates Act, 1877, to confirm a sale; in which case it was held unnecessary to entitle the petition in the matter of the Conv. Act, 1881 (*Re Landfield, Landfield* v. *Landfield*, 46 L. T. 227); on a summons under the Vendor and Purchaser Act, 1874 (*Re Tippet and Newbould*, 37 Ch. D. 444). For form of orders generally, see Seton, 6th ed. 905. Practice.

Service on the trustees of the settlement has been dispensed with (*Re Little, Re Harrison*, 36 Ch. Div. 701).

Notwithstanding a restraint on anticipation, the costs of proceedings commenced by a married woman may be recovered out of her property (M. W. P. Act, 1893, s. 2, *ante*, p. 361), and the court may charge costs on a fund preserved (Solicitors Act, 1860, s. 28; *Re Keane, Lumley* v. *Desborough*, 12 Eq. 115); and may impound a married woman's interest to indemnify trustees (Trustee Act, 1893, s. 45 (1), *post*, replacing Trustee Act, 1888, s. 6). Other statutory powers of releasing restraint.

40.—(1.) A married woman, whether an infant or not, shall by virtue of this act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this act relating to instruments creating powers of attorney shall apply thereto. Power of attorney of married woman.

(2.) This section applies only to deeds executed after the commencement of this act.

Under this section a married woman can appoint an attorney to receive her income, even if she is restrained from anticipation (*Stewart* v. *Fletcher*, 38 Ch. D. 627). For the law before the act, see *Oulds* v. *Sansom* (3 Taunt. 261); *Graham* v. *Jackson* (6 Q. B. 811); *Kenrick* v. *Wood* (9 Eq. 377). As to powers of attorney generally, see sects. 46—48 (*post*, p. 593), and sects. 8 and 9 of Conv. Act, 1882 (*post*, p. 614).

IX.—Infants.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877. Sales and leases on behalf of infant owner. 40 & 41 Vict. c. 18.

Land was held to be settled estate under this section where the interest of the infant was determinable on death under twenty-one (*Liddell* v. *Liddell*, 31 W. R. 238; 52 L. J. Ch. 207; see *Re Sparrow*, 1892, 1 Ch. 412; see S. L. Act, 1882, s. 59, *post*).

44 & 45 Vict. c. 41, s. 42.

Management of land and receipt and application of income during minority.

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course of sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the

land and from investments of income on the trusts following (namely): 44 & 45 Vict. c. 41, s. 42.

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but,

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this act.

This section has been held applicable to the case of an infant taking land by descent (*Re Cowley*, 1901, 1 Ch. 38; *Re Glover*, 1899, 1 I. R. 337).

Trustees for the purpose of the S. L. Acts who can, under sects. 56 and 60 of the S. L. Act, 1882, exercise the statutory power of sale of an infant tenant for life, are not trustees with power of sale within this section (*Re Helyar, Helyar* v. *Beckett*, 1902, 1 Ch. 391). It was said that sub-sects. (2) and (3) seemed to exclude any power to pay expenses of management out of corpus (*Re Jackson, Jackson* v. *Talbot*, 21 Ch. D. 787; where costs of repairs were raised by mortgage of an infant's estate).

Application by trustees of income of property of infant for maintenance, &c.

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or

44 & 45 Vict. c. 41, s. 43.

towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not (*g*).

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year (*h*).

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained (*i*).

(4.) This section applies whether that instrument comes into operation before or after the commencement of this act.

(*g*) This section only authorizes the application for maintenance of income to which, independently of the section, the infant is or will, on or before attaining twenty-one, become entitled (*Re Dickson, Hill* v. *Grant*, 29 Ch. Div. 331; *Re Judkin*, 25 Ch. D. 743).

General rules as to when a gift carries income.

Independently of the section it is settled that in the case of immediate gifts an infant is entitled as from the testator's death to the income of realty, and also of personalty included in a specific or residuary bequest; and is also entitled (at least from the expiration of one year from the testator's death) to the income of a general legacy (see the cases collected, Theobald, 5th ed. pp. 158, 165). In the case of future or contingent gifts, a distinction must be drawn between real and personal estate. As regards personal estate, a future bequest carries the intermediate income where (1) the gift is residuary (*Re Taylor, Smart* v. *Taylor*, 1901, 2 Ch. 136); or where (2) the property is directed to be set apart from the rest of the estate (*Re Woodin, Woodin* v. *Glass*, 1895, 2 Ch. 309; *Re Clements, Clements* v. *Pearsall*, 1894, 1 Ch. 665; *Re Medlock, Ruffle* v. *Medlock*, 54 L. T. 828); or where (3) the bequest being of a general legacy the testator stands *in loco parentis* to the legatee, and the will provides no other maintenance (*Re George*, 5 Ch. D. 837). But where the property was not directed to be set apart, the intermediate income was not carried by a future bequest of specific personalty (*Guthrie* v. *Walrond*, 22 Ch. D. 573), or of a general legacy (*Re Dickson, Hill* v. *Grant*, 29 Ch. D. 331; in which last case the testator did not stand *in loco parentis* to the legatee). In the case of a bequest to a class contingently on their attaining twenty-one, if the bequest carries the intermediate income, any beneficiary attaining twenty-one is entitled only to his share of income, having regard to the number of the class for the time being in existence (*Re Holford, Holford* v. *Holford*, 1894, 3 Ch. 30; *Re Jeffery, Arnold* v. *Burt*, 1895, 2 Ch. 577). But if the bequest does not carry the intermediate income, it seems that the first beneficiary attaining twenty-one takes as from that time the whole income until another share vests (*Furneaux* v. *Rucker*, 1879, W. N. 135; *Re Adams, Adams* v. *Adams*, 1893, 1 Ch. 332; *Re Holford, Holford* v. *Holford*, 1894, 3 Ch. 40; as to *Furneaux* v. *Rucker*, however, see *Re Woodin, Woodin* v. *Glass*, 1895, 2 Ch. 309).

As regards real estate, a future devise does not carry intermediate

income (*Re Eddel's Trusts*, 11 Eq. 559), even where the devise is residuary (*Wade Gery* v. *Handley*, 3 Ch. D. 374). But where realty and personalty are given together, the rules as to income in the case of bequests of personalty (*sup.*) apply (*Re Townsend*, *Townsend* v. *Townsend*, 34 Ch. D. 357; *Re Burton*, *Banks* v. *Heaven*, 1892, 2 Ch. 38). Where real estate is devised to a class contingently on their attaining twenty-one, the first beneficiary attaining that age takes as from that time the whole income until another share vests (*Re Averill*, *Salsbury* v. *Buckle*, 1898, 1 Ch. 523).

Cases under sub-sect. (1).

Having regard to the above rules the powers of the section have been held available in the case of future or contingent gifts of (1) residuary personalty (*Re Holford*, *Holford* v. *Holford*, 1894, 3 Ch. 30); (2) personalty directed to be set apart, consisting of either a pecuniary legacy (*Re Medlock*, *Ruffle* v. *Medlock*, 54 L. T. 828), or a specific legacy (*Re Clements*, *Clements* v. *Pearsall*, 1894, 1 Ch. 665), or leaseholds (*Re Woodin*, *Woodin* v. *Glass*, 1895, 2 Ch. 309); (3) a legacy given by a parent (*Re Moody*, *Woodroffe* v. *Moody*, 1895, 1 Ch. 101); and (4) realty and personalty given together (*Re Burton*, *Banks* v. *Heaven*, 1892, 2 Ch. 38; *Re Jeffery*, *Arnold* v. *Burt*, 1895, 2 Ch. 577). But the powers of the section have been held not available in the case of a contingent pecuniary legacy not directed to be set apart (*Re Judkin*, 25 Ch. D. 743; *Re Dickson*, *Hill* v. *Grant*, 29 Ch. Div. 331).

Where there is a gift (carrying income) in favour of a class on attaining twenty-one, the income is divisible into as many shares as there are members in existence, one share being payable to each adult, the other shares being applicable under this section for the benefit of the infants (*Re Holford*, *Holford* v. *Holford*, 1894, 3 Ch. 30; *Re Jeffery*, *Arnold* v. *Burt*, 1895, 2 Ch. 577).

Where residue is bequeathed to an infant, the executor on the residue being ascertained is a trustee within this section (*Re Smith*, *Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302).

It seems doubtful whether the section applies to an absolute gift subject to a gift over on not attaining twenty-one (*Re Buckley*, 22 Ch. D. 583, decided on 23 & 24 Vict. c. 145, s. 26).

Accumulations. Sub-sect. (2).

(*h*) Where residue was bequeathed to the testator's daughters who should attain twenty-one, each daughter's share to be in trust for her life and after her death for her children, income accumulated during a daughter's minority belonged to her absolutely on attaining twenty-one (*Re Scott*, *Scott* v. *Scott*, 1902, 1 Ch. 918). A similar decision was given where the infant was tenant for life subject to no contingency (*Re Wells*, *Wells* v. *Wells*, 43 Ch. D. 281; *Re Humphreys*, *Humphreys* v. *Levett*, 1893, 3 Ch. 1); and *semble* in the last case the accumulations would have formed part of the daughter's estate if she had died under twenty-one (*Re Humphreys*, 1893, 3 Ch. 6). Past accumulations may be applied for past maintenance (*Re Pitts*, *Collins* v. *Pitts*, 1884, W. N. 225, 242; compare *Re Wise*, *Jackson* v. *Parrott*, 1896, 1 Ch. 281). Income accruing during the minority of a life tenant may be applied for maintenance (*Re Long*, *Lovegrove* v. *Long*, 1902, W. N. 166), and may be paid to the guardians, who can give a good receipt (*Ib.*).

Contrary intention. Sub-sect. (3).

(*i*) A direction to accumulate income and pay it to legatees when shares become payable is not an expression of contrary intention (*Re Thatcher*, 26 Ch. D. 427). See, in general, as to the cases in which the court will direct payments for maintenance notwithstanding directions to accumulate, *Re Allan*, *Havelock* v. *Havelock* (17 Ch. D. 807); *Re Collins*, *Collins* v. *Collins* (32 Ch. D. 229); *Re Alford*, *Hunt* v. *Parry* (*id.* 383).

X.—Rentcharges and other Annual Sums.

Remedies for recovery of annual sums charged on land.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the

44 & 45 Vict. c. 41, s. 44.

income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this act. 44 & 45 Vict. c. 41, s. 44.

This section has been extended to the rentcharges created under the Copyhold Acts, 1887, s. 16, and 1894, s. 27 (e), but an owner of such a rentcharge can still pursue his other remedies, *e.g.*, by action (*Searle* v. *Cooke*, 43 Ch. Div. 533). The section also applies to rentcharges created under the Improvement of Land Acts (62 & 63 Vict. c. 46, s. 3). As to the equitable jurisdiction to raise by sale or mortgage arrears of a rentcharge issuing out of rent and profits, see *Hambro* v. *Hambro* (1894, 2 Ch. 564).

Redemption of quitrents and other perpetual charges.

45.—(1.) Where there is a quitrent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the commissioners.

(3.) On proof to the commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the commissioners.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this act.

(7.) This section does not extend to Ireland.

The Board of Agriculture has now taken the place of the Copyhold Commissioners (S. L. Act, 1882, s. 48; Board of Agriculture Act, 1889). As to the meaning of "quitrent," "chief-rent," and "rentcharge," see *ante*, p. 115.

XI.—Powers of Attorney.

Execution under power of attorney.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done

44 & 45 Vict. c. 41, s. 46.

shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this act.

Sects. 46 to 48 should be read in connection with sects. 8 and 9 of the Conv. Act, 1882, *post*, p. 614.

Payment by attorney under power without notice of death, &c. good.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this act.

This section extends to all persons the protection which was given to trustees and executors by Law of Prop. Amdt. Act, 1859, s. 26; now replaced by sect. 23 of the Trustee Act, 1893, *post*, where see note.

Deposit of original instruments creating powers of attorney.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court *of Judicature*.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5.) General rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the *commissioners of her Majesty's* Treasury, the fees to be taken therein.

(6.) This section applies to instruments creating powers of

attorney executed either before or after the commencement of this act. 44 & 45 Vict. c. 41, s. 48.

See Rule 6 relating to this section (*post*, p. 619). The fees mentioned in sub-sect. (5) are regulated by an order dated 1st January, 1883, for which see Shelford, R. P. Stat. p. 641, 9th ed.

XII.—Construction and Effect of Deeds and other Instruments.

Use of word grant unnecessary.

49.—(1.) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

(2.) This section applies to conveyances made before or after the commencement of this act.

Conveyance by a person to himself, &c.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

(2.) This section applies only to conveyances made after the commencement of this act.

According to the old common law, a person could not convey or assign real or personal estate to himself and another. As regards freeholds, this inconvenience was avoided by means of the Statute of Uses (see Williams' Real Property, p. 198, 14th ed.). Sect. 21 of Law of Prop. Amdt. Act, 1859 (*ante*, p. 530), gave power to a person to assign to himself and another "personal property now by law assignable including chattels real." The power did not include choses in action which were not then assignable (Williams' Personal Property, p. 4, 12th ed.). A similar power has now been extended to freeholds and things in action by the above section.

Compare note to sect. 1 of M. W. P. Act, 1882, *ante*, p. 342.

Words of limitation in fee or in tail.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

(2.) This section applies only to deeds executed after the commencement of this act.

Where on payment off of a mortgage freeholds were reconveyed to the mortgagor "in fee freed and discharged" from the mortgage, the legal estate in the fee simple did not pass, the court refusing to supply by construction the word "simple" (*Re Ethel and Mitchell*, 1901, 1 Ch. 945).

Powers

52.—(1.) A person to whom any power, whether coupled with

44 & 45 Vict. c. 41, s. 52.

an interest or not, is given may by deed release, or contract not to exercise, the power.

simply collateral.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this act.

Before this act powers simply collateral could not be released, but powers appendant or in gross might be (see *ante*, p. 318; Farwell on Powers, pp. 11 *et seq.* 2nd ed.; *Re Radcliffe, Radcliffe* v. *Bewes*, 1892, 1 Ch. 231). Any power may now be released by deed under the above section, and may be disclaimed under sect. 6 of the Conv. Act, 1882, *post*, p. 613. As to the release of a power by conduct, see *Foakes* v. *Jackson*, 1900, 1 Ch. 807. The power to release, however, does not apply to powers given by the S. L. Act, 1882 (S. L. Act, 1882, sect. 50, *post*). Nor does it apply to a power coupled with a duty (*Re Eyre, Eyre* v. *Eyre*, 49 L. T. 259; see *Saul* v. *Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831; *Re Somes, Smith* v. *Somes*, 1896, 1 Ch. 250, 255).

A married woman may, under this section, by deed unacknowledged release her power over any property real or personal, and whether in possession or reversion; and, where the power is coupled with an interest, whether in respect of such interest she is restrained from anticipation or not (*Re Chisholm, Hemphill* v. *Hemphill*, 1901, 2 Ch. 82; see Farwell, p. 18, 2nd ed.; *Re Davenport, Turner* v. *King*, 1895, 1 Ch. 361).

As to the release of a power of appointing among children or issue, see *Cunynghame* v. *Thurlow* (1 R. & M. 436, n.); *Smith* v. *Houblon* (26 Beav. 482); *Horner* v. *Swan* (T. & R. 430); *Re Little, Harrison* v. *Harrison* (40 Ch. D. 418). In a case since the Conv. Act, 1881, where a father released a power of appointment, in default of the exercise of which his children took equally, he was held absolutely entitled to the share of a deceased child (*Shirley* v. *Fisher*, 47 L. T. 109). In a similar case the release was held valid by the C. A., and the father was held entitled, on surrendering his life interest, to have the child's share transferred to him (*Re Radcliffe, Radcliffe* v. *Bewes*, 1892, 1 Ch. 227; see *Re Somes, Smith* v. *Somes*, 1896, 1 Ch. 250).

Construction of supplemental or annexed deed.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

(2.) This section applies to deeds executed either before or after the commencement of this act.

Receipt in deed sufficient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this act.

Receipt in deed or indorsed, evidence for subsequent purchaser.

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be

sufficient evidence of the payment or giving of the whole amount thereof. 44 & 45 Vict. c. 41, s. 55.

(2.) This section applies only to deeds executed after the commencement of this act.

A mortgagor who had executed a deed containing a receipt for the full amount named therein could only redeem from a transferee without notice, on payment of the full amount, though a less sum was really due on the mortgage (*Saunders* v. *Kent*, 1885, W. N. 147; see *Bickerton* v. *Walker*, 31 Ch. D. 151; *Gordon* v. *James*, 30 Ch. Div. 249; *Lloyds Bank Ld.* v. *Bullock*, 1896, 2 Ch. 192).

As to what constitutes a receipt, see, further, *Renner* v. *Tolley* (68 L. T. 815; 1893, W. N. 99). A statement in a transfer of mortgage made in form prescribed by statute that consideration money had been paid was a receipt within the section and created an estoppel (*Rimmer* v. *Webster*, 1902, 2 Ch. 163).

Receipt in deed or indorsed, authority for payment to solicitor.

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this act.

This section, which had been held not to extend to the case of trustees selling (*Re Bellamy and Metropolitan Board*, 24 Ch. Div. 387), was extended to them (Trustee Act, 1888, s. 2, now replaced by Trustee Act, 1893, s. 17 (1), *post*). A deed in the form pointed out in the section is equivalent to a special authority given to the solicitor to receive the money (*Re Bellamy and Metropolitan Board*, 24 Ch. Div. 399, 403). The solicitor producing the deed must be a solicitor acting for the payee (*Day* v. *Woolwich Society*, 40 Ch. Div. 491; see *Gordon* v. *James*, 30 Ch. Div. 256). It has been said that if it should turn out that the solicitor had stolen the deed, or had not been permitted by the person for whom he is acting to have the custody of the deed and to produce it, the purchaser would not be protected (*Re Hetling and Merton*, 1893, 3 Ch. 280). On the other hand, in the absence of anything to suggest the contrary, the person paying the money is bound to assume that the solicitor producing the deed is acting as solicitor for the person having power to give a discharge (*King* v. *Smith*, 1900, 2 Ch. 432). And if a purchaser, without reason, requires proof of the vendor's permission to the solicitor to have the custody of the deed and to produce it, such purchaser would *primâ facie* be acting unreasonably (*Re Hetling and Merton*, 1893, 3 Ch. 280). The fact of a deed being in the office of a solicitor is not equivalent to its production (*Day* v. *Woolwich Society*, *sup.*).

Sufficiency of forms in Fourth Schedule.

57. Deeds in the form of and using the expressions in the forms given in the fourth schedule to this act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this act, be sufficient.

44 & 45 Vict. c. 41, s. 58.

Covenants to bind heirs, &c.

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3.) This section applies only to covenants made after the commencement of this act.

Covenants to extend to heirs, &c.

59.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2.) This section extends to a covenant implied by virtue of this act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this act.

Effect of covenant with two or more jointly.

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant implied by virtue of this act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this act.

Effect of advance on joint account, &c.

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed

to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account. 44 & 45 Vict. c. 41, s. 61.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this act.

The old joint account clause was usually inserted in the case of trustees investing on mortgage; and as between the trustees and a purchaser from them, or the mortgagor, the court (in a case where the trusts were not disclosed) refused to go behind the clause (*Re Harman & Uxbridge R. Co.*, 24 Ch. D. 726). It may be different where the trusts are disclosed (*Re Blaiberg and Abrahams*, 1899, 2 Ch. 340). As between the mortgagees *inter se*, the court has gone behind the clause, and on the evidence held the mortgagees to be tenants in common (*Re Jackson, Smith* v. *Sibthorpe*, 34 Ch. D. 732).

Grants of easements, &c. by way of use.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this act.

Provision for all the estate, &c.

63.—(1.) Every conveyance shall, by virtue of this act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have

44 & 45 Vict. c. 41, s. 63.

effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this act.

Under this section a mortgage deed purporting to convey the fee was held to pass the only interest of the mortgagor, which was leasehold (*Thellusson* v. *Liddard*, 1900, 2 Ch. 635).

Construction of implied covenants.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

XIII.—Long Terms.

Enlargement of residue of long term into fee simple.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that,

from and after the execution of the deed, the term shall be enlarged into a fee simple. 44 & 45 Vict. c. 41, s. 65.

(3.) Thereupon, by virtue of the deed and of this act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this act.

A rent of three shillings has been held to be a rent "having money value" (*Re Smith and Stott*, 29 Ch. D. 1009, n.), but not a rent of one silver penny (*Re Chapman and Hobbs*, 29 Ch. D. 1007). As to the terms of years to which the section applies, see Conv. Act, 1882, s. 11 (*post*, p. 615).

XIV.—Adoption of Act.

Protection of solicitor and trustees adopting act.

66.—(1.) It is hereby declared that the powers given by this act to any person, and the covenants, provisions, stipulations, and words which under this act are to be deemed included or implied in any instrument, or are by this act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connexion with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable,

44 & 45 Vict. c. 41, s. 66.

by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this act would allow of his doing so.

(2.) But nothing in this act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

XV.—Miscellaneous.

Regulations respecting notice.

67.—(1.) Any notice required or authorized by this act to be served shall be in writing.

(2.) Any notice required or authorized by this act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained (*k*).

(3.) Any notice required or authorized by this act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4.) Any notice required or authorized by this act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5.) This section does not apply to notices served in proceedings in the court.

(*k*) Where a lease had been assigned, a notice addressed to the original lessee and all others concerned and served on the occupier was sufficient (*Cronin* v. *Rogers*, 1 Cab. & El. 348). But where a lessee had executed an assignment for the benefit of his creditors, which contained a declara-

tion of trust of his leaseholds for the benefit of the creditors' trustee, and such trustee had entered, a notice addressed to and served on such trustee alone, was insufficient (*Gentle* v. *Faulkner*, 1900, 2 Q. B. 267). 44 & 45 Vict. c. 41, s. 67.

68. *The act described in Part II. of the first schedule to this act shall, by virtue of this act, have the short title of the Statutory Declarations Act*, 1835, *and may be cited by that short title in any declaration made for any purpose under or by virtue of that act, or in any other document, or in any act of parliament.* *Short title of* 5 & 6 *Will.* 4, c. 62.

XVI.—Court; Procedure; Orders.

69.—(1.) All matters within the jurisdiction of the court under this act shall, subject to the acts regulating the court, be assigned to the Chancery Division of the court. Regulations respecting payments into court and applications.

(2.) Payment of money into court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the court shall, except where it is otherwise expressed, be by summons at chambers (*l*).

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the court thinks fit.

(7.) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

(8.) General rules for purposes of this act shall be deemed rules of court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly. 39 & 40 Vict. c. 59, s. 17.

(9.) The powers of the court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and rules for regulating proceedings in that court shall be from time to time made by the chancellor of the Duchy of Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the vice-chancellor of the County Palatine (*m*).

(10.) *General rules, and rules of the Court of Chancery of the County Palatine, under this act may be made at any time after the passing of this act, to take effect on or after the commencement of this act.*

(*l*) See *Re Lillwall*, 1882, W. N. 6; 30 W. R. 243.

(*m*) Under Palatine Court of Durham Act, 1889, s. 10, the powers of the court may be exercised by the Palatine Court of Durham.

70.—(1.) An order of the court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any con- Orders of court conclusive.

44 & 45 Vict. c. 41, s. 70.

currence, consent, notice, or service, whether the purchaser has notice of any such want or not.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the court, and purporting to be in pursuance of the Settled Estates Act, 1877, *notwithstanding the exception in section forty of that act*, or to be in pursuance of any former act repealed by that act, notwithstanding any exception in such former act.

40 & 41 Vict. c. 18, s. 40.

(3.) This section applies to all orders made before or after the commencement of this act, except any order which has before the commencement of this act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this act pending for having it set aside or determined to be invalid.

Having regard to this section an order of the court will be conclusive even where the blot appears on the face of it (*Re Hall Dare*, 21 Ch. D. 41). The section prevented a purchaser to whom a conveyance of the legal estate was offered from requiring an abstract of an equitable title (*Re Whitham, Whitham* v. *Davis*, 1901, W. N. 86); or (on a sale in a foreclosure action to which the administratrix of the mortgagor was a party) from requiring the concurrence in the conveyance of the mortgagor's heir (*Re Harrowby and Paine*, 1902, W. N. 137). On a sale in an administration action, it was held that the purchasers were entitled to a conveyance of the fee in an absolute form from mortgagor and first mortgagee, notwithstanding the existence of puisne mortgagees not parties to the action, and that as against such puisne mortgagees this section would protect the purchaser (*Mostyn* v. *Mostyn*, 1893, 3 Ch. 376). Where, however, the order for sale was made on the assumption that the property belonged to A., whereas it in fact belonged to B., who was not a party to the action, this section did not give the purchaser a good title against B. (*Jones* v. *Barnett*, 1900, 1 Ch. 370). The court will not, in reliance on this section, attempt to exercise a jurisdiction which it does not possess (*Re Montagu, Derbishire* v. *Montagu*, 1897, 2 Ch. 8).

XVII.—Repeals.

Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

71.—(1.) *The enactments described in Part III. of the second schedule to this act are hereby repealed.*

(2.) *The repeal by this act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this act; but this provision shall not be construed as qualifying the provision of this act relating to section forty of the Settled Estates Act*, 1877, *or any former act repealed by that act.*

Where a mortgage was made prior to 1882, the mortgagee can still exercise the powers given by 23 & 24 Vict. c. 145, *ante*, p. 540 (*Re Solomon and Meagher*, 40 Ch. D. 508).

XVIII.—Ireland.

Modifications respecting Ireland.

72.—(1.) In the application of this act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The court shall be Her Majesty's High Court *of Justice* in Ireland. 44 & 45 Vict. c. 41, s. 72.

(3.) All matters within the jurisdiction of that court shall, subject to the acts regulating that court, be assigned to the Chancery Division of that court; but general rules under this act may direct that any of those matters be assigned to the land judges of that Division.

(4.) The proper office of the Supreme Court *of Judicature* in Ireland shall be substituted for the central office of the Supreme Court *of Judicature.*

(5.) General rules for purposes of this act for Ireland shall be deemed rules of court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, *at any time after the passing of this act, to take effect on or after the commencement of this act.* 40 & 41 Vict. c. 57, s. 69.

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation. Death of bare trustee intestate, &c. 37 & 38 Vict. c. 78.

(2.) This section extends to Ireland only.

SCHEDULES.

THE FIRST SCHEDULE.

ACTS AFFECTED.

PART I. (*n*).

1 & 2 *Vict.* c. 110.—*An act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.*

2 & 3 *Vict.* c. 11.—*An act for the better protection of purchasers against judgments, crown debts, lis pendens, and fiats in bankruptcy.*

18 & 19 *Vict.* c. 15.—*An act for the better protection of purchasers against judgments, crown debts, cases of lis pendens, and life annuities or rent-charges.*

22 & 23 *Vict.* c. 35.—*An act to further amend the law of property and to relieve trustees.*

23 & 24 *Vict.* c. 38.—*An act to further amend the law of property.*

23 & 24 *Vict.* c. 115.—*An act to simplify and amend the practice as to the entry of satisfaction on crown debts and on judgments.*

27 & 28 *Vict.* c. 112.—*An act to amend the law relating to future judgments, statutes, and recognizances.*

28 & 29 *Vict.* c. 104.—*The Crown Suits, &c. Act,* 1865.

31 & 32 *Vict.* c. 54.—*The Judgments Extension Act,* 1868.

(*n*) See Conv. Act, 1882, s. 2 (1), *post*, p. 611.

44 & 45 Vict. c. 41.

PART II. (*o*).

5 & 6 *Will.* 4, c. 62.—*An act to repeal an act of the present session of parliament, intituled "An act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;" and to make other provisions for the abolition of unnecessary oaths.*

(*o*) See Conv. Act, 1881, s. 68, *ante*, p. 603.

THE SECOND SCHEDULE.

REPEALS.

A description or citation of a portion of an act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

PART I. (*p*).

22 & 23 *Vict.* c. 35 ... *in part.*	*An act to further amend the law of property and to relieve trustees* ..... *Sections four to nine.*	*in part; namely,—*
23 & 24 *Vict.* c. 126... *in part.*	*The Common Law Procedure Act*, 1860 ..... *Section two.*	*in part; namely,—*

PART II. (*q*).

15 & 16 *Vict.* c. 86 ... *in part.*	*An act to amend the practice and course of proceeding in the High Court of Chancery* ..... *Section forty-eight.*	*in part; namely,—*

PART III. (*r*).

8 & 9 *Vict.* c. 119 ...	*An act to facilitate the conveyance of real property.*	
23 & 24 *Vict.* c. 145... *in part.*	*An act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills* ..... *Parts II. and III.* (*sections eleven to thirty*).	*in part; namely,—*

(*p*) See sect. 14 (7), *ante*, p. 570. (*q*) See sect. 25 (6), *ante*, p. 581.
(*r*) See sect. 71 (1), *ante*, p. 604.

THE THIRD SCHEDULE.

STATUTORY MORTGAGE.

PART I. (*s*).

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [*&c.*] of the one part and *M.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

*** *Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

PART II. (*t*).

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [*&c.*] of the one part and *T.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WHEREAS the prin-

(*s*) See sect. 26 (1), *ante*, p. 582.
(*t*) See sect. 27 (1), *ante*, p. 583.

44 & 45 Vict. c. 41.

cipal sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid * *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of† the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness, &c.

[*Or, in case of further advance, after* aforesaid *at* * *insert* and also in consideration of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, *and after* of *at* † *insert* the sums of £ and £ making together]

*** *Variations to be made, as required, in case of the deed being made by indorsement or in respect of any other thing.*

PART III. (*u*).

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness, &c.

*** *Variations as noted above.*

THE FOURTH SCHEDULE (*x*).

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same

(*u*) See sect. 29, *ante*, p. 584.
(*x*) See sect. 57, *ante*, p. 597.

rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the day of 1882 pay to *B.* and *C.* the sum of £ and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons claiming under him re-convey the premises to *A.* or the persons claiming under him And *A.* hereby covenants with *B.* as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness, &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of £ and interest at [*four*] per centum per annum on property at [*&c.*] WITNESSETH that in consideration of the further sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *B.* and *C.* of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness, &c.

III.—*Conveyance on Sale.*

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] and *C.* of [*&c.*] of the second part and *M.* of [*&c.*] of the third part WHEREAS by an indenture dated [*&c.*] and made between [*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [*&c.*] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the payment and receipt in manner before-mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add if required,* And *A.* hereby acknowledges the right of *M.* to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof.]

In witness, &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

44 & 45 Vict. c. 41.

IV.—*Marriage Settlement.*

THIS INDENTURE made the day of 1882 between *John M.* of [*&c.*] of the first part *Jane S.* of [*&c.*] of the second part and *X.* of [*&c.*] and *Y.* of [*&c.*] of the third part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S. John M.* as settlor hereby conveys to *X.* and *Y.* All that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rentcharge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable,* to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple [*Insert trusts of term of 500 years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired.*]

In witness, &c.

THE CONVEYANCING ACT, 1882.

45 & 46 VICT. c. 39.

Preliminary.

45 & 46 Vict. c. 39, s. 1.

Short titles; commencement; extent; interpretation. 44 & 45 Vict. c. 41.

1.—(1.) This act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this act referred to as the Conveyancing Act of 1881) and this act may be cited together as the Conveyancing Acts, 1881, 1882.

(2.) This act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this act referred to as the commencement of this act.

(3.) This act does not extend to Scotland.

(4.) In this act and in the schedule thereto—

(i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not;

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who,

for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser; 45 & 46 Vict. c. 39, s. 1.

(iii.) The act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance" is referred to as the Fines and Recoveries Act; and the act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act. 3 & 4 Will. 4, c. 74. 4 & 5 Will. 4, c. 92.

Searches.

Official negative and other certificates of searches for judgments, crown debts, &c.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any act described in Part I. of the first schedule to the Conveyancing Act of 1881 (*y*), or by any other act, he may deliver in the office a requisition in that behalf, referring to this section.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5.) General rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of her Majesty's Treasury, the fees to be taken therein; which rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after 39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68.

45 & 46 Vict. c. 39, s. 2.

the passing of this act, to take effect on or after the commencement of this act (z).

(6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(7.) Nothing in this section or in any rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such rule had not been enacted or made.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

3 & 4 Will. 4, c. 74.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other act, or under any statutory rule.

(12.) This section does not extend to Ireland.

(y) See *ante*, p. 605.

(z) See rules, *post*, p. 618. The fees are regulated by an order dated 1 Jan., 1883, for which see Shelford R. P. Stat. 9th ed., 64.

Notice.

Restriction on constructive notice.

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted. 45 & 46 Vict. c. 39, s. 3.

(4.) This section applies to purchases made either before or after the commencement of this act; save that, where an action is pending at the commencement of this act, the rights of the parties shall not be affected by this section.

In a case where this section was much discussed, the same solicitor acted for mortgagor and mortgagee. The court refused to impute to the mortgagee notice either of facts known to the mortgagor, or of facts which had come to the knowledge of the solicitor when acting in previous transactions for other mortgagees of the same property (*Re Cousins*, 31 Ch. D. 671; see *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231). The inquiry which ought reasonably to be made by an intending mortgagee is an investigation of the title; so a mortgagee was held entitled as a purchaser for value without notice, on the ground that such an investigation would have disclosed no flaw (*Gainsborough* v. *Watcombe Co.*, 53 L. T. 116; see *Taylor* v. *London and County Bank*, *sup.*). *Secus* where inquiry would have disclosed the flaw. (*Re Alms Corn Charity*, *Charity Commrs.* v. *Bode*, 1901, 2 Ch. 762).

The section does not impose on a mortgagee the obligation of inquiring from a tenant as to the interest of his lessor (*Hunt* v. *Luck*, 1902, 1 Ch. 434).

The effect of this section is discussed in *Bailey* v. *Barnes*, 1894, 1 Ch. 25, where Lord Cranworth's statement of the doctrine of constructive notice in *Ware* v. *Egmont*, 4 D. M. G. 473, was approved; and it was said that the form of the present section shows that a restriction rather than an extension of the old doctrine was intended (1894, 1 Ch. 35). See generally as to constructive notice, Seton, 6th ed. p. 2105 *et seq.*

Leases.

Contract for lease not part of title to lease.

4.—(1.) Where a lease is made under a power contained in a settlement, will, act of parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2.) This section applies to leases made either before or after the commencement of this act.

See V. & P. Act, 1874, sect. 2, rule 1, *ante*, p. 545; Conv. Act, 1881, sect. 13, *ante*, p. 568; S. L. Act, 1882, s. 31 (4), *post*, p. 684.

[*Sect.* 5 *was replaced by the Trustee Act*, 1893, *s.* 10 (2) (*b*), post.]

Powers.

Disclaimer of power by trustees.

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments

45 & 46 Vict. c. 39, s. 6.

coming into operation either before or after the commencement of this act.

See Conv. Act, 1881, sect. 52, and note, *ante*, p. 596; and the notes to the Fines and Recoveries Act, 1833, secs. 77, 78, *ante*, pp. 316, 318. A renunciation of executorship was held to be a disclaimer of a power of sale (*Re Fisher and Haslett*, 13 L. R. Ir. 546). The power given by the Settled Land Acts cannot be disclaimed (S. L. Act, 1882, s. 50, *post*).

[*Sect.* 7, *referring to acknowledgments by married women, is inserted* ante, *p.* 329.]

Powers of Attorney.

Effect of power of attorney, for value, made absolutely irrevocable.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this act.

Effect of power of attorney, for value or not, made irrevocable for fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time. 45 & 46 Vict. c. 39, s. 9.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this act.

Executory Limitations.

Restriction on executory limitations.

10.—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this act.

A declaration was made defining the effect of an executory limitation over in accordance with this section (*Re Booth*, *Pickard* v. *Booth*, 1900, 1 Ch. 768).

Long Terms.

Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 (*a*) shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

(*a*) *Ante*, p. 600.

Mortgages.

Reconveyance on mortgage.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881 (*b*), to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mort-

45 & 46 Vict. c. 39, s. 12.

gagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

(*b*) *Ante*, p. 572.

Saving.

Restriction on repeals in this act.

13. The repeal by this act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this act.

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1892.

55 & 56 Vict. c. 13.

Preliminary.

55 & 56 Vict. c. 13, s. 1.

Short title and extent. 44 & 45 Vict. c. 41. 45 & 46 Vict. c. 39.

1.—(1.) This act may be cited as the Conveyancing and Law of Property Act, 1892, and the Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this act shall be read together and may be cited together as the Conveyancing Acts, 1881, 1882, and 1892.

(2.) This Act does not extend to Scotland.

Leases, Under-leases, Forfeiture.

Costs of waiver, and forfeiture in case of bankruptcy or execution.

2.—(1.) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved, under the provisions of the Conveyancing and Law of Property Act, 1881, or of this act (*c*).

(2.) Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto (*d*).

(3.) Sub-section two of this section is not to apply to any lease of— 55 & 56 Vict. c. 13, s. 2.

(a) Agricultural or pastoral land:
(b) Mines or minerals:
(c) A house used or intended to be used as a public-house or beershop:
(d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures:
(e.) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

(*c*) This section must be read with sect. 14 of the Conv. Act, 1881 (*ante*, p. 569), where see note.

Before this act it was held, under sect. 14, sub-sect. 2, of the Conv. Act, 1881, that payment by the lessee of the expenses of a solicitor, &c. might be made by the court a condition of relief (*Bridge* v. *Quick*, 61 L. J. Q. B. 375).

An under-lessee is not as between himself and the lessor a "lessee" within this section, and the lessor cannot, therefore, recover costs from him under sub-sect. 1 (*Nind* v. *Nineteenth Century Society*, 1894, 2 Q. B. 226). In a case under the present sub-section an opinion was expressed in the C. A. that a lessee who by complying with the lessor's notice avoids a forfeiture, is not "relieved" from forfeiture within the sub-section (*Nind* v. *Nineteenth Century Society*, 1894, 2 Q. B. 226). If this be correct, the operation of the sub-section would seem to be much narrowed.

(*d*) The effect of sub-sect. 2 is to take the case of forfeiture for bankruptcy or liquidation out of sub-sect. (6) of sect. 14 of Conv. Act, 1881; and to make a notice necessary for one year from the bankruptcy or liquidation (*Horsey Estate, Ltd.* v. *Steiger*, 1899, 2 Q. B. 79, 91; where see also as to what is sufficient notice). Where, immediately after the bankruptcy, a lessor re-entered peaceably without giving notice, his re-entry was void against the bankruptcy trustee (*Re Riggs*, 1901, 2 K. B. 16). Sub-sect. 3 prevented sub-sect. 2 from applying to a public-house (*Fryer* v. *Ewart*, 1902, A. C. 187).

3. In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent. No fine to be exacted for licence to assign.

Requiring (as a condition of a licence) the deposit of money to secure the fulfilment of the obligations of the lessee in regard to other property is not a fine within this section (*Re Cosh*, 1897, 1 Ch. 9).

55 & 56 Vict. c. 13, s. 4.

Power of court to protect under-lessees on forfeiture of superior leases.

4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

This section was passed in consequence of the decisions (*ante*, p. 571) that sect. 14 of the Conv. Act, 1881, did not apply as between ground landlord and under-lessee (*Nind* v. *Nineteenth Century Society*, 1894, 2 Q. B. 231).

The application of the under-lessee may be made by defence and counterclaim in an action for possession by the lessor (*Cholmeley's School* v. *Sewell*, 1893, 2 Q. B. 254). Relief can be granted under this section in cases in which no relief could be granted to the original lessee, *e.g.*, bankruptcy (*Cholmeley School* v. *Sewell*, 1894, 2 Q. B. 906), or breach of covenant not to assign (*Imray* v. *Oakshette*, 1897, 2 Q. B. 218). The jurisdiction will, however, be exercised with caution (*ib.*), and the court has the most ample discretion in fixing the terms of the new lease (*Ewart* v. *Fryer*, 1901, 1 Ch. 499; 1902, A. C. 187). The new lease might, it seems, be granted at an advanced rent (1901, 1 Ch. 507—517: see *Cholmeley's School* v. *Sewell*, 1894, 2 Q. B. 913).

Extension of definitions of "lease," "under-lease," and "under-lessee."

5. In section fourteen of the Conveyancing and Law of Property Act, 1881, as amended by this act, and in this act, "lease" shall also include an agreement for a lease where the lessee has become entitled to have his lease granted, and "under-lease" shall also include an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted, and in this act "under-lessee" shall include any person deriving title under or from an under-lessee.

See Conv. Act, sect. 14 (3), *ante*, p. 569. As to a tenancy agreement, see *Charrington* v. *Camp*, 1902, 1 Ch. 386.

[*Sect.* 6 *was replaced by the Trustee Act*, 1893, s. 10 (2) (*b*), post.]

RULES UNDER SECTION 2 OF THE CONVEYANCING ACT, 1882 (*e*).

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration accord-

ing to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and the certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require.

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

(*e*) *Ante*, p. 611.

RULE UNDER THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (*f*).

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the office.

(*f*) *Ante*, p. 594.

APPENDIX.

FORM I.—DECLARATION BY SEPARATE INSTRUMENT AS TO PURPOSES OF SEARCH.

Supreme Court of Judicature. Central Office.

To the Clerk of Enrolments *or* The Registrar of
Royal Courts of Justice, London.

In the matter of A. B. and C. D.

I declare that the search (*or* searches) in the name (*or* names) of required to be made by the requisition for search, dated the is (*or* are) required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by A. B. to C. D.

Signature, address, and description.

Dated .

FORM II.—DECLARATION AS TO PURPOSES OF SEARCH CONTAINED IN THE REQUISITION.

I declare that the above-mentioned search is required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by A. B. to C. D.

Forms.

FORM III.—REQUISITION FOR SEARCH IN THE ENROLMENT OFFICE, UNDER THE CONVEYANCING ACT, 1882, S. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Clerk of Enrolments, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for deeds and other documents enrolled during the period from 18 to 18 both inclusive, in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated .

FORM IV.—REQUISITION FOR SEARCH IN THE BILLS OF SALE DEPARTMENT, UNDER THE CONVEYANCING ACT, 1882, S. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Registrar of Bills of Sale, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments registered or re-registered as bills of sale during the period from 18 to 18 both inclusive in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated .

FORM V.—REQUISITION FOR SEARCH IN THE REGISTRY OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for certificates of Acknowledgments of Deeds by Married Women during the period from 18 to 18 both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname.	Christian Name or Names of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed, if the Search relates to a particular Deed.	County, Parish, or Place in which the Property is situate, or other description of the Property.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated .

FORM VI.—REQUISITION FOR SEARCH IN THE REGISTRY OF JUDGMENTS UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Registrar of Judgments, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules, and lis pendens, and for judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period from 18 to 18 , both inclusive and for executions for the period from the 29th July 1864 (*or as the case may require*) to the 18 , both inclusive, and for annuities for the period from the 26th April 1855 (*or as the case may require*) to the 18 , both inclusive, in the following name (*or* names.)

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated .

Forms.

FORM VII.—CERTIFICATE OF SEARCH BY ENROLMENT DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature Central Office, Enrolment Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in the name (*or* names) of for the period from to , both inclusive, and that no deed or other document has been enrolled in the said office in that name (*or* in any one or more of those names) during the period aforesaid.

or and that except the described in the schedule hereto no deed or document has been enrolled in that name (*or* in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated .

FORM VIII.—CERTIFICATE OF SEARCH BY THE REGISTRAR OF BILLS OF SALE UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature. Central Office, Bills of Sale Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Register of Bills of Sale in the name (*or* names) of for the period from 18 to 18 both inclusive, and that no instrument has been registered or re-registered as a bill of sale in that name (*or* in any one or more of those names) during that period.

or, and that except the described in the schedule hereto, no instrument has been registered or re-registered as a bill of sale in the name (*or* in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated .

FORM IX.—CERTIFICATE OF SEARCH BY REGISTRAR OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Registry of Certificates of Acknowledgments of Deeds by Married Women.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women in the name (*or* names) of for the period from to 18 , both inclusive, for a certificate dated the *or* for certificates of acknowledgment of a deed dated the .

or for certificates of acknowledgments of deeds relating to (*fill in the description of the property from the Requisition*)

and that no such certificate has been filed in that name (*or* in any one or more of those names) during the period aforesaid.

or and that except the certificate (*or* certificates) described in the Schedule

hereto, no such certificate has been filed in that name (*or* in any one or more of those names) during the period aforesaid.

Surname.	Christian Names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish, or Place in which Property situated, or other description of the Property.

Dated day of 188 .

FORM X.—CERTIFICATE OF SEARCH BY REGISTRAR OF JUDGMENTS UNDER CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

The Registry of Judgments.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, lis pendens, judgments at the suit of the Crown, Statutes, recognizances, Crown bonds, inquisitions, and acceptances of office, for the period from 18 to 18 , both inclusive, and for executions for the period from 18 to 18 , both inclusive, and for annuities for the period from 18 to 18 , both inclusive, in the name (*or* names) of and that no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name (*or* in any one or more of those names) during the respective periods covered by the aforesaid searches.

or and that except the mentioned in the Schedule hereto, no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, Statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name (*or* in any one or more of those names) during the respective periods covered by the aforesaid search.

THE SCHEDULE.

Dated the day of 188 .

FORM XI.—REQUISITION FOR CONTINUATION OF SEARCH UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature. Central Office.

Requisition for continuation of Search.

To the Clerk of Enrolments *or* The Registrar of
Royal Courts of Justice, London, W.C.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of 18 , in the name (*or* names) of , from the day of to the day of 18 , both inclusive.

Signature, address, and description of person requiring the search.

Dated .

Forms.

FORM XII.—CERTIFICATE OF RESULT OF CONTINUED SEARCH UNDER THE CONVEYANCING ACT, 1882, S. 2, TO BE ENDORSED ON ORIGINAL CERTIFICATE.

This is to certify that the search (*or* searches) mentioned in the within written certificate has (*or* have) been diligently continued to the day of , 18 , and that up to and including that date [except the mentioned in the schedule hereto (*these words to be omitted where nothing is found*)], no deed or other document has been enrolled, *or* no instrument has been registered, or re-registered, as a bill of sale, *or* no certificate has been filed, *or* no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution or annuity, has been registered or re-registered in the within-mentioned name (*or* in any one or more of the within-mentioned names).

Dated .

SETTLED LAND.

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I.—The Settled Estates Act, 1877.

40 & 41 Vict. c. 18.

1. This act may be cited for all purposes as "The Settled Estates Act, 1877." 40 & 41 Vict. c. 18, s. 1. Short title.

This act is a re-enactment with amendments of the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), and the four amending acts (21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45; 37 & 38 Vict. c. 33; and 39 & 40 Vict. c. 30), all which are repealed by this act. Such of the cases decided under the last-mentioned acts as are applicable to the present act are given in the notes.

2. The word "settlement" as used in this act shall signify any act of parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively (*a*). Interpretation of "settlement" and "settled estates."

The term "settled estates" as used in this act shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement (*b*); and for the purposes of this act a tenant-in-tail after possibility of issue extinct shall be deemed to be a tenant for life.

All estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement.

In determining what are settled estates within the meaning of this act, the court shall be governed by the state of facts, and by

40 & 41 Vict. c. 18, s. 2.

the trusts or limitations of the settlement at the time of the said settlement taking effect.

(*a*) This section re-enacts the provisions of 19 & 20 Vict. c. 120, s. 1; 21 & 22 Vict. c. 77, s. 1; and 27 & 28 Vict. c. 45, s. 3.

A will and a sub-settlement were held together to constitute a "settlement" (*Re Dendy*, 4 Ch. D. 879).

Accruer was held succession within the Act of 1856 (*Re Goodwin*, 3 Giff. 620; see, however, *Re Bardin*, 7 W. R. 711; 5 Jur. N. S. 1378).

Cases under old act.

(*b*) The following were held to be settled estates within the Act of 1856:—Land limited to a person for life with remainder subject to a power of appointment to his heir (*Beioley* v. *Carter*, 4 Ch. 230); land devised in trust for several in fee, subject to the payment of one moiety of the income to B. for life (*Re Shepheard*, 8 Eq. 571); land devised in trust for A. on a contingency, with a gift over in default (*Re Horne*, 29 L. T. 830; see *Re Bardin*, 7 W. R. 711; and as to an estate in fee with an executory devise over, the construction being doubtful, see *Re Williams*, 20 W. R. 967); land limited on trust for A. for life, and on her death on trust for sale (*Re Morgan*, 9 Eq. 578; *Carlyon* v. *Truscott*, 20 Eq. 348); land devised in trust for sale, the proceeds to go in succession (*Re Laing*, 1 Eq. 416; *Re Greene*, 10 Jur. N. S. 1098; *Collett* v. *Collett*, 2 Eq. 203; *Re Chamberlain*, 23 W. R. 852; *Re Morgan*, 49 L. J. Ch. 577; *Dixie* v. *Dixie*, 1881, W. N. 49). Where an undivided share of an estate was settled it was held that the whole must be considered a settled estate (*Re Shepheard*, 8 Eq. 571; see *Re Goodwin*, 3 Giff. 620). As to copyholds, see *Re Adair* (16 Eq. 124).

Cases under the sect.

Under sect. 41 of the Conv. Act. 1881 (*ante*, p. 587), land vested in an infant in fee or for a leasehold interest at a rent is a settled estate within this act. Land was held a settled estate under this section, where the interest of the infant was determinable on death under twenty-one (*Liddell* v. *Liddell*, 31 W. R. 238; see *Re Sparrow*, 1892, 1 Ch. 412).

Interpretation of "the court."

3. The expression "the court" in this act shall, so far as relates to estates in England, mean the High Court of Justice, and all causes and matters in respect of such estates commenced or continued under this act shall, subject to the provisions of the Judicature Acts, be assigned to the Chancery Division of the High Court of Justice in like manner as if such causes and matters had arisen under an act of parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such causes and matters had been given to the Court of Chancery, or to any judges or judge thereof respectively.

The expression "the court" in this act shall, so far as relates to estates in Ireland, mean the Court of Chancery in Ireland.

Power to authorize leases of settled estates.

4. It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, to authorize leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed (*c*):

First. Every such lease shall be made to take effect in possession at or within one year next after the making thereof,

and shall be for a term of years not exceeding for an agricultural or occupation lease, so far as relates to estates in England twenty-one years, or so far as relates to estates in Ireland thirty-five years, and for a mining lease or a lease of water mills, way leaves, water leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the court shall direct, where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than the term hereinbefore specified in that behalf (*d*): 40 & 41 Vict. c. 18, s. 4.

Secondly. On every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine: Provided always, that in the case of a mining lease, a repairing lease, or a building lease a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease (*e*):

Thirdly. Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the court shall deem expedient (*f*):

Fourthly. No such lease shall authorize the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorized by the lease:

Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf.

(c) This section substantially re-enacts 19 & 20 Vict. c. 120, s. 2, and 21 & 22 Vict. c. 77, ss. 2 and 4. By this section, however, the term for Irish agricultural leases is extended from twenty-one to thirty-five years, and leases at a small rent for the first five years are allowed.

This section does not give a general power, which must be exerciseable at the instance of some one, but a modified power, subject to the restrictions

40 & 41 Vict. c. 18, s. 4.

of the act as to who can petition, &c. (*Taylor* v. *Taylor*, 1 Ch. D. 432). It requires the court to have regard to the interests of all parties (*Vine* v. *Raleigh*, 24 Ch. D. 241).

(*d*) On a surrender and new grant under sect. 7 (*infra*), an unexpired underlease does not prevent the new lease taking "effect in possession" (*Re Ford*, 8 Eq. 309). A lease with a covenant to grant a new lease at the end of the term will not be sanctioned (*Re Farnell*, 33 Ch. D. 599). A mining lease may include any land necessary for working the minerals (*Re Revely*, 11 W. R. 744; *Re Wallace*, 1869, W. N. 66). As to the meaning of "repairing lease," see *Truscott* v. *Diamond, &c. Co.* (20 Ch. Div. 251). Building leases have been authorized for 600 years (*Re Cross*, 27 Beav. 592); or for 999 years (*Re Carr*, 9 W. R. 776).

(*e*) In estimating the "best rent," the value of a surrendered lease may be taken into account (*Re Rawlins*, 1 Eq. 286; compare the cases quoted under sect. 6 of the S. L. Act, 1882, *post*). Where a building agreement provided that part of the land was to be let at a peppercorn rent, the court considered that this act could not safely be resorted to for granting the leases (*Cust* v. *Middleton*, 3 D. F. & J. 33).

(*f*) On the separate devolution of the surface and the minerals, the rent set aside will pass with the surface (*Re Scarth*, 10 Ch. D. 499). Where two portions of a settled estate under which the same seam of coal ran were separated by a strip of land belonging to other owners and the seam had been worked from one of the portions, it was held that working the seam under the other portion was working an unopened mine and that three-fourths of the rent must be set aside (*Re Maynard*, 1899, 2 Ch. 347).

As regards open mines worked by a tenant for life not expressly declared unimpeachable for waste, it was suggested that the effect of the present section might be more favourable to the tenant for life than sect. 11 of the S. L. Act, 1882 (see Clerke's S. L. Acts, 2nd ed., 61; Hood & Challis, 5th ed., 214). But it is now decided that sect. 11 of the S. L. Act is equally favourable to him (*Re Chaytor*, 1900, 2 Ch. 804).

Leases of infants' land.

Leases of infants' land may be granted (1) under this act (see sect. 41 of the Conv. Act, 1881, *ante*, p. 587); or (2) under S. L. Act, 1882, ss. 59, 60, *post*, p. 702; or (3) under 1 Will. 4, c. 65; as to which, see Seton, 1029, 6th ed.; *Re Letchford* (2 Ch. D. 719); *Re Griffiths* (29 Ch. D. 248); R. S. C. Ord. 55, r. 2 (9).

Form of order.

For forms of orders under this section, see Seton, 1791 *et seq.*, 6th ed. And see *Re Boyd* (I. R. 8 Eq. 56), for form of order sanctioning mining lease of infant's land.

Compare with the provisions of sections 4—15 of the present act, the powers of a tenant for life under sections 6—17 of the S. L. Act, 1882, *post*, p. 665 *et seq.*

Leases may contain special covenants.

5. Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances of the demise.

The court will not under this section sanction a covenant in a lease to grant a new lease at the end of the term (*Re Farnell*, 33 Ch. D. 599). See the S. E. Act Orders, No. 25 (*post*, p. 652), and Seton, 6th ed. 1794.

Parts of settled estates may be leased.

6. The power to authorize leases conferred by this act shall extend to authorize leases either of the whole or any parts of the settled estates, and may be exercised from time to time.

Leases may be surrendered and renewed.

7. Any leases, whether granted in pursuance of this act or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same or not, and the power to authorize

leases conferred by this act shall extend to authorize new leases of the whole or any part of the hereditaments comprised in any surrendered lease. 40 & 41 Vict. c. 18, s. 7.

This section is a substantial re-enactment of the provisions of 19 & 20 Vict. c. 120, s. 5, and 21 & 22 Vict. c. 77, s. 5. See *Re Ford* (8 Eq. 309); *Re Rawlins* (1 Eq. 286).
For forms of order, see Seton, 6th ed. 1798.

8. The power to authorize leases conferred by this act shall extend to authorize preliminary contracts to grant any such leases, and any of the terms of such contracts may be varied in the leases. Power to authorize leases to extend to preliminary contracts.

For form of order, see Seton, 6th ed. 1797.

9. All the powers to authorize and to grant leases contained in this act shall be deemed to include respectively powers to authorize the lords of settled manors and powers to the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorized or granted of freehold hereditaments under this act. Powers of leasing to include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases.

10. The power to authorize leases conferred by this act may be exercised by the court either by approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of this act, shall be vested in trustees in manner hereinafter mentioned. Mode in which leases may be authorized.

11. When application is made to the court either to approve of a particular lease or to vest any powers of leasing in trustees, the court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized. What evidence to be produced on an application to authorize leases.

12. When a particular lease or contract for a lease has been approved by the court, the court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct. After approval of a lease, court to direct who shall be the lessor.

Under this section the court has directed the tenant for life to execute the lease (*Re Farnell*, 33 Ch. D. 599).
For form of order, see Seton, 6th ed. 1798.

13. Where the court shall deem it expedient that any general powers of leasing any settled estates conformably to this act should be vested in trustees, it may by order vest any such Powers of leasing may be vested in trustees.

40 & 41 Vict. c. 18, s. 13.

power accordingly either in the existing trustees of the settlement or in any other persons, and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct; and in every such case the court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the court may also authorize the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid.

This section is a re-enactment in similar terms of 19 & 20 Vict. c. 120, s. 10, the decisions under which are accordingly applicable to the present section.

It has been said that it is intended that the persons in whom the court vests leasing powers shall be the persons making the application (*Vine* v. *Raleigh*, 24 Ch. D. 241). General powers have been vested to grant the following leases: building leases, for 600 years (*Re Cross*, 27 Beav. 592), or for 999 years (*Re Hoyle*, 12 W. R. 1124; *Re Elliott*, 1879, W. N. 135); mining leases (*Re Dorning*, 14 W. R. 125; *Folson* v. *Sheard*, 5 Ch. Div. 19; *Re Green*, 10 Jur. N. S. 1098), together with way-leaves (*Re Wallace*, 1869, W. N. 66); leases in accordance with a model settled in chambers (*Re Hemingway*, 7 W. R. 279; see *Re Chambers*, 28 Beav. 653; *A.-G.* v. *Christchurch*, 3 Giff. 514; *Re Jersey*, 9 W. R. 609). A general power was refused where some of the remaindermen opposed (*Re Hutchinson*, 14 W. R. 473).

Where a power of leasing in the settlement was subject to a consent, the court refused to vest a power under this section except subject to the same consent (*Re Hurle*, 2 H. & M. 196). General powers vested under this section in two sets of trustees over two different properties will not authorize a joint mining lease at a single undivided rent (*Folson* v. *Sheard*, 5 Ch. Div. 19). Where an order has been made under this section, proceedings under it must be stayed before leases can be granted under the S. L. Act, 1882 (*Re Poole*, 50 L. T. 585). Where owing to some of the tenants for life being permanently resident abroad there was difficulty in exercising the powers of the S. L. Acts, general powers were given to the trustees (*Re Houghton*, 1894, W. N. 20).

For form of order, see Seton, 6th ed. 1791, 1795.

Conditions that leases be settled by the court not to be inserted in orders made under this act.

14. Provided always, that in orders under this act for vesting any powers of leasing in any trustees or other persons, no conditions shall be inserted requiring that the leases thereby authorized should be submitted to or be settled by the court or a judge thereof or be made conformable with a model lease deposited in the judge's chambers, save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the court that there is some special reason rendering the insertion of such a condition necessary or expedient.

For a case where the lease was ordered to be settled in chambers, see *Re Farnell* (33 Ch. D. 599). See also the cases quoted under sect. 13 (*ante*).

40 & 41 Vict. c. 18, s. 15.

Conditions where inserted, may be struck out.

15. Provided also, that in all cases of orders (whether under this act or under the corresponding enactment of the acts hereby repealed) in which any such condition as last aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the court to alter and amend such order by striking out such condition, and the court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the court to act under this provision in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the court that there is any special reason why in the case in question such a condition is necessary or expedient.

This section corresponds to 27 & 28 Vict. c. 45, s. 2 (see *Re Hoyle*, 12 W. R. 1124; *Re Dorning*, 14 W. R. 125; *Re Russell*, 22 W. R. 399; *Re Riley*, 30 W. R. 78).

For form of order, see Seton, 6th ed. 1798.

Court may authorize sales of settled estates and of timber.

16. It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, from time to time to authorize a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the court for the time being is or shall be required in the sale of lands sold under a decree of the court.

This section is a substantial re-enactment of 19 & 20 Vict. c. 120, s. 11, the decisions under which appear to be applicable.

The existence of a power of sale in the settlement will not prevent an order authorizing a sale under this section (sect. 38, *post*, p. 641; *Re Thompson*, Johns. 418); but in such case a sale will only be authorized subject to any consents limiting the power (*Re Hurle*, 2 H. & M. 196). A sale has been authorized under this section notwithstanding the opposition of a contingent remainderman (*Re Spurway*, 10 Ch. D. 230; see further as to consents of persons interested, sects. 24—29, *post*, p. 634, and notes). The court refused to authorize a sale to the tenant for life without inquiry (*Re Hilton*, 1866, W. N. 107), or to give trustees a general power of sale (*Re Peacock*, 15 W. R. 100; see *Re Elliott*, 1879, W. N. 135); but where the settlement gave a general power after the death of a tenant for life, a general power was given by the court during his life (*Re Andrews*, 38 L. T. 877; 26 W. R. 811). Where the trustees were two ladies, the court at first refused to give them power to sell, but when no other suitable persons could be found to act as trustees, authority was given them during their joint lives to sell subject to the approval of the court in each case (*Re Peake*, 1894, 3 Ch. 520; see *Re Dickinson*, 1902, W. N. 104). A sale may be ordered with an indefeasible title (25 & 26 Vict. c. 53, s. 49). The minerals under the land may be excepted from a sale (sect. 19, *post*), or the minerals may be sold apart from the surface (*Re Mallin*, 9 W. R. 588; *Re Gray*, 1875, W. N. 106; *Re Law*, 7 Jur. N. S. 511). And in the latter case wayleaves may be granted, and a rent reserved in respect of surface damage (*Re Milward*, 6 Eq. 248). Where part of the property sold

40 & 41 Vict. c. 18, s. 16.

was copyhold, it was ordered to be enfranchised, and the whole sold as freehold (*Re Adair*, 16 Eq. 124). Property not subject to settlement should not be included in an order under this section (*Re Thompson*, Johns. 418); but may be if the owner consents (*Grey* v. *Jenkins*, 26 Beav. 356; see *Re Spurway*, 10 Ch. D. 230; *Re Goodwin*, 3 Giff. 620). As to the effect of an order for sale dealing with such property, see note to sect. 40 (*post*, p. 641); *Re Shepheard* (8 Eq. 571). The consideration for a sale of leaseholds under this section may be a rent-charge during the remainder of the term sold (*Re Grove*, 1888, W. N. 47). And under sect. 18 (*post*), the consideration for a building sale may be a fee farm rent (see *Re Carr*, 9 W. R. 776). In *Re Eyre* (4 K. & J. 268), it was said that the conveyance must be settled by the judge whether the parties differed or not; but in a later case this was only required when the parties differed (*Re Sheffield*, 1876, W. N. 152). An application that a sale under this act might be conducted out of court was refused (*Re Harvey*, 21 Ch. D. 123); but was granted (*Re Tonge*, 1902, W. N. 72). It seems that an order under this section will prevent a sale under the S. L. Act, 1882, until the proceedings are stayed (*Re Barrs-Haden*, 49 L. T. 645; 32 W. R. 194; see *Re Poole*, 50 L. T. 585).

For forms of orders, see Seton, 6th ed. 1799—1806. The order for sale may be varied by inserting the name of a new trustee (*Scott* v. *Heisch*, 1875, W. N. 211).

Compare with the provisions of sects. 16—22 of the present act, the powers of a tenant for life under sects. 3, 4, 16 and 17 of the S. L. Act, 1882, *post*, p. 662 *et seq.*

[*Sect.* 17 *is now repealed by sect.* 64 *of the S. L. Act*, 1882, *but somewhat similar provisions are contained in sect.* 36 *of the S. L. Act*, 1882, *post*, *p.* 686, *where see note.*]

Consideration for land sold for building may be a fee-farm rent.

18. When any land is sold for building purposes it shall be lawful for the court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the court shall approve.

A grant at a fee-farm rent was authorized (*Re Carr*, 9 W. R. 776; *Re Christy*, 42 W. R. 613; 8 R. 439), but a general power to trustees to make such grants was refused (*Re Elliott*, 1879, W. N. 135).

Minerals, &c. may be excepted from sales.

19. On any sale of land, any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the court may deem advisable.

For form of order excepting minerals, see Seton, 6th ed. 1801. And see the special covenant into which a purchaser was required to enter (*Re Mallin*, 9 W. R. 588).

Court may authorize dedication of any part of settled estates for streets, roads, and other works.

20. It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or

watercourses, either to be dedicated to the public or not; and the court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the court shall be deemed advisable. 40 & 41 Vict. c. 18, s. 20.

This section is a substantial re-enactment of 19 & 20 Vict. c. 120, s. 14, the decisions under which appear to be applicable.

The object of this and the following section is the development of land as a building estate, and the court cannot sanction drainage for agricultural purposes (*Re Poynder, Dickson-Poynder* v. *Cook*, 45 L. T. 403). The court will not direct roads to be made except where they are beneficial to the property in its actual state, or will be in a state immediately contemplated (*Re Hurle*, 2 H. & M. 196). The court has authorized leases on the terms of the lessees making roads (*Re Chambers*, 28 Beav. 653). The court will not require plans to be laid before it in every case (*Re Hargreaves*, 15 W. R. 54; see *Re Christy*, 42 W. R. 613; 8 R. 439).

For forms of orders, see Seton, 6th ed. 1807—1809.

As to laying out and making and executing and maintaining streets, roads, and other works, and expenses thereof.

21. Where any part of any settled estates is directed to be laid out for such purposes as aforesaid, the court may direct that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connexions, and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or be raised and paid out of the rents and profits of the settled estates or any part thereof, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income; and the court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the court shall seem advisable.

How sales and dedications are to be effected under the direction of the court.

22. On every sale or dedication to be effected as hereinbefore mentioned the court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct.

The wording of this section corresponds with 19 & 20 Vict. c. 120, s. 15, the decisions under which appear to be applicable.

40 & 41 Vict. c. 18, s. 22.

Where land was sold and a person appointed to convey, the legal estate, which was outstanding in mortgagees who were bound by the order, passed by the conveyance (*Eyre* v. *Saunders*, 28 L. J. Ch. 439). Where the land was vested in eleven persons, the court refused to order one to convey for all (*Re Hole*, 1868, W. N. 70). Where one of two trustees directed to convey died before completion, a new trustee was appointed and the order varied (*Scott* v. *Heisch*, 33 L. T. 498). The effect of a conveyance under this section being the same as a revocation of the uses of the settlement, the land is freed from succession duty (*Re Warner*, 17 Ch. D. 711).

For forms of order, see Seton, 6th ed. 1800, 1807.

Application by petition to exercise powers conferred by this act.

23. Any person entitled to the possession or to the receipts of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life, or for an estate for any life or any greater estate, may apply to the court by petition in a summary way to exercise the powers conferred by this act.

This section corresponds with 19 & 20 Vict. c. 120, s. 16, with the addition, however, of the words relating to an assignee. The decisions under the latter section appear to be applicable.

The following have been held proper persons to petition. A widow and her children, where she was entitled during widowhood with remainder to her children (*Williams* v. *Williams*, 9 W. R. 888); trustees where there was no equitable tenant for life (*Vine* v. *Raleigh*, 24 Ch. D. 238; *Re Christy*, 42 W. R. 613; 8 R. 439; see *Re Smith*, 1878, W. N. 196), but not in such a case a receiver (24 Ch. D. 243). *Jessel*, M. R., considered that the words of the section did not apply to a tenant for life whose life estate was subject to a power of management in others (*Taylor* v. *Taylor*, 1 Ch. D. 432; 20 Eq. 302; but see 3 Ch. Div. 147). Orders have been made on the petition of a tenant for life and the trustees of prior terms (*Ex p. Puxley*, I. R. 2 Eq. 237; *Re Harris*, 42 L. T. 583; and see *Re Smith*, 1878, W. N. 196; *Re Williams*, 20 W. R. 967). Where one share was settled after the petition had been presented, the trustees of the settled share were joined as co-petitioners (*Re Wilkinson*, 21 W. R. 537). It was said by *Jessel*, M. R., that no person other than those described can petition (*Taylor* v. *Taylor*, 1 Ch. D. 431; but see *Re Harris*, *sup.*). It seems that a petition is necessary although an action is pending (*Harvey* v. *Clark*, 25 Beav. 7). The assignee of a tenant for life can petition under this act for a sale (*Re Ebsworth and Tidy*, 42 Ch. Div. 23). He could not sell under the S. L. Act, 1882 (see s. 50 of that act, *post*, p. 695).

As to the title, &c., of the petition, see S. E. Act Orders (*post*, pp. 648, 653); *Re Burnley* (23 W. R. 546); *Re Ward* (1895, W. N. 41). See the rules adopted by the Practice Masters stated in the Annual Practice. See also as to petitions, R. S. C. Ord. 52, rr. 16, 17.

With whose consent such application to be made.

24. Subject to the exceptions hereinafter contained, every application to the court must be made with the concurrence or consent of the following parties; namely,

Where there is a tenant-in-tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant-in-tail, or if there is more than one

such tenant-in-tail, then the first of such tenants-in-tail and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant-in-tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant-in-tail: 40 & 41 Vict. c. 18, s. 24.

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child.

The reference to exceptions ("the exceptions hereinafter contained") in the present section is wider than the similar reference in 19 & 20 Vict. c. 120, s. 17; but except in this respect the wording of the two sections is identical. The following cases were decided on the older section. It did not apply to petitions dealing with purchase-money (*Re Cleveland*, 1 Dr. & Sm. 481; *Re Sexton Barnes*, 10 W. R. 416). The concurrence was held necessary, of remaindermen (*Re Merry*, 15 W. R. 307); of persons interested in a term for raising portions (*Re Boughton*, 12 W. R. 34), or in the proceeds of a trust for sale after the death of the tenant for life (*Re Ives, Bailey* v. *Holmes*, 3 Ch. D. 690), or interested contingently under a subsettlement (*Re Dendy*, 4 Ch. D. 879; see, however, *Re Hodge*, 1895, W. N. 69). Trustees could only concur on behalf of unborn persons (*Grey* v. *Jenkins*, 26 Beav. 351; *Eyre* v. *Saunders*, 4 Jur. N. S. 830), not living *cestuis que trusts* (*Re Boughton*; *Re Ives*; *Re Dendy*, *sup.*).

25. Provided always, that where an infant is tenant-in-tail under the settlement, it shall be lawful for the court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant. Court may dispense with consent in respect of certain estates.

See *Camden* v. *Murray* (27 S. J. 652).

26. Provided always, that where on an application under this act the concurrence or consent of any such person as aforesaid shall not have been obtained, notice shall be given to such person in such manner as the court to which the application shall be made shall direct, requiring him to notify within a time to be specified in such notice whether he assents to or dissents from such application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the court, and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the court. Notice to be given to persons who do not consent to or concur in the application.

This section corresponds in substance with 37 & 38 Vict. c. 33, s. 2.
As to the mode of giving notices required by this section, see S. E. Act,

40 & 41 Vict. c. 18, s. 26.

Ords. Nos. 4—9, 11, 12, and 22, *post*, p. 649 *et seq.* The court has ordered notice to be given to a person of unsound mind (*Re Crabtree*, 10 Ch. 201); to a married woman resident out of the jurisdiction (*Re Rylar*, 24 W. R. 949); to an infirm person (*Re Slark*, 1875, W. N. 224); to persons who might be included in a class determinable at a future date (*Re Chamberlain*, 23 W. R. 852); and to infants contingently entitled (*Re Dendy*, 4 Ch. D. 879). Notification in writing of submission to the court by a married woman is sufficient without separate examination (*Re Stanley*, 1889, W. N. 164).

Notice as well as consent may now be dispensed with under sect. 27 of the present act. It has been dispensed with in the case of a child *en ventre sa mère* (*Re Rayner*, 1891, W. N. 152), and annuitants whose security was increased (*Re Harris*, 42 L. T. 583), and was not required to persons subsequent to an infant tenant in tail (*Ib.*). Before the present act it was dispensed with in the case of infants contingently entitled (*Re Chamberlain*, 23 W. R. 852); persons of unsound mind remotely interested (*Re Franklin*, 7 W. R. 45; *Re Turbutt*, 2 N. R. 158). Leave to effect service out of the jurisdiction of proceedings under the act was refused in *Re Mewburn* (22 W. R. 752), but granted in *Re Rylar* (24 W. R. 949). See S. E. Act, Ord. No. 4, *post*, p. 649; *Re Busfield* (32 Ch. Div. 132).

For form of orders, see Seton, 6th ed. 1789, 1790.

Court may dispense with notice under certain circumstances.

27. Provided also, that where on an application under this act the concurrence or consent of any such person as aforesaid shall not have been obtained, and in case such person cannot be found, or in case it shall be uncertain whether he be living or dead, or in case it shall appear to the court that such notice as aforesaid cannot be given to such person without expense disproportionate to the value of the subject-matter of the application, then and in any such case the court, if it shall think fit, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person or person, or on any other ground, may by order dispense with notice to such person, and such person shall thereupon be deemed to have submitted his rights and interests to be dealt with by the court.

See note to sect. 26 (*ante*). For orders, see Seton, 6th ed. 1790.

Court may dispense with consent, having regard to the number and interests of parties.

28. An order may be made upon any application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom, or who submit or are to be deemed to submit their rights or interests to be dealt with by the court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made; and every order of the court made upon such application shall have the same effect as if all such persons had been consenting parties thereto.

This section corresponds with 37 & 38 Vict. c. 33, s. 3.

The court will not dispense with the consent of persons equal in number and nearly equal in interest to the applicants (*Taylor* v. *Taylor*, 1 Ch. D. 433; 3 Ch. Div. 145). The consents of the following persons have been

dispensed with: a remainderman whose estate was contingent on the death of four children without issue (*Re Spurway*, 10 Ch. D. 230; see *Re Hooke*, 1875, W. N. 29); a married woman having a small share (*Re Cundee*, 37 L. T. 271; *Re Thorp*, 1876, W. N. 251; see *Re Rylar*, 24 W. R. 949); a married woman having a contingent interest represented by trustees (*Re Kilmorey*, 26 W. R. 54); an infant remainderman born since the presentation of the petition (*Re Lewis*, 24 W. R. 103); a person too infirm to concur in writing (*Re Slark*, 1875, W. N. 224); and also (in cases decided before 37 & 38 Vict. c. 33) persons only remotely interested (*Re Cholmondely*, 1866, W. N. 388); tenants for life in remainder (*Re Hutchinson*, 14 W. R. 473); and persons who could not be presently ascertained (*Beioley* v. *Carter*, 4 Ch. 230; *Re Strutt*, 16 Eq. 629).

40 & 41 Vict. c. 18, s. 28.

29. Provided nevertheless, that it shall be lawful for the court, if it shall think fit, to give effect to any petition subject to and so as not to affect the rights, estate, or interest of any person whose concurrence or consent has been refused, or who has not submitted or is not deemed to have submitted his rights or interests to be dealt with by the court, or whose rights, estate, or interest ought in the opinion of the court to be excepted.

Petition may be granted without consent, saving rights of non-consenting parties.

This section corresponds to 19 & 20 Vict. c. 120, s. 18, but is considerably wider. Under that section the rights of legatees having charges on the estate have been left unaffected (*Re Legge*, 6 W. R. 20; *Re Parry*, 34 Beav. 462).

For form of order, see Seton, 6th ed. 1794, 1795, 1803.

30. Notice of any application to the court under this act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the court ought to be so served, unless the court shall think fit to dispense with such notice.

Notice of application to be served on all trustees, &c.

The wording of this section corresponds with 19 & 20 Vict. c. 120, s. 19. See as to notice, the note to sect. 26 (*ante*, p. 635).

As to notices under this section, see S. E. Act Orders, Nos. 16, 18, 22 (*post*, p. 651). For form of order, see Seton, 6th ed. 1793.

31. Notice of any application to the court under this act shall, if the court shall so direct, but not otherwise, be inserted in such newspapers as the court shall direct, and any person or body corporate, whether interested in the estate or not, may apply to the court by motion for leave to be heard in opposition to or in support of any application which may be made to the court under this act; and the court is hereby authorized to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner as it shall think fit.

Notice of application to be given in newspapers if court direct.

The wording of this section corresponds with 19 & 20 Vict. c. 120, s. 20, the following words, however, being added: "if the court shall so direct, but not otherwise." It has been said that the court will only so direct in

40 & 41 Vict. c. 18, s. 31.

exceptional cases (*Re Chilcott*, 1877, W. N. 259; see S. E. Act Orders, Nos. 18—21, *post*, p. 651; Form 13, *post*, p. 657; Seton, 6th ed. 1791, 1792).

The following cases were decided under the former act. Substantial agreement between the petition and the advertisements is sufficient (*Re Whiteley*, 8 Eq. 574; *Re Bicknell*, 14 Eq. 467; *Re Snell*, 19 W. R. 1000); especially where all parties are before the court (*Re Hemsley*, 16 Eq. 315). Where the petition is amended, the court did not necessarily direct fresh advertisements to be issued unless the amendment involved new facts and new parties (*Re Bunbury*, 13 W. R. 370; *Ex p. Puxley*, I. R. 2 Eq. 237). As to dispensing with the repetition of advertisements, see further *Re Horton* (34 Beav. 386); *Re Corbet* (1866, W. N. 318); *Re Wilkinson* (9 Eq. 71); *Re Marshall* (15 Eq. 66); *Re Wilkinson* (21 W. R. 537); *Re Kentish Town Estate* (1 J. & H. 230); *Wheeler* v. *Tootel* (16 W. R. 273).

No application under this act to be granted where a similar application has been rejected by Parliament.

32. The court shall not be at liberty to grant any application under this act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament for a private act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the bill may have been referred.

See S. E. Act Orders, No. 17 (*post*, p. 651). A rejection by either House will be presumed to have been on the merits, if the contrary is not shown (*Re Wilson*, 1 L. T. 25).

Notice of the exercise of powers to be given as directed by the court.

33. The court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the court to be practicable and expedient for preventing fraud or mistake.

See S. E. Act Orders, No. 23 (*post*, p. 651); *Re Cross* (27 B. 292); *Re Burnley* (1868, W. N. 148).

For form of order, see Seton, 6th ed. 1794.

Payment and application of moneys arising from sales or set aside out of rent, &c. reserved on mining leases.

34. All money to be received on any sale effected under the authority of this act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same, so far as relates to estates in England, shall be paid into court ex parte the applicant in the matter of this act, and so far as relates to estates in Ireland, shall be paid into the Bank of Ireland to the account of the Accountant-General ex parte the applicant in the matter of this act; and such money shall be applied as the court shall from time to time direct to some one or more of the following purposes, namely,—

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates to estates in Ireland the purchase or redemption of rentcharge in lieu of tithes, crown rent, or quit rent (*g*);

40 & 41 Vict. c. 18, s. 34.

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled (*h*).

(*g*) The express provision as to the redemption of tithe rentcharge, crown rent, or quit rent on Irish estates is new. But with this exception this section corresponds with 19 & 20 Vict. c. 120, s. 23, the decisions under which appear to be applicable.

Discharge of incumbrances.

(*h*) A charge created to pay a fine on renewal has been discharged out of money received on a sale under this act (*Re Barber*, 18 Ch. D. 624), and an assessment for paving a new street (*Re Hilliard*, 38 L. T. 93).

Purchase of other hereditaments to be settled.

Where money received on a sale under this act was laid out in land, the court required new trustees to be appointed to accept a conveyance (*Re Sexton Barnes*, 10 W. R. 416). Moneys liable to be laid out in the purchase of hereditaments, &c., may be applied in payment of the expenses of laying out roads and streets (sects. 20 and 21, *ante*, p. 632).

Buildings and repairs.

It has been laid down in general that under this section money may be applied in erecting new buildings on the settled land, whether in addition to existing buildings or in substitution for ruinous buildings (*Drake* v. *Trefusis*, 10 Ch. 367; *Re Leigh*, 6 Ch. 887; *Re Speer*, 3 Ch. D. 262; *Donaldson* v. *Donaldson*, 3 Ch. D. 743; *Vine* v. *Raleigh*, 1891, 2 Ch. 13; as to a mansion-house burnt down, see *Jesse* v. *Lloyd*, 48 L. T. 656); but cannot be applied in executing repairs or permanent improvements (*Drake* v. *Trefusis*, *sup.*; *Brunskill* v. *Caird*, 16 Eq. 493; see, however, *Re Newman*, 9 Ch. 681; *Re Leadbitter*, 30 W. R. 378). Compare the orders made under the general jurisdiction of the court providing for the expenditure of money on settled land, where a case of salvage was established (*Conway* v. *Fenton*, 40 Ch. D. 512; *Re Household*, 27 Ch. D. 553; *Re Jackson*, *Jackson* v. *Talbot*, 21 Ch. D. 786); but refused where the case did not amount to salvage (*Re De Teissier*, 1893, 1 Ch. 153; *Re De Tabley*, *Leighton* v. *Leighton*, 1896, W. N. 162; *Re Montagu*, *Derbishire* v. *Montagu*, 1897, 2 Ch. 8; *Re Willis*, *Willis* v. *Willis*, 1902, 1 Ch. 15; *Re Legh*, 1902, 2 Ch. 274). Compare also the effect of the Thellusson Act on a trust for repairs, discussed in *Re Mason*, *Mason* v. *Mason* (1891, 3 Ch. 467); and see the note to sect. 25 of the S. L. A. 1882 (*post*, p. 680). Under this section money will not be applied in repaying to the tenant for life money expended by him in new buildings (*Re Leigh*, 6 Ch. 887; see *Jesse* v. *Lloyd*, 48 L. T. 656).

Other investments.

Where money received on a sale under this act had been invested in consols until it could be applied under this section, the court permitted the consols to be sold and the proceeds re-invested under sect. 21 of the S. L. Act, 1882 (*Re Tennant*, 40 Ch. D. 594). Proceeds arising from leaseholds for lives sold under this act (as to which there was a trust for renewal out of rents) were invested in ordinary securities and the income paid to the tenant for life (*Re Barber*, 18 Ch. D. 624).

Payment to persons becoming absolutely entitled.

The concluding words of the section are similar to those of sect. 69 of the L. C. C. Act, 1845, under which it has been held that trustees with a power of sale are "persons becoming absolutely entitled" (*Re Hobson*, 7 Ch. Div. 708; *Ex p. Bowman*, 1888, W. N. 179; *Re Ward*, 28 Ch. D. 100; *Re Morgan*, *Smith* v. *May*, 1900, 2 Ch. 474; but see *Re Smith*, 40 Ch. Div. 391; compare the wider language of the S. L. Act, 1882, s. 21, sub-s. ix., *post*, p. 674). Money received from sales under the S. E. Act, 1877, has been paid to trustees to be held on the trusts of the settlement (*Re Morgan*, 9 Eq. 587; *Re Hemsley*, 29 L. T. 173; see *Re Evans*, 14 Ch. D. 511).

40 & 41 Vict. c. 18, s. 34.

Before payment out to a tenant in tail, a disentailing deed should be executed (*Re Broadwood*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. Div. 61; *contra*, *Re Wood*, 20 Eq. 372); and an affidavit of no incumbrances should be made (*Thornhill* v. *Millbank*, 12 W. R. 523). Where the survivor of a husband and wife was entitled absolutely in default of issue, and the wife was past child-bearing, money was paid to their joint account on the execution of a deed acknowledged by the wife (*Re Belt*, 37 L. T. 272; 25 W. R. 901). Payment of the purchase-money of a lunatic's land into court to the credit of a lunacy is not a payment "to a person becoming absolutely entitled" (*Re Barker*, 17 Ch. Div. 241).

As to the effect of this section on conversion, see *Re Lloyd* (9 P. D. 65), and note to sect. 8 of the Partition Act, 1868, *post*.

For form of order as to appointment of trustees to receive rents or proceeds of sales, &c., see Seton, 6th ed. 1797, 1801.

Trustees may apply moneys in certain cases without application to court.

35. The application of the money in manner aforesaid may, if the court shall so direct, be made by the trustees (if any) without any application to the court, or otherwise upon an order of the court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

This section corresponds to 19 & 20 Vict. c. 120, s. 24, under which the following cases were decided. The court directed the application of money by the trustees in *Re Peacock* (15 W. R. 100); *Re Hoare* (30 W. R. 177). Petitions under this section are not affected by sect. 24 (*ante*, p. 634), as to consents (*Re Cleveland*, 1 Dr. & S. 481), or by sect. 31 (*ante*, p. 637), as to advertisements (*Re Sexton Barnes*, 10 W. R. 416); as to service, see *Re Bolton* (19 W. R. 429).

For form of order, see Seton, 6th ed. 1799.

Until money can be applied to be invested, and dividends to be paid to parties entitled.

36. Until the money can be applied as aforesaid, the same shall be invested as the court shall direct in some or one of the investments in which cash under the control of the court is for the time being authorised to be invested, and the interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

The order should specify the particular investment (*Re Taylor*, 28 W. R. 594). The mode of investment must be according to the course of the court (*Re Woodcock*, 13 Eq. 183; see Supreme Court Funds Rules, 1894). As to what investments are authorised for cash under the control of the court, see R. S. C. Ord. 22, rr. 17, 17a. An investment on mortgage has been authorized (*Wall* v. *Hall*, 11 W. R. 298).

For form of order as to an investment, see Seton, 6th ed. 1796, 1800.

Court may direct application of money in respect of leases or reversions as may appear just.

37. Where any purchase money paid into court under the provisions of this act, shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the court on the petition of any party interested in such money to order that the same shall be laid out, invested,

accumulated, and paid in such manner as the said court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be. 40 & 41 Vict. c. 18, s. 37.

For an order as to the proceeds of leaseholds, see *Re Walsh* (7 L. R. Ir. 554).

38. The court shall be at liberty to exercise any of the powers conferred on it by this act, whether the court shall have already exercised any of the powers conferred by this act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the court from exercising any of the powers conferred by this act, if it shall think that the powers contained in the settlement ought to be extended. Court may exercise powers repeatedly, but may not exercise them if expressly negatived.

An express declaration that the trusts for sale in a will should not be exercised during a certain period, was held not to prevent the court authorizing a sale (*Re Peake*, 1893, 3 Ch. 430; see *Re Williams*, 1878, W. N. 189; and also *Re Hurle*, 2 H. & M. 196; *Re Cleveland*, 22 W. R. 818, decided under 19 & 20 Vict. c. 120, s. 26, which was in somewhat wider terms).

39. Nothing in this act shall be construed to empower the court to authorize any lease, sale, or other act beyond the extent to which in the opinion of the court the same might have been authorized in and by the settlement by the settlor or settlors. Court not to authorize any act which could not have been authorized by the settlor.

40. After the completion of any lease or sale or other act under the authority of the court, and purporting to be in pursuance of this act, the same shall not be invalidated on the ground that the court was not hereby empowered to authorize the same, except that no such lease, sale, or other act shall have any effect against such person as herein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with. Acts of the court in professed pursuance of this act not to be invalidated.

Orders under this section are valid in favour of a purchaser, notwithstanding any want of jurisdiction, and notwithstanding the exception in this section (Conv. Act, 1881, s. 70, *ante*, p. 603); even if the irregularity appear on the face of the order (*Re Hall Dare*, 21 Ch. D. 41; see also *Beioley* v. *Carter*, 4 Ch. 232; *Re Shepheard*, 8 Eq. 571; *Re Clough*, 15 Eq. 284, decided under 19 & 20 Vict. c. 120, s. 28).

41. It shall be lawful for the court, if it shall think fit, to order that all or any costs or expenses of all or any parties of Costs.

40 & 41 Vict. c. 18, s. 41.

and incident to any application under this act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement and subject to the same limitations; and the court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the court shall direct.

For form of order as to costs, see Seton, 6th ed. 1794, 1800; *Re Tunstall* (14 L. T. 352).

Rules and orders.

42. General rules and orders of court for carrying into effect the purposes of this act, and for regulating the times and form and mode of procedure, and generally the practice of the court in respect of the matters to which this act relates, and for regulating the fees and allowances to all officers and solicitors of the court in respect to such matters, shall be made [*so far as relates to proceedings in England by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and*] so far as relates to proceedings in Ireland by any three or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely, the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and four other judges of the superior courts in Ireland to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein, and such rules and orders may from time to time be rescinded or altered by the like authorities respectively, and all such rules and orders shall take effect as general orders of the court.

See S. E. Act Orders (*post*, p. 648 *et seq.*). The part of this section relating to England has been repealed (42 & 43 Vict. c. 78, s. 29).

Rules and orders to be laid before Parliament.

43. All general rules and orders made as aforesaid shall be laid before each House of Parliament within forty days after the making thereof if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session, and if an address is presented to her Majesty by either House of Parliament within the next subsequent forty days on which the said house shall have sat, praying that any such rule or order may be annulled, her Majesty may thereupon

by order in council annul the same, and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same. 40 & 41 Vict. c. 18, s. 43.

Concurrent jurisdiction of the Court of Chancery of the County Palatine of Lancaster.

44. The powers vested in the High Court of Justice by this act may, so far as relates to estates within the County Palatine of Lancaster, be exercised also by the Court of Chancery of the said County Palatine; and general rules and orders of court for the purposes aforesaid, so far as relates to proceedings in the said court of the said County Palatine, shall be made by the Chancellor of the Duchy and County Palatine of Lancaster, with the advice and consent of any one or more of the persons authorized under this act to concur in the making of general rules and orders relating to proceedings in England, and also with the advice and consent of the Vice-Chancellor of the said County Palatine.

As to lands within the County Palatine of Durham, see Palatine Court of Durham Act, 1889, s. 10.

Application for lease or sale in Ireland may be made to Landed Estates Court.

45. It shall and may be lawful for any person who under the provisions of this act may make an application to the Court of Chancery in Ireland for the lease or sale of a settled estate, instead of making such application to the said Court of Chancery in Ireland to apply to the Landed Estates Court, Ireland, for the purpose of having the lease or sale of such settled estate under the said last-mentioned court; and thereupon it shall be lawful for the said Landed Estates Court, Ireland, to exercise all the powers conferred upon the Court of Chancery in Ireland in relation to leases or sales of such nature under the provisions of this act, save that the judge in the case of a sale shall himself execute the conveyance to the purchaser under such sale, and save that such conveyance shall have the like operation and effect, and confer such indefeasible title to the purchaser as if such sale had been made and such conveyance had been executed upon an application for the sale of an incumbered estate under the act of the twenty-first and the twenty-second years of her Majesty, chapter seventy-two: Provided always, that the Landed Estates Court, Ireland, shall make such investigation of the title and circumstances of the said estates as shall appear expedient, and also in cases of sales as in other cases preliminary to sales conducted in the said Landed Estates Court, Ireland: Provided also, that every decision and order in the course of such proceedings shall be subject to appeal to the Court of Appeal in Chancery as in other cases under the said act.

The Landed Estates Court jurisdiction is now transferred to the High Court of Justice of Ireland (40 & 41 Vict. c. 57, ss. 4, 7, 36).

Tenants for

46. It shall be lawful for any person entitled to the possession

40 & 41 Vict. c. 18, s. 46.

life, &c. may grant leases for twenty-one years.

or to the receipt of the rents and profits of any settled estates for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, without any application to the court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession at or within one year next after the making thereof; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee.

The above section is somewhat wider in terms than 19 & 20 Vict. c. 120, s. 32. Under the latter section it was held that a person entitled to part of the income of an estate absolutely, and to the rest after payment thereout of certain charges and expenses, was not "entitled to the receipt of the rents and profits" (*Taylor* v. *Taylor*, 20 Eq. 297). In a case under the present section, it was said that an improper motive would not invalidate a lease, if the terms of the section were strictly complied with (*Davies* v. *Davies*, 38 Ch. D. 502). The lessor has a discretion as to what are proper covenants, which cannot be controlled unless there be an outrageous omission in this respect (*Ib.*). A lease exempting the lessee from liability for "fair wear and tear and damage by tempest," was void as "made without impeachment of waste" (*Ib.*). The appointment of a receiver will prevent the grant of a lease under this section, except with the leave of the court (*Vine* v. *Raleigh*, 24 Ch. D. 248). See, further, as to a tenant for life's power of leasing, S. L. Act, 1882, ss. 6 *et seq.* (*post*, p. 665 *et seq.*).

Against whom such leases shall be valid.

47. Every demise authorized by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person, under or by virtue of the same settlement, if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

40 & 41 Vict. c. 18, s. 48.

Evidence of execution of counterpart lease by lessee.

48. The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this act.

Provision as to infants, lunatics, &c.

49. All powers given by this act, and all applications to the court under this act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under this act may be given to guardians on behalf of infants, and by or to committees on behalf of lunatics, and by or to trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants-in-tail no application to the court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the court.

Under sect. 36 of 19 & 20 Vict. c. 120, which was in similar terms, but referred to consents only, and not to notifications, the following cases were decided: That the consent of the father of an infant was not sufficient (*Re Chaddick*, 7 W. R. 334; see *Re Salisbury*, 2 Ch. Div. 39), nor the consent of a testamentary guardian (*Re James*, 5 Eq. 334); that an infant petitioner who was a married woman, must be examined (*Re Broadwood*, 7 Ch. 323; see now sect. 52, *post*, p. 647); that the court could not appoint a guardian to consent for a person of unsound mind (*Re Clough*, 15 Eq. 284; see, however, *Re Venner*, 6 Eq. 249); that the committee of a lunatic must obtain leave before consenting (*Re Woodcock*, 3 Ch. 229; see R. S. C. Ord. 16, r. 21; 53 Vict. c. 5, s. 120).

As to appointing a guardian to give consents, &c., under this section, see S. E. Act Orders, Nos. 5—12 (*post*, p. 649 *et seq.*). For form of order, see Seton, 6th ed. 1789.

A married woman applying to the court, or consenting to be examined apart from her husband.

50. Where a married woman shall apply to the court, or consent to an application to the court, under this act, she shall first be examined apart from her husband, touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement restraining anticipation shall prevent the court from exercising, if it shall think fit, any of the powers given by this act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

This section is a re-enactment in similar terms of 19 & 20 Vict. c. 120, s. 37, the decisions under which appear to be applicable.

The examination is necessary in the case of a married woman who is an infant (*Re Broadwood*, 7 Ch. 323). It was required where she was entitled to a jointure charged on the estate (*Re Turbutt*, 2 N. R. 487); or had out of her separate estate purchased the interest of her husband, who was tenant for life (*Re Fowles*, 1887, W. N. 208). But it was dispensed with where the married woman's interest was remote, and was represented by trustees (*Re De Tabley*, 11 W. R. 936; *Re Tibbett*, 17 W. R.

40 & 41 Vict. c. 18, s. 50.

394; *Re Kilmorey*, 26 W. R. 54); where her interest was small (*Re Cundee*, 37 L. T. 271); where she was an object of a discretionary trust as to income during her husband's life (*Re Tesseyman*, 1897, W. N. 167; 77 L. T. 484); where the court was satisfied that the order would be beneficial and that the delay necessary for her examination would be prejudicial (*Re Halliday*, 12 Eq. 199; *Re Thorne*, 20 W. R. 587; but see *Re Johnson*, 1869, W. N. 87); where she was married between the presentation of the petition and the hearing (*Re Marshall*, 15 Eq. 66); where she was married after 31st December, 1882 (*Riddell* v. *Errington*, 26 Ch. D. 220); where she was married before that date, but the application related to property acquired by her since that date (*Re Harris*, 28 Ch. D. 171; *Re Batt*, 1897, 2 Ch. 65); where she had given a notification in writing under sect. 26 (*ante*, p. 635; *Re Stanley*, 1889, W. N. 164). In the case of applications under this act for sanction to the investment in land of funds in court, it seems that sect. 32 of the S. L. Act, 1882 (*post*), does not enable the examination to be dispensed with (*Re Arabin*, 52 L. T. 728); but where the money was to be paid to trustees examination was dispensed with (*Re Ward*, 1895, W. N. 41). In the last case the petition was ordered to be entitled under the S. L. Act, 1882.

As to when the examination may be taken, see S. E. Act Orders, No. 13 (*post*, p. 658; *Re Foster*, 1 De G. & J. 386; *Re Packer*, 39 L. J. Ch. 220; *Re Turbutt*, 2 N. R. 487). It was taken in court at the hearing of the petition (*Re Taylor*, 14 Eq. 557).

An affidavit of no settlement is not necessary on an application under this act, unless it is for payment out of money (*Re Standish*, 25 W. R. 8).

Examination of married woman: how to be made when residing within the jurisdiction of the court, and how when residing without such jurisdiction.

51. The examination of such married woman, when resident within the jurisdiction of the court to which such application is made, shall be made either by the court or by some solicitor duly appointed by the court for that purpose, who shall certify under his hand that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. And when the married woman is resident out of the jurisdiction of the court to which such application is made, her examination may be made by any person appointed for that purpose by the court, whether he is or is not a solicitor of the court, and such person shall certify under his hand to the effect hereinbefore provided in respect of the examination of a married woman resident within the jurisdiction. And the appointment of any such person not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the court.

This section is a re-enactment in substantially similar terms of 19 & 20 Vict. c. 120, s. 38, and 21 & 22 Vict. c. 77, s. 6, the decisions under which appear to be applicable.

The solicitor appointed must be in actual practice in England (*Re Noyes*, 6 W. R. 7; *Turner* v. *Turner*, 2 De G. & J. 534), and not acting for the husband (*Re Noyes*, *sup.*), or any of the parties to the proceedings (*Re Brealy*, 24 Beav. 220). But the husband's solicitor may attest the signatures of the married woman and the commissioner (*Re Lewis*, 24 W. R. 103). A British consul abroad was appointed to take the examination (*Re Johnson*, 1869, W. N. 87). See S. E. Act Orders, No. 14 (*post*, p. 650).

For form of order, see Seton, 6th ed. 1791.

40 & 41 Vict. c. 18, s. 52.

52. Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

As to application by or consent of married women, whether of full age or under age.

53. Nothing in this act shall be construed to create any obligation on any person to make or consent to any application to the court or to exercise any power.

No obligation to make or consent to application, &c.

54. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein.

Tenants for life, &c. to be deemed entitled notwithstanding incumbrances.

Exception as to entails created by act of parliament.

55. Provided always, that nothing in this act shall authorise any sale or lease beyond the term of twenty-one years of any settled estates in respect of which, under the act of the thirty-fourth and thirty-fifth years of King Henry the Eighth, chapter twenty, "to embar feigned recovery of lands wherein the King's Majesty is in reversion," or under any other act of parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

Saving rights of lords of manors.

56. Nothing in this act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

To what settlements this act to extend.

57. This act shall, except as hereinafter provided, apply to all matters existing at the time of the passing of this act, whether proceedings are actually pending or not, and any proceedings in any such matter may be continued or taken under this act as if the matter originated under this act, or may be continued or taken under the acts hereby repealed, or partly under this act and partly under the said repealed acts as occasion may require: Provided always, that the provisions in this act contained respecting demises to be made without application to the court shall extend only to settlements made after the first day of November one thousand eight hundred and fifty-six.

Repeal of acts specified in schedule.

58. The acts specified in the schedule to this act are hereby repealed: Provided always, that this repeal shall not affect anything done or any proceeding taken under any enactment hereby repealed.

Saving.

59. Nothing in this act shall interfere with the exercise of

40 & 41 Vict. c. 18, s. 59.

any powers to authorise or grant leases conferred by any act of parliament not expressly repealed by this act.

Extent of act.

60. This act shall not extend to Scotland.

Commencement of act.

61. This act shall commence on the first day of November one thousand eight hundred and seventy-seven.

SCHEDULE.

Session and Chapter.	Title or Short Title.
19 & 20 Vict. c. 120 ..	An Act to facilitate leases and sales of Settled Estates.
21 & 22 Vict. c. 77 ..	An Act to amend and extend the Settled Estates Act of 1856.
27 & 28 Vict. c. 45 ..	An Act to further amend the Settled Estates Act of 1856.
37 & 38 Vict. c. 33 ..	The Leases and Sales of Settled Estates Amendment Act, 1874.
39 & 40 Vict. c. 30 ..	The Settled Estates Act, 1876.

ORDERS UNDER THE SETTLED ESTATES ACT, 1877.

1. The words "settlement," "settled estates," and "the court," in these orders shall have the same interpretation as in the act.

The words "the act" in these orders shall mean the Settled Estates Act, 1877, "the petition" shall mean a petition under the act, and "the judge" shall mean the judge of the court with whose name the petition shall be marked, or to whom the petition shall be transferred.

2. All petitions, notices, affidavits, and other proceedings under the act shall be entitled "In the matter of the estates settled" [by the settlor or settlors, naming one of them and referring to the instrument by which the settlement shall have been created, and mentioning the parish or place and county in which the lands, messuages, or tenements proposed to be dealt with are situate] "and in the matter of the Settled Estates Act, 1877," and every such petition shall be marked with the words "In the High Court of Justice, Chancery Division," and with the title of the judge before whom it is intended to be heard (see Form No. 1 in the Appendix hereto). Upon the presentation of the petition, a day shall be appointed for hearing not less (unless the judge gives special leave) than eight clear days after such presentation, and in the computation of such eight clear days, Sundays and other days on which the offices are closed shall not be reckoned; and every petition shall, in the body thereof, or in a schedule thereto, or by a plan thereto annexed, contain a detailed description of the property proposed to be dealt with by such petition sufficient to identify the same.

3. When a petition has been put into the paper for hearing, and by reason of the parties not being ready, or for any other cause, the judge allows it to stand over generally, it may be put into the paper for a subsequent day, without any application to the court or judge, on the petitioner or his solicitor applying for that purpose to the secretary of the Lord Chancellor or Master of the Rolls (as the case may be), and

notice of the appointment of such subsequent day shall be given by the petitioner, or his solicitor, two clear days before the day fixed to the other parties entitled to appear on such petition.

4. The notice required to be given by the 26th section of the act if given before the hearing (or if given after the hearing, and the judge shall not otherwise direct) may, without any other direction of the court, be given within the jurisdiction of the court, except in the case of a person of unsound mind, not so found by inquisition, by delivering to the person to be served a notice (in the Form No. 3 in the Appendix hereto) with such variations as circumstances require, and the time to be specified in such notice for the person served to deliver or leave a notification shall—(*a*) in case the person to be served is a guardian of an infant, be such as shall be directed by the judge in the order appointing the guardian, and in case the person to be served is a married woman, or a committee of a lunatic, not less than twenty-eight clear days after the service; (*b*) and in other cases not less than fourteen clear days after the service. In case the person to be served is of unsound mind, not so found by inquisition, or out of the jurisdiction of the court, or it is desired to serve such notice on any person within the jurisdiction of the court in any other manner than above provided, an application shall be made at chambers ex parte by the petitioner for directions as to the manner in which such notice shall be given, and as to the time to be specified in such notice within which the notification is to be made by the person served.

5. Where it is desired that any guardian of an infant shall make or consent to any application to the court under the act, or make any notification respecting any application to the court, or that notice may be given to any such guardian on behalf of an infant, the court may appoint a guardian to such infant for the purposes of the act, and an application for such appointment may, after the petition is presented, be made at chambers by the petitioner by summons. And if an infant is the petitioner the petition may be presented by the infant by his next friend, and after the petition has been presented and answered, and a guardian appointed, the word "guardian" shall be substituted in the petition for the words "next friend," and the name of the guardian (if the next friend and guardian shall not be the same person) for the name of the next friend.

6. In the case of a lunatic or infant tenant in tail by his committee or guardian applying or consenting to an application, or giving a notification respecting an application, an application may be made at chambers by the petitioner after the petition is presented that such committee or guardian may be directed to so apply or consent, or give a notification, and in the case of an infant such application may be combined with the application to appoint a guardian.

7. In cases where the committees or guardians of lunatic or infant tenants in tail shall be served with notice of the application in pursuance of the 26th section of the act, an application may be made at chambers by the petitioner, before the expiration of the time specified in such notice, that such committees or guardians may notify that they either assent to or dissent from such application, or submit their rights or interests so far as they may be affected by such application to be dealt with by the court.

8. Upon an application to appoint a guardian to an infant for any such purpose as aforesaid, the summons shall be served upon the parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, of the infant, if there be any such parent or guardian, unless the court or judge shall dispense therewith.

9. Upon any application that a committee or guardian of a lunatic or infant tenant in tail may be directed to make or consent to any application on behalf of such lunatic or infant, or to notify that the lunatic or infant assents to or dissents from such application, or submits his rights or

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interests so far as they are affected by such application to be dealt with by the court, the summons shall be served on the committee of such lunatic, or the guardian appointed or proposed to be appointed of such infant, for such purpose.

10. Upon an application to appoint a guardian of an infant the following facts shall be proved:—

1. The age of the infant.
2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, and, if so, whether such parent or guardian has any interest in the application, and if he has the nature of such interest, and whether or not adverse to the interest of the infant.
3. Where and under whose care the infant is residing, and at whose expense he is maintained.
4. In what way the proposed guardian is connected with the infant, and why proposed and how qualified to be appointed.
5. That the proposed guardian has no interest in the application, or if he has the nature of his interest, and that it is not adverse to the interest of the infant.
6. The consent of the guardian to act.

11. Upon an application that a committee of a lunatic tenant in tail may be directed to make or consent to any application, or to give any notification respecting any application, the authority of the judge or judges entrusted with the care and commitment of the custody of the persons and estates of lunatics to such committee to act on behalf of the lunatic shall be produced, and if it shall appear thereby that such judge or judges are of opinion that it is proper and consistent with a due regard for the interest of the lunatic that the committee shall make or consent to the application or give any specific notification respecting the application, such authority shall, unless the court or judge shall for any special reason require further evidence, be sufficient evidence upon which the court or judge may direct the committee to act in conformity with such authority.

12. Upon an application that a guardian of an infant tenant in tail may be directed to make or consent to any application or to give any notification respecting any application, evidence is to be produced to satisfy the judge that it is, and the guardian is to make an affidavit that he believes that it is, proper and consistent with a due regard for the interest of such infant that such direction shall be given.

13. The examination of a married woman under sects. 50 and 51 of the act may be taken at any time after the petition is presented and answered.

14. When it is desired that a married woman resident within the jurisdiction of the court shall be examined otherwise than by the court, a solicitor who is a perpetual commissioner to take acknowledgments of deeds by married women may be appointed for that purpose by the judge at chambers in the Form No. 7 in the Appendix hereto without summons or order, upon the request of the petitioner and a certificate of the solicitor for the petitioner in the Form No. 7 in the Appendix hereto that the person to be appointed is not a solicitor for the petitioner, or for any party whose concurrence or consent to the application is required, but where an examination by such solicitor will cause unreasonable expense, delay, or inconvenience, or where the married woman is resident out of the jurisdiction of the court, an application by summons may be made ex parte by the petitioner at chambers to appoint a solicitor if such woman is resident within the jurisdiction of the court, and if not so resident a person, whether a solicitor or not, to take such examination.

15. Upon every petition the court shall be satisfied by sufficient evidence that it is proper and consistent with a due regard for the interests of all parties entitled under the settlement that the powers should be exercised; and it shall be stated in the affidavit why and upon what ground it is deemed to be so.

16. Upon every petition where there are any trustees seised or possessed of any estate in trust for any of the persons whose consent or concurrence to or in the application is required, evidence is to be produced that notice of the application has been served on such trustees.

17. Upon every petition evidence shall be produced to satisfy the court that neither the applicant nor any party entitled has previously applied to either House of Parliament for a private act to effect the same or a similar object, or if any such application has been made that the same was not rejected on its merits or reported against by the judges to whom the bill may have been referred.

18. If upon the hearing of any petition the court shall be of opinion that notice ought to be served on any person who shall not have been served, or that notice of the application ought to be inserted in any newspaper, the court shall give directions accordingly, and the petition shall stand over generally or to such time as the court shall direct.

19. When the court shall at the hearing have directed notice of any application to be inserted in any newspapers, any person may, within the time specified in the notice, apply to the court by motion, either ex parte or upon notice to the petitioner, for leave to be heard in opposition to or in support of the application, but if such motion shall be made ex parte and the court shall think fit to give such leave, it shall be subject to such order as the court shall think fit to make as to costs.

20. Any such person having obtained leave under the last preceding order shall be at liberty, upon reasonable notice, to inspect and peruse the petition at the office of the solicitor for the petitioner, upon payment of a fee of 13*s*. 4*d*. on each inspection, and shall be entitled (either without or after such inspection) to be furnished with a copy of such petition upon such application, terms, and conditions as are provided by Rules 8, 9, 12, and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875. [See R. S. C. Ord. 66, r. 7.]

21. Any order made on an ex parte motion giving leave to such person to be heard on any application shall be served on the solicitor for the petitioner.

22. Any person served with a notice, pursuant to the 26th section of the act, requiring him to notify whether he assents to or dissents from the application or submits his rights or interests so far as they may be affected by such application to be dealt with by the court, and any trustee or other person served with notice pursuant to the 30th section of the act, shall be at liberty, upon reasonable notice to the petitioner's solicitor, to inspect and peruse the petition without payment of any fee, and he shall be entitled to be furnished with a copy thereof upon such application, terms, and conditions as are provided by Rules 8, 9, 12, and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875. [See R. S. C. Ord. 66, r. 7.]

23. In all cases in which land in a register county or district is affected by the exercise of any powers conferred on the court by the act, and the court shall direct notice to be recorded, pursuant to the 33rd section of the act, such notice may be given by directing a memorial of the order to be registered. And in all cases in which the court shall not think it practicable or expedient that notice under the said section should be recorded as therein mentioned, the order shall state that no record of the order need be made.

24. Every order shall state, in addition to the names of the petitioners, the names of the persons other than the petitioners who concur or consent or to whom notice of the application has been given, or who (under Order 19) may have obtained leave to be heard in opposition to or in support of the application, and whether any notification was received from the persons to whom notice has been given, and if any has been received the purport thereof, and also the names of the persons, if any, notice to whom has been dispensed with, and whether the order is made subject to any and what rights, estate, or interest of any person whose concurrence

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or consent has been refused, or who shall not or shall not be deemed to have submitted his rights or interests to be dealt with by the court, or whose rights or interests ought, in the opinion of the court, to be excepted.

25. In cases where the court authorizes a lease the order shall direct that the lease shall contain such conditions as are required by the act, and such other covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances, or may direct the same to contain such covenants, conditions, and stipulations as may be approved by the judge at chambers without directing the lease to be settled by the judge.

26. The Rules 1, 2, 3, and 6 of Order 57 (as to time) in the schedule to the Supreme Court of Judicature Act, 1875, shall be applicable to these orders, and to all proceedings under the act. [See R. S. C. Ord. 64, rr. 1, 2, 3, and 7.]

27. The forms set forth in the Appendix hereto shall be adhered to, subject only to such variations as may be necessary to meet the circumstances of the case or direction of the court.

28. In all cases not provided for by the act, or these orders, the existing forms and mode of procedure and general practice of the court on similar proceeding shall apply to proceedings under the act.

29. The fees and allowances to solicitors of the court in respect to proceedings under the act shall be such as are provided by Order 6 of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875, and are applicable to such proceedings, and solicitors shall be entitled to charge and be allowed for a request and certificate under the 14th Order (of these Orders), and for attendances at the judges' chambers to procure the appointment of an examiner thereon, a fee of 13*s.* 4*d.* if the lower scale of fees is applicable, and 1*l.* 1*s.* 0*d.* in other cases. [See R. S. C. Ord. 65, r. 27.]

30. The fees to be taken by the officers of the court in respect to proceedings under the act shall be such as are provided by the orders under the Supreme Court of Judicature Act, 1875, dated 28th October, 1875, and are applicable to such proceedings; and every request under the 14th Order (of these Orders) shall bear a stamp of 2*s.* if the lower scale of fees is applicable, and 3*s.* in other cases.

31. Every petition under the act shall set forth the name, address, and description of the petitioner, and also a place within three miles from the site of Temple Bar, London, where he may be served with any order of the court or of the judge in chambers, or notice relating to the subject of such petition.

32. The judge in person sitting in court or in chambers in the case of any petition may by special order dispense with all or any of the preceding orders so far as they are applicable to such petition in any case in which he shall think fit, and upon such terms and conditions (if any) as he may deem proper.

33. These orders shall come into operation on the 7th day of January, 1879, and shall apply to any petition presented on or after that date.

34. These orders may be cited as "The Settled Estates Act Orders, 1878."

APPENDIX.

No. 1.—Form of Title of Petition and other proceedings.

In the High Court of Justice, Chancery Division,
The Master of the Rolls (*or* the Vice-Chancellor Malins, *or other Vice-Chancellor*).

In the matter of estates settled by *A. B.* (*or A. B. and others*) by will dated (*or* deed dated) consisting of certain lands (*or* messuages or tenements) in in the parish of in the county of .
And in the matter of the Settled Estates Act, 1877.

No. 2.—Form of Summons for directions as to service of notice pursuant to the 26th section of the act.

(*Title same as petition.*)

Let all parties concerned attend at my chambers at on at o'clock on the hearing of an application on the part of [the petitioners] that notice of the application intended to be made by a petition presented in the above matters on the day of requiring *A. B.* and *C. D.* severally to notify whether he assents to or dissents from such application, or submits his rights and interests so far as they may be affected by such application to be dealt with by the court, may be given by [*state the manner in which it is proposed to give the notice, and the time within which the notification is to be required*] or in such other manner as the judge may think fit.

Dated this day of .

This summons was taken out by of , solicitors for the applicant.

No. 3.—Form of Notice pursuant to section 26 of the act.

In the High Court of Justice, Chancery Division,
The Master of the Rolls (*or* the Vice-Chancellor Malins *or other Vice-Chancellor*).

(*Title same as petition.*)

Take notice that [*name petitioners and their addresses as in petition*] have presented a petition in the above matters praying that [*as in petition, but describing the lands, messuages, or tenements as in the petition*], and it is intended to apply to the said court for an order in accordance with such prayer, and you are [severally] hereby required to notify in writing within after the service hereof whether you assent to or dissent from such application, or submit your rights or interests so far as they may be affected by such application to be dealt with by the court, such notification is to be delivered to the petitioners' solicitors, or left for them at the address specified at the foot hereof, and may be so delivered by transmitting the same to them by post at such address.

If no notification shall be so delivered or left within the time above limited, you will be deemed to have submitted your rights and interests to be dealt with by the court.

In the event of your dissenting from such application and desiring to be heard in opposition to the application you are by your notification to require notice to be given to or left for you or your solicitor at a place to be specified within three miles from the site of Temple Bar, London, of the day on which the petition is fixed for hearing.

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You or your solicitor can upon reasonable notice to the under-named *A. & B.* inspect and peruse the petition without payment of any fee, and you are entitled at your own expense to have a copy of such petition furnished to you.

Dated the day of .

A. & B.

[*Address within three miles of the site of Temple Bar, London.*]

Petitioners' Solicitors.

To [*name the person or all persons to be served pursuant to the above section*].

NOTE.—A copy of the above notice, with a notification at the foot thereof to be filled up by you, is sent herewith.

No. 4.—Form to accompany Notice pursuant to section 26 of the act.

Copy Notice.

In pursuance of a notice, of which the above is a copy, served on me on the day of , I hereby notify that I*

Dated this day of .

To Messrs. .†

* Here insert "assent to the application," or "dissent from the application," or "submit my rights and interests so far as they may be affected by the application to be dealt with by the court."

And if you dissent and desire to be heard in opposition thereto, add "And I desire to be heard in opposition to the application, and require notice to be given to at [*naming a place within three miles of the site of Temple Bar, London*] of the day fixed for the hearing of the petition.

† Signature and address.

No. 5.—Form of Summons for Appointment of a Guardian of an Infant, and for leave for the Guardian to make or consent to an Application.

(*Title same as petition.*)

Let all parties concerned attend at my chambers at , on , at o'clock, on the hearing of an application on the part of [the petitioners].

That *A. B.* or some other proper person may be appointed guardian of *C. D.*, an infant, and that *E. F.* or some other proper person may be appointed guardian of *G. H.*, an infant, for the purpose of making on behalf of such infants (or consenting on behalf of such infants to) an application proposed to be made by a petition presented on the day of , by the above-named applicants for an order in accordance with the prayer of such petition, and (in case the infants are tenants-in-tail) that such guardians may be directed to make (or consent to) such application.

Dated this .

This summons was taken out by , of , solicitors for the applicants.

No. 6.—Form of Summons for Appointment of a Guardian of an Infant to be served with notice of an Application, and for leave for the Guardian to deliver a notification pursuant to such Notice.

(*Title same as petition.*)

Let all parties concerned attend at my chambers at , on , at o'clock, on the hearing of an application on the part of [the petitioners].

That *A. B.* or some other proper person may be appointed guardian of *C. D.*, an infant, and that *E. F.* or some other proper person may be appointed guardian of *G. H.*, an infant, for the purpose of being served with a notice requiring them on behalf of such infants, within clear days after service thereof, to notify whether they assent to or dissent from an application proposed to be made by a petition presented on the day of by the above-named applicants for an order in accordance with the prayer of such petition, or submit the infant's rights or interests so far as they may be affected by such application to be dealt with by the court, and (in case the infants are tenants-in-tail) that such guardians may be directed to notify that they, on behalf of such infants, assent to (or dissent from) such application (or submit the infant's rights or interests, so far as they may be affected by such application to be dealt with by the court.

Dated this day of .

This summons was taken out by , of , solicitors for the applicants.

No. 7.—Form of Request to appoint a person to examine a Married Woman.

(*Title same as petition.*)

The petitioners , in a petition presented in these matters on the day of , request that *A. B.* of, &c. [*C. D.* of, &c., and *E. F.* of, &c.], being a solicitor [*or* solicitors], and a perpetual commissioner [*or* perpetual commissioners] to take the acknowledgment of deeds by married women, may be appointed for the purpose of any or either of them examining the petitioners *G.* the wife of *H. I.*, and *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, of, &c., respectively touching their knowledge of the nature and effect of the application intended to be made by the petition, and to ascertain whether they the said *G. I.* and *K. M.* respectively freely desire to make such application, and whether she the said *N. P.* freely desires to consent to such application.

Name such as may be required to examine all the married women who are to be examined.

We, the solicitors for the petitioners, hereby certify that neither of them, the said *A. B.*, *C. D.* and *E. F.* is the solicitor for the petitioner, or for any party whose concurrence or consent to the application is required.

Dated this day of .

A. and B. solicitors for the petitioners.
Address.

The Master of the Rolls [*or* the Vice-Chancellor] appoints the said for the purposes mentioned in the above request.

E. F.,
Chief Clerk.

No. 8.—Form of Summons to appoint persons to examine Married Women.

Let all parties concerned attend at my chambers at on , at o'clock, on the hearing of an application on the part of , the petitioners in a petition presented in this matter on the day of , that *A. B.* of, &c., and *C. D.* of, &c. [*and if the married women are within the jurisdiction, add being solicitors*] be appointed for the purpose of any or either of them examining the petitioners *G.* the wife of *H. I.*, and *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, of, &c., respectively touching their knowledge of the nature and effect of the application intended to be made by the said petition, and to ascertain whether they the said *G. I.* and *K. M.* freely desire to make such application, and whether she the said *N. P.* freely desires to consent to such application.

Dated this day of .

This summons was taken out by of , solicitors for the applicant.

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No. 9.—Form of Examination of a Married Woman making or assenting to an Application.

(*Title same as petition.*)

The examination of the petitioner *G.* the wife of *H. J.*, and *K.* the wife of *L. M.*, and of *N.* the wife of *O. P.* of *

We, the said *G. J.*, *K. M.*, and *N. P.*, having been this day respectively examined apart from our respective husbands touching our knowledge of the nature and effect of an application intended to be made to the High Court of Justice by a petition presented in this matter on the day of by us the said *G. J.* and *K. M.* and others, for answer thereto severally say that we are aware of the nature and effect of the said intended application, and we the said *G. J.* and *K. M.* severally freely desire to make such application, and I, the said *N. P.*, freely desire to consent to such application. As witness our hands this day of .

Witness to the signature of the said *G. J.*, *K. M.*, and *N. P.* *Q. R.*, address.

* Insert the names of all who can be conveniently examined by the same person and at the same time.

[*To be at the foot of the above Examination.*]

No. 10.—Form of Certificate of Examination of Married Women making or assenting to an Application.

I, the undersigned *A. B.*, being the person appointed by the Master of the Rolls or the Vice-Chancellor for the purpose of examining the above-named *G.* the wife of *H. I.*, *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, hereby certify that I have this day of examined the said *G. I.*, *K. M.*, and *N. P.* apart from their respective husbands touching their knowledge of the nature and effect of the application intended to be made by the petition above referred to, and I have taken such examination in writing as above set forth, and I further certify that at the time of such examination I explained to them the nature and effect of the said application, and I am satisfied that they were aware of the nature and effect of such application, and that they the said *G. I.* and *K. M.* freely desire to make the said application, and that the said *N. P.* freely desires to consent to the said application.

No. 11.—Form of Affidavit verifying Examination.

(*Title as in petition.*)

I, *Q. R.* of , make oath and say that I was present and did see *G. I.*, *K. M.*, and *N. P.* respectively named in the above petition, sign the examination or paper writing annexed hereto and now produced and shown to me marked A, and that the signatures *G. I.*, *K. M.*, and *N. P.* attached thereto are respectively the proper handwritings of *G.* the wife of *H. I.* of , *K.* the wife of *L. M.* of , and *N.* the wife of *O. P.* of . And I further say that I was present and did see *A. B.* sign the certificate or paper writing annexed hereto and now produced and shown to me marked B, and that the signature *A. B.* attached thereto is the proper handwriting of *A. B.* of &c. And I say that the signature *Q. R.* attached to the said paper writings as a witness is my handwriting.

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No. 12.—Form of Notice pursuant to the 30th section of the Act.

(*Title same as petition.*)

In the High Court of Justice, Chancery Division,
Master of the Rolls [*or* the Vice-Chancellor Malins *or other Vice-Chancellor*].

Take notice that [*name petitioners and their addresses as in petition*] have presented a petition in the above matters praying that [*as in petition, but describing the lands, messuages, or tenements, as in the petition*], and it is intended to apply to the said court for an order in accordance with such prayer. This notice is given to you in pursuance of the above act because you are seised or possessed of an estate in trust for , whose consent or concurrence to or in the application is required by the act. You or your solicitors can upon reasonable notice to the under-named *A.* and *B.* inspect and peruse the petition at the address specified at the foot hereof without payment of any fee, and you are entitled at your expense to have a copy of such petition furnished to you.

Dated this day of .

A. & B.
Address,
Solicitors for the petitioners.

To [*name the persons to be served pursuant to the above section*].

No. 13.—Form of Notice to be inserted in newspapers if directed pursuant to the 31st section.

(*Title as in petition.*)

By direction of the Master of the Rolls (or the Vice-Chancellor) notice is hereby given that an application by petition has been made to the court of the said judge for a sale or for powers to grant leases of the above-mentioned hereditaments (or otherwise according to the circumstances), and the court has directed the application to be adjourned (or adjourned till), and any person, whether interested in the estate or not, may on or before apply to the said court by motion for leave to be heard in opposition to or in support of such application. The petition may be inspected on application to Messrs. *A.* and *B.* of , the solicitors for the petitioners.

II.—The Settled Land Act, 1882.

45 & 46 Vict. c. 38.

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon. [10th August, 1882.]

I.—Preliminary.

45 & 46 Vict. c. 38, s. 1.

Short title; commencement;

1.—(1.) This act may be cited as the Settled Land Act, 1882.

(2.) This act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this act referred to as the commencement of this act.

45 & 46 Vict. c. 38, s. 1.

extent.

(3.) This act does not extend to Scotland.

The paramount object of the Legislature in the S. L. Acts, 1882 to 1890, was the well-being of settled land (*Bruce* v. *Ailesbury*, 1892, A. C. 365). The general object has been said to be to confer on the present generation of landowners the means of alienation (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 536). The S. E. Act, 1877, has little bearing on the construction of the S. L. Act, 1882, which rests on a different principle (*Re Aldam*, 1902, 2 Ch. 46; a decision as to mining leases). As regards the L. C. C. Act, 1845, decisions thereunder were held applicable on a question under sect. 34 of the S. L. Act, 1882 (*Cottrell* v. *C.*, 28 Ch. D. 628); but not on a question under sects. 21 and 25 (*Re Gerard*, 1893, 3 Ch. 257). Generally speaking, cases decided before the present act may have no application to questions thereunder (*Re Gladstone, G.* v. *G.*, 1900, 2 Ch. 105; *Re Aldam*, 1902, 2 Ch. 53).

II.—Definitions.

Definition of settlement, tenant for life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this act a settlement, and is in this act referred to as a settlement, or as the settlement, as the case requires (*i*).

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement (*ii*).

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this act settled land, and is, in relation to the settlement, referred to in this act as the settled land (*k*).

(4.) The determination of the question whether land is settled land, for purposes of this act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect (*l*).

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this act the tenant for life of that land, and the tenant for life under that settlement (*m*).

(6.) If, in any case, there are two or more persons so entitled (*n*) as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this act.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is encumbered or charged in any manner or to any extent (*o*).

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this act, are for purposes of this act trustees of the settlement (*p*). 45 & 46 Vict. c. 38, s. 2.

(9.) Capital money arising under this act, and receivable for the trusts and purposes of the settlement, is in this act referred to as capital money arising under this act (*q*).

(10.) In this act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land (*r*); income includes rents and profits; and possession includes receipt of income:

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings: and a building lease is a lease for any building purposes or purposes connected therewith (*s*):

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the court:

(x.) The Land Commissioners for England as constituted by this act are referred to as the Land Commissioners (*t*):

(xi.) Person includes corporation.

(*s*) The Settled Land Acts do not apply to ecclesiastical property (*Re Bath and Wells*, 1899, 2 Ch. 138). An award of land to a vicar "and his successors" does not constitute a settlement within the act (*Ex p. Castle Bytham*, 1895, 1 Ch. 348). Sub-sect. (1). Settlement:

45 & 46 Vict. c. 38, s. 2.

by one instrument;

The settlement may consist of one instrument. But a succession must take place under that instrument. And where land was devised to a married woman in fee, the mere fact that her husband might under the general law take an estate by the curtesy did not make the devise a settlement (*Bates* v. *Kesterton*, 1896, 1 Ch. 159). Nor did the imposition of a restraint on anticipation make the married woman a tenant for life (*ib.*; see sect. 61, *post*). Where land was limited to a married woman for life without power of anticipation, with remainder as she should by will appoint, and in default to herself in fee, it was doubted whether the instrument was a settlement within the section (*Re Pocock and Prankerd*, 1896, 1 Ch. 302). The last case, however, was held to fall within sect. 58, sub-s. (1) (ix) (*ib.*). The mere fact that by failure of a contingent remainder in part of the land, which occurred after the death of the tenant for life, that part devolved differently from the rest, did not prevent the settlement from being one settlement during the tenancy for life (*Re Freme, Freme* v. *Logan*, 1894, 1 Ch. 1). One instrument may create several settlements requiring separate sets of trustees (see *Re Skerritt*, 1899, W. N. 240).

by several instruments;

The settlement may also consist of two or more instruments (*Wheelwright* v. *Walker*, 23 Ch. D. 739; *Re Earle and Webster*, 24 Ch. D. 148). Where a will directed property to be held on the trusts of a pre-existing settlement, the will and settlement constituted for the purposes of this act one settlement (*Re Mundy*, 1891, 1 Ch. 399). So where the limitations of the will and deed were stated independently (*Re Byng*, 1892, 2 Ch. 219). Where an estate was settled by one instrument and afterwards by a separate instrument the equity of redemption in another estate was settled on like trusts, the two instruments formed one settlement within the section (*Re Monson*, 1898, 1 Ch. 427). Where a direction in the will to accumulate was void under the Thellusson Act and the accumulations went to the next of kin, the will and the act constituted the settlement (*Vine* v. *Raleigh*, 1896, 1 Ch. 37).

by several successive instruments. Compound settlements.

Where family estates have been dealt with by successive instruments, questions have arisen as to what is the settlement. In such a case it was recently laid down in the Court of Appeal, that for the purposes of the act, there might be co-existing at the same time a more comprehensive settlement consisting of several deeds and a less comprehensive settlement constituted by one of the deeds only (*Re Mundy and Roper*, 1899, 1 Ch. 295; see *Re Du Cane and Nettlefold*, 1898, 2 Ch. 96). It had been previously held that every derivative settlement was not necessarily part of the settlement for the purposes of the act, whether made by a remainderman (*Re Knowles*, 27 Ch. D. 707), or by the tenant for life of his life estate (*Re Du Cane and Nettlefold*, 1898, 2 Ch. 96; see further as to dealings by a tenant for life, sect. 50, *post*, p. 695; and S. L. Act, 1890, s. 4, and note thereto, *post*, p. 712). It had also been held that a jointure deed executed under a power in a settlement was not necessarily part of the settlement (*Re Keck and Hart*, 1898, 1 Ch. 617; see *Re Meade*, 1897, 1 I. R. 121; *Re Tibbits*, 1897, 2 Ch. 149). But limitations of a jointure and portions to arise on the death of a tenant for life may be treated as part of the settlement, as being limitations "by way of succession" (*Re Mundy and Roper*, 1899, 1 Ch. 290; *A.-G.* v. *Owen*, 1899, 2 Q. B. 253).

Where a tenant for life under a re-settlement desired to sell free from jointures created under powers in previous settlements, the court appointed trustees of the compound settlement consisting of the previous settlements, the jointure deeds and the re-settlement; and held that on the purchase-money being paid to such trustees, the land could be conveyed free from the jointures (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; *Re Mundy and Roper*, *sup.*).

It seems that a tenant for life who re-settles can, notwithstanding the re-settlement, sell in respect of his old life estate (*Re Mundy and Roper*, 1899, 1 Ch. 296; see *Re Wright and Marshall*, 28 Ch. D. 93, a case decided before the S. L. Acts, where by the re-settlement a new life estate was limited "in restoration" of the old life estate).

By sect. 22, sub-sect. (1) (i) of the Finance Act, 1894, a settlement in that act means any instrument relating to real or personal property which is a settlement within sect. 2 of the present act, or if it related to real property would be such a settlement. Duty has been held payable in respect of property contingently settled (*A.-G.* v. *Fairley*, 1897, 1 Q. B. 698; *A.-G.* v. *Clarkson*, 1900, 1 Q. B. 156), and in respect of a fund held in trust to provide an annuity and subject thereto in trust for A. (*A.-G.* v. *Owen*, 1899, 2 Q. B. 253; *Re Campbell*, 1902, 1 K. B. 113). **45 & 46 Vict. c. 38, s. 2.**

See, further in connection with the definition of "settlement" in sub-sect. (1), the cases under S. E. Act, 1877, *ante*, p. 626.

(*ii*) As to sub-sect. (2) see *Re Freme, Freme* v. *Logan*, 1894, 1 Ch. 1. **Sub-sect. (2).**

(*k*) Where two properties are limited by the same instrument to the same uses, except that one is subject to a term, they together form one settled estate (*Re Stamford*, 43 Ch. D. 84). It is doubtful whether properties limited by the same instrument to the same tenant for life and after his death to different remaindermen constitute one settled estate (*Id.* 43 Ch. D. 91; see *Re Freme, Freme* v. *Logan*, 1894, 1 Ch. 1). **Sub-sect. (3). Settled land.**

(*l*) The time of the settlement taking effect is, in the case of a will, the death of the testator (*Re Stamford*, 43 Ch. D. 90; see also *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; *Re Bective*, 27 L. R. Ir. 364). **Sub-sect. (4).**

(*m*) "Beneficially entitled" means entitled for his own benefit, if there is anything to be derived from the estate, and not simply as trustee for others (*Re Jones*, 26 Ch. Div. 743; see, however, *Vine* v. *Raleigh*, 1896, 1 Ch. 41). A person may be "beneficially entitled" even though he actually receives nothing (*Re Jones*, 26 Ch. Div. 743; *Re Atkinson, Atkinson* v. *Bruce*, 30 Ch. D. 612; see sect. 2, sub-sect. (7)). A trust to pay rents during a person's life to him, his wife and children, or one or more of them, does not make him a tenant for life (*Re Atkinson*, 31 Ch. Div. 577). Where land was limited to trustees during the life of A. on trust to sell the life estate and hand over the proceeds to A. and B., and A. covenanted not to take the life estate *in specie*, it was held that A. and B. could together sell as the tenant for life (*Re Hale and Smyth*, 55 L. T. 151). Where there was a trust in a will for accumulation of rents during the life of the testator's son, who was his heir, such heir was on the expiration of the period allowed by the Thellusson Act held to be a tenant for life or person having the powers of a tenant for life (*Re Atherton*, 1891, W. N. 85; *Vine* v. *Raleigh*, 1896, 1 Ch. 37). "Entitled to possession" means possession as contradistinguished from reversion (*Re Atkinson, Atkinson* v. *Bruce*, 30 Ch. D. 612). A trust to allow a lady to occupy a house so long as she desires constitutes her a tenant for life (*Re Carne*, 1899, 1 Ch. 324; see cases there quoted; *Re Llanover, Herbert* v. *Freshfield*, 1902, W. N. 149). As to persons who have the same powers as a tenant for life, see sects. 58—63, *post*, p. 699 *et seq.*, and cases there quoted. **Sub-sect. (5). Tenant for life.**

(*n*) "So entitled" in this sub-section means entitled for life (*Re Atkinson, Atkinson* v. *Bruce*, 31 Ch. Div. 577; *Re Collinge*, 36 Ch. D. 516). Several persons constituted under this sub-section the tenant for life (*Smith* v. *Lancaster*, 1894, 3 Ch. 439); but not where the shares were separate (*Re Osborne and Bright*, 1902, 1 Ch. 335). Where trustees have power to distribute rents between one or more of several persons during the life of one of them, these persons do not together constitute a tenant for life (*Re Atkinson, sup.*). A jointress has not a "concurrent estate or interest" with the tenant for life (*Re Ailesbury*, 1893, 2 Ch. 357). When one undivided moiety is vested in A. in fee, the tenant for life of the other moiety can sell such moiety alone (*Cooper* v. *Belsey*, 1899, 1 Ch. 639; overruling *Re Collinge*, 36 Ch. D. 516; see also *Williams* v. *Jenkins*, 1894, W. N. 176; *Smith* v. *Lancaster*, 1894, 3 Ch. 439). **Sub-sect. (6).**

(*o*) Even if the incumbrances exceed the income (*Re Jones*, 26 Ch. Div. 740; *Williams* v. *Jenkins*, 1893, 1 Ch. 704). A disposition of the entire rent is not an incumbrance within this sub-section (*Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 427). See sect. 50 (*post*, p. 695). **Sub-sect. (7).**

(*p*) See S. L. Act, 1890, s. 16, *post*, p. 716. Trustees with a power of sale subject to the consent of another are trustees for the purposes of this **Sub-sect. (8). Trustees of the settlement.**

45 & 46 Vict. c. 38, s. 2.

act (*Constable* v. *Constable*, 32 Ch. D. 233), unless that consent cannot be obtained (*Re Johnstone*, 17 L. R. Ir. 172); and will be such trustees for the purposes of a sale of heirlooms, though the power of sale does not extend to the heirlooms (*Constable* v. *Constable*, *sup.*). Trustees holding realty on trusts declared of personalty, which included a power to call in and vary investments, were held trustees for the purposes of this act (*Re Garnett Orme and Hargreave*, 25 Ch. D. 595). Trustees of a term of a thousand years limited immediately before the life estate on trusts *inter alia* by mortgage, or out of rents, or by other reasonable means, to raise large sums, are not trustees within this definition (*Re Carne*, 1899, 1 Ch. 324).

Sub-sect. (9). Capital money.

(*q*) The following sections refer expressly to sources from which capital money may be derived, viz., S. L. Act, 1882, ss. 11, 18, 22 (7), 31 (1) (ii.), 34, 35 (2), 37 (2); S. L. Act, 1884, s. 4; S. L. Act, 1889, s. 3; S. L. Act, 1890, s. 11 (1). As to moneys which may be treated as capital moneys, see sects. 32, 33 (*post*, p. 684); *Re Mackenzie* (23 Ch. D. 750); *Re Tennant* (40 Ch. D. 594); *Re Mundy* (1891, 1 Ch. 406); *Clarke* v. *Thornton* (35 Ch. D. 314; *Re Rosher*, *Briant* v. *Rosher* (1899, W. N. 134). Moneys arising from an exercise of the powers of a tenant for life under sect. 3 are capital moneys (*Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 375).

Sub-sect. (10) (i.).

(*r*) Land includes copyholds (*Re Price*, *Leighton* v. *Price*, 27 Ch. D. 552), a dignity which descends to heirs, such as a baronetcy (*Re Rivett-Carnac*, 30 Ch. D. 136; see *Re Aylesford*, 32 Ch. D. 162), tithes (*Re Esdaile*, *Esdaile* v. *Esdaile*, 54 L. T. 637), and a perpetual rent-charge (*Re Bective*, 27 L. R. Ir. 364). As to an undivided share, see *Cooper* v. *Belsey* (1899, 1 Ch. 639). As to the concluding words of the clause, see *Re Jones* (26 Ch. Div. 740).

Sub-sect. (10) (iii.).

(*s*) See *Re Ellesmere*, 1898, W. N. 18.

Sub-sect. (10) (x.).

(*t*) The powers and duties of the Land Commissioners are now vested in the Board of Agriculture (Board of Agriculture Act, 1889).

III.—Sale; Enfranchisement; Exchange; Partition.

General Powers and Regulations.

Powers to tenant for life to sell, &c.

3. A tenant for life—

(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

(ii.) Where the settlement comprises a manor, may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition

in consideration of money paid for equality of partition. 45 & 46 Vict. c. 38, s. 3.

The act confers on tenants for life the power of sale and other powers of an absolute owner, but does not make saleable what is in its nature inalienable, as a dignity (*Re Rivett-Carnac*, 30 Ch. D. 140). A sale to a railway company of the right to construct and use tunnels was held to fall within this section, as being a sale, not of an easement, but of part of the settled land (*Re Pearson*, 83 L. T. 626). In selling the tenant for life is a trustee for all parties (sect. 53); but he may sell to increase his own income (*Wheelwright* v. *Walker*, 23 Ch. D. 759; *Re Sebright*, 33 Ch. D. 436; see *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 539). It has been said that he may sell from ill-will, or caprice, or because the remainderman is disliked (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540; *Wheelwright* v. *Walker*, *sup.*; *Re Chaytor*, 25 Ch. D. 654; see, however, the cases quoted under sect. 53, *post*, p. 697). The tenant for life may sell, notwithstanding that he has assigned his own interest (sect. 50, *post*, p. 695; *Re Sebright*, 33 Ch. D. 429; *Re Ailesbury*, 1892, 1 Ch. 506; see *Re Mundy and Roper*, 1899, 1 Ch. 296; *Re Barry Rail. and Wimborne*, 76 L. T. 489); but in such case the sale is without prejudice to the assignee's rights (*Cardigan* v. *Curzon-Howe*, 40 Ch. D. 341); and may sell, notwithstanding that the remainderman has assigned his interest (*Wheelwright* v. *Walker*, 23 Ch. D. 752).

A remainderman cannot restrain the tenant for life from selling on the ground that the property may increase in value (*Thomas* v. *Williams*, 24 Ch. D. 558). But he may restrain him from selling until trustees under the act have been appointed (*Wheelwright* v. *Walker*, 23 Ch. D. 752; see *Mogridge* v. *Clapp*, 1892, 3 Ch. 395, 400). As between the tenant for life and a purchaser from him, however, the fact that there were no trustees at the time of the contract, or that (if there were any) no notice (see sect. 45, *post*, p. 690) had been given to them, is not a defect of the title of the tenant for life to sell (*Hatten* v. *Russell*, 38 Ch. D. 344; *Marlborough* v. *Sartoris*, 32 Ch. D. 616; *Mogridge* v. *Clapp*, *sup.*). It would seem that a purchaser may require the appointment of trustees before completion (*Hatten* v. *Russell*, 38 Ch. D. 345; see *Re Fisher and Grazebrook*, 1898, 2 Ch. 661). As to the result where a purchaser completes with knowledge that there are no trustees, see *Mogridge* v. *Clapp*, 1892, 3 Ch. 396, 401. Where persons have been appointed under sect. 60 (*post*, p. 702) to exercise a tenant for life's powers, no trustee need ever be appointed (*Re Dudley*, 35 Ch. D. 338). The restrictions imposed by a private act on a sale by trustees do not affect a sale by the tenant for life under this section (*Re Chaytor*, 25 Ch. D. 651). A decree for the execution of the trusts of the settlement does not prevent the tenant for life from selling without the sanction of the court (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531). For the case where an order for sale has been previously made in an action, see *Taylor* v. *Poncia* (25 Ch. D. 646); or under the S. E. Act, 1877, *Re Barre-Haden* (49 L. T. 661; 32 W. R. 194); *Re Poole* (50 L. T. 585; 32 W. R. 956).

Where trustees had contracted for an immediate sale, but, in consequence of their power of sale not arising till after the death of a tenant for life, could not make a good title, they could not force the purchaser to accept a conveyance from the tenant for life under this act (*Re Bryant and Barningham*, 44 Ch. Div. 218).

Crown.

Semble, a sale under the act is good as against the Crown claiming in remainder in default of heirs (*Re Bond, Panes* v. *Att.-Gen.*, 1901, 1 Ch. 20).

Letting tenant for life into possession.

Before this act the court had a discretion to put an equitable tenant for life into possession (*Tidd* v. *Lister*, 5 Madd. 429; *Taylor* v. *Taylor*, 20 Eq. 303). Since the act, and having regard to the powers thereby conferred on a tenant for life, the court has exercised this discretion more freely in his favour (*Re Bagot, Bagot* v. *Kittoe*, 1894, 1 Ch. 182; *Re*

45 & 46 Vict. c. 38, s. 3.

Richardson, R. v. *R.*, 1900, 2 Ch. 784); and has let into possession equitable tenants for life, even where the trustees had powers of management (*Re Bagot, sup.*; *Re Wythes*, 1893, 2 Ch. 369; see *Re Wilkinson, Lloyd* v. *Steel*, 85 L. T. 43, the case of a tenant for life of ground rents subject to a mortgage); and where the property was leasehold (*Re Newen, Newen* v. *Barnes*, 1894, 2 Ch. 297); and has let into possession legal tenants for life subject to terms for securing incumbrances (*Re Richardson, sup.*; *Re Money Kyrle, M.* v. *M.*, 1900, 2 Ch. 839). The orders have been made on terms protecting the trustees, in the form of undertakings (*Re Wythes, sup.*; *Re Bagot, sup.*; *Re Newen, sup.*), and the giving of security (*Re Money Kyrle, sup.*). As to letting into possession the assignee of an equitable life interest, see *Re Hunt, Pollard* v. *Geake*, 1901, W. N. 144.

Since the S. L. Act, 1882, the court has also ordered the title-deeds to be delivered to an equitable tenant for life (*Re Burnaby*, 42 Ch. D. 621; *Re Richardson, sup.*; *Re Money Kyrle, sup.*; *Re Wilkinson, Lloyd* v. *Steel, sup.*); but not where he had mortgaged his interest (*Re Newen, sup.*).

Regulations respecting sale, enfranchisement, exchange, and partition.

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life, and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a regrant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.

Having regard to sub-sect. (1), a tenant for life was restrained from selling at a less price than that offered by the remainderman (*Wheelwright* v. *Walker*, 48 L. T. 867). A sale which involved the taking by the trustees of fully paid shares in a water company was sanctioned under the circumstances (*Re Orwell Park Estate*, 1894, W. N. 135). When the sale or exchange is made for the erection of dwellings for the working classes, see S. L. Act, 1890, s. 18 (*post*, p. 717); and 53 & 54 Vict. c. 70, s. 74. As to granting and reserving easements on an exchange or partition, see S. L. Act, 1890, s. 5 (*post*, p. 712).

Special Powers.

45 & 46 Vict. c. 38, s. 5.

Transfer of incumbrances on land sold, &c.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

"Incumbrance" in this section includes a rentcharge under the Improvement of Land Act, 1864, and upon the terms of the section being complied with the land sold will be completely exonerated (*Re Strafford and Maples*, 1896, 1 Ch. 235).

IV.—Leases.

General Powers and Regulations.

Power for tenant for life to lease for ordinary or building or mining purposes.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years:

(ii.) In case of a mining lease, sixty years:

(iii.) In case of any other lease, twenty-one years.

Where there has been an order under the S. E. Act, 1877, granting a power of leasing to trustees, a tenant for life cannot exercise the powers of this section until that order is stayed (*Re Poole*, 50 L. T. 585; 32 W. R. 956). A lease of the surface reserving the minerals may be granted (*Re Gladstone, G. v. G.*, 1900, 2 Ch. 101; overruling *Re Newell and Nevill*, 1900, 1 Ch. 90; see *Scott* v. *Moxon*, 1900, W. N. 14; and compare *Re Rutland, Rutland* v. *Bristol*, 1900, 2 Ch. 206). Leases granted by a tenant for life to his wife solely for her benefit were held void as not a *bonâ fide* exercise of his powers (*Sutherland* v. *Sutherland*, 1893, 3 Ch. 169; *Middlemas* v. *Stevens*, 1901, 1 Ch. 574). As to granting a lease to a married woman, see *Sutherland* v. *Sutherland* (*sup.*). A lease was held void as infringing sect. 10 of the S. L. Act, 1890, by granting a right of way over land usually occupied with the mansion house (*S. C.*). As to a tenant for life refusing to lease, see *Re Mansel* (1884, W. N. 209).

The tenant for life must give notice to the trustees before granting a lease (sect. 45 (1), *post*, p. 690); but where the lessee deals with the tenant for life in good faith the lease will be valid even if there are no trustees (*Mogridge* v. *Clapp*, 1892, 3 Ch. 382).

Further provisions as to leases by a tenant for life are contained in sects. 7, 8, and 10 of the S. L. Act, 1890, *post*, p. 713.

Regulations respecting leases generally.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date (*u*).

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any

45 & 46 Vict. c. 38, s. 7.

money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case (*x*).

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated (*y*).

(*u*) A writing is sufficient where the term does not extend beyond three years (S. L. Act, 1890, s. 7, sub-s. (iii), *post*, p. 713). Compare note to Real Prop. Act, 1845, s. 3, *ante*, p. 516). As to a lease "taking effect in possession," see *Sutherland* v. *Sutherland* (1893, 3 Ch. 169, 192); note (*d*), *ante*, p. 628.

(*x*) The application of sub-sect. (2) to mining leases was discussed in *Re Aldam*, 1902, 2 Ch. 59, 62. As to what is "the best rent," see *Sutherland* v. *Sutherland* (1893, 3 Ch. 195). The test is whether the man who makes the lease had got as much for others as he has for himself (*Chandler* v. *Bradley*, 1897, 1 Ch. 324). In the last case a lease granted by a tenant for life in consideration of a money payment was declared void (*Ib.*). It seems doubtful whether a lease granted at a rent not the best is void or voidable (*Re Handman and Wilcox*, 1902, 1 Ch. 599; see *Mogridge* v. *Clapp*, 1892, 3 Ch. 398). The fine will be capital money (S. L. Act, 1884, s. 4, *post*, p. 708). See, as to money paid on the surrender of a lease, *Re Hunloke*, *Fitzroy* v. *Hunloke* (1902, 1 Ch. 941; *Re Guthrie*, *ib.*, 942, n.). The words "any money laid out" do not include a past voluntary expenditure (*Re Chawner*, 1892, 2 Ch. 196).

(*y*) See further S. L. Act, 1890, s. 7 (*post*, p. 712). As to renewable leases, see *Re Farnell* (33 Ch. D. 599). And when a lease is made for the erection of dwellings for the working classes, see S. L. Act, 1890, s. 18 (*post*, p. 717), and Housing of the Working Classes Act, 1890.

Building and Mining Leases.

Regulations respecting building leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this act, for or in connexion with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

45 & 46 Vict. c. 38, s. 8.

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

See the definition of building lease in sect. 2, sub-sect. (10), *ante*, p. 659; and *Re Ellesmere* (1898, W. N. 18). The words in sub-sect. (1), "in consideration of the lessee having erected buildings," do not include the case of past voluntary expenditure (*Re Chawner*, 1892, 2 Ch. 195). A lease partly in consideration of the expenditure of money on specified improvements and repairs is within the section; but the court will not sanction a lease where the repairs agreed to be done are such as a landlord is usually expected to do (*Re Daniell*, 1894, 3 Ch. 503; compare *Truscott* v. *Diamond, &c. Co.*, 20 Ch. Div. 251). As to whether a lease of land let in connection with building land, but not itself built upon, is a building lease, see *Re Sabin* (1885, W. N. 197). As to what are "building purposes," see sect. 2, sub-sect. (10) (iii), *ante*, p. 659; *Re Ellesmere* (1898, W. N. 18).

As to inserting an option of purchase in a building lease under this section, see S. L. Act, 1889 (*post*, p. 711).

Regulations respecting mining leases.

9.—(1.) In a mining lease—

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf (z); and

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this act, for or in connexion with mining purposes.

(z) The rent may vary according to the price of the minerals (S. L. Act, 1890, s. 8, *post*, p. 713; compare *Lonsdale* v. *Lowther*, 1900, 2 Ch. 687, a lease under a power). See also sect. 2, sub-sect. (10), (ii), (iv), *ante*, p. 659. A varying rent may be reserved without the addition of a fixed or minimum rent. Such fixed or minimum rent, if reserved, need not be uniform, but may vary; and in a particular year, *e.g.*, the first of the term, it may be nil. It may also cease when all the coal has been paid for at the acreage rent reserved (*Re Aldam*, 1902, 2 Ch. 59, 60).

45 & 46 Vict. c. 38, s. 10.

Variation of building or mining lease according to circumstances of district.

10.—(1.) Where it is shown to the court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this act, or in perpetuity; or

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this act, or except in perpetuity;

the court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

When the tenant for life was an infant of eighteen, and the trustees asked for power to grant building leases for 200 years, power was only given subject to the approval of the court in each case (*Cecil* v. *Langdon*, 51 L. T. 618; 54 L. J. Ch. 313). A mining lease for ninety-nine years has been sanctioned under this section (*Re Powell, Allaway* v. *Oakeley*, 1884, W. N. 67). As to reserving a rent charge in a conveyance in fee for building, see S. L. Act, 1890, s. 9, *post*, p. 713. For forms of summons under this section, see *post*, p. 720.

Part of mining rent to be set aside.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

Compare the corresponding provision of the S. E. Act, 1877, s. 4 (*ante*, p. 626). Rent in a mining lease is really purchase money for coal worked (*Re Aldam*, 1902, 2 Ch. 63). In the case of open mines, it has been held under the present section that a tenant for life even though not declared unimpeachable for waste by the settlement is still not "impeachable for waste in respect of minerals" and only one-fourth of the rent need be set aside (*Re Chaytor*, 1900, 2 Ch. 804). A person deemed, under sect. 63 (*post*, p. 704), to be a tenant for life is to be treated as impeachable for waste (*Re Ridge, Hellard* v. *Moody*, 31 Ch. Div. 504). For an instance of contrary intention, see *Re Newcastle* (24 Ch. D. 129); *Re Bagot* (1894, 1 Ch. 184). For form of summons for payment into court of rent set aside, see R. S. L. Act, Form 10 (*post*, p. 722).

Where a lease of mines is granted by the tenant for life under sect. 12, sub-sect. (i.), to give effect to a contract of the settlor, the right of the tenant for life to rents is the same as if the lease had been granted by the settlor, sect. 11 not applying (*Re Kemeys-Tynte*, 1892, 2 Ch. 211). 45 & 46 Vict. c. 38, s. 11.

Special Powers.

Leasing powers for special objects.

12. The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this act, or otherwise, as the case may require.

See *Re Kemeys-Tynte* (1892, 2 Ch. 211). Before the act trustees who were donees of leasing powers could effectuate a previous tenant for life's contract (*Davis* v. *Harford*, 22 Ch. D. 128).

Surrenders.

Surrender and new grant of leases.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

45 & 46 Vict. c. 38, s. 13.

(6.) Every new or other lease shall be in conformity with this act.

Where a lease granted under a power by a legal tenant for life enabled the tenant to surrender on payment of money to the lessor, and the tenant surrendered accordingly, the money belonged to the tenant for life (*Re Hunloke, Fitzroy* v. *Hunloke*, 1902, 1 Ch. 941; see *Re Guthrie, Ib.*, 942, n.).

Copyholds.

Power to grant to copyholders licences for leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

As to the meaning of "steward," see sect. 2, sub-sect. (10) (vi.).

V.—Sales, Leases, and other Dispositions.

[*Sect.* 15 *was repealed and other provisions substituted by S. L. Act*, 1890, *s.* 10, post, *p.* 713.]

Streets and Open Spaces.

Dedication for streets, open spaces, &c.

16. On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents of the settled land, or on any part thereof,—

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted. 45 & 46 Vict. c. 38, s. 16.

Surface and Minerals apart.

Separate dealing with surface and minerals, with or without way-leaves, &c.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, way-leaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

In the following cases land has been sold separately from the minerals: *Re Newcastle*, 24 Ch. D. 129; *Re Brown*, 27 Ch. D. 179. This section does not prevent the reservation of minerals in a building lease of the surface by a tenant for life (*Re Gladstone*, *G.* v. *G.*, 1900, 2 Ch. 105). The lease may grant a wayleave for foreign coal without reserving a separate rent therefor; and such wayleave may continue after the cesser of the minimum rent (*Re Aldam*, 1902, 2 Ch. 46). See, as to the power of trustees to dispose, with the sanction of the court, of land and minerals separately, Trustee Act, 1893, s. 44, *post*, p. 787.

Mortgage.

Mortgage for equality money, &c.

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this act.

For form of summons, see R. S. L. Act, Form 11, *post*, p. 722. See S. L. Act, 1890, s. 11, *post*, p. 714.

Undivided Share.

Concurrence in exercise of powers as to undivided share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent

45 & 46 Vict. c. 38, s. 19.

necessary or proper for any purpose of this act, with any person entitled to or having power or right of disposition of or over another undivided share.

As to the sale of an undivided share, see *Cooper* v. *Belsey* (1899, 1 Ch. 639); overruling *Re Collinge* (36 Ch. D. 516). See *Williams* v. *Jenkins* (1894, W. N. 176); and see *Re Powell, Allaway* v. *Oakley* (1884, W. N. 67).

Conveyance.

Completion of sale, lease, &c. by conveyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge (*a*).

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder (*b*), but subject to and with the exception of—

(i.) All estates, interests, and charges having priority to the settlement; and

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed (*c*); and

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required, on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title

of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls (*d*). 45 & 46 Vict. c. 38, s. 20.

(*a*) The tenant for life may properly convey "as beneficial owner" (*Re Ray*, 1896, 1 Ch. 474, 475; see *ante*, p. 560). In practice a provision is usually inserted restricting his liability on the implied covenants to the acts and defaults of himself and persons claiming through or in trust for him. Before the act covenants for title could be required from a tenant for life assenting to a sale by his trustees (*Poulett* v. *Hood*, 5 Eq. 115; *Re Sawyer and Baring*, 1884, W. N. 192).

(*b*) A building lease granted by a tenant by the curtesy as absolute owner was held by virtue of this sub-section to operate as a good lease under the act (*Mogridge* v. *Clapp*, 1892, 3 Ch. 382).

(*c*) Sub-sect. 2 (ii.) includes all estates and interests created subsequently to the settlement to secure money; and includes not only charges for raising portions when the money has been "actually raised," but also a mortgage of his life interest by the tenant for life (*Re Sebright*, 33 Ch. D. 438; but see *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 343). Clause ii. prevents a tenant for life from conveying free from the mortgages of mortgagees who have actually lent their money (*Re Mundy and Roper*, 1899, 1 Ch. 289). But a tenant for life can convey free from jointures created under the settlement (*Re Keck and Hart*, 1898, 1 Ch. 617; *Re Ailesbury and Iveagh*, 1893, 2 Ch. 357), and from portions not actually raised (*Re Ducane and Nettlefold*, 1898, 2 Ch. 108).

(*d*) Where copyholds are devised to trustees, and the tenant for life sells before they have been admitted, only one fine is payable (*Re Naylor and Spendla*, 34 Ch. Div. 217).

VI.—Investment or other Application of Capital Trust Money.

Capital money under act; investment, &c. by trustees or court.

21. Capital money arising under this act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others of the following modes (namely) (*e*):

(i.) In investment on government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland incorporated by special act of parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities (*f*):

(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land (*g*):

(iii.) In payment for any improvement authorized by this act (*h*):

45 & 46 Vict. c. 38, s. 21.

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land (*i*):

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge (*k*):

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this act (*l*):

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

(*e*) This section states what is to be done with capital moneys "when received"; and the court cannot previously charge them (*Round* v. *Turner*, 60 L. T. 379). Money bequeathed to trustees to be laid out in a new purchase of land to be settled has been applied under this section as capital money (*Re Mackenzie*, 23 Ch. D. 750); and where such new land was to be settled on the trusts of an existing settlement, the money was applicable in improving land originally comprised in the settlement (*Re Mundy*, 1891, 1 Ch. 399; *Re Byng*, 1892, 2 Ch. 219). Purchase-money arising from a sale under the S. E. Act, 1877, and ordered to be applied under sect. 34 of that act (*ante*, p. 639), has been applied under this section (*Re Tennant*, 40 Ch. D. 594). As to the application of purchase-money of interests in land less than fee simple, see sect. 34, *post*, p. 686. The court will not allow trustees to retain, as representing trust funds other than capital money, investments unauthorized by the trust, even though such investments are authorized by this section for capital money (*Fox* v. *Dolby*, 1883, W. N. 29).

Sub-sect. (i.). (*f*) As to what investments are by law authorized for trust money, see Trustee Act, 1893, ss. 1—7 (*post*); which authorizes (amongst other investments) any stocks, funds, or securities authorized for the investment of cash under the control of the court (as to which see R. S. C. Ord. 22, r. 17), and also real securities, including long terms, and land improvement charges (sect. 5, sub-sect. (i.)). The tenant for life can select the particular investment (*Re Coleridge*, 1895, 2 Ch. 704).

Sub-sect. (ii.). (*g*) The word "incumbrances," as used in sub-sect. (ii.) includes a mortgage of a long term (*Re Frewen*, *Frewen* v. *James*, 38 Ch. D. 383);

an annuity charged on tithes (*Re Esdaile, Esdaile* v. *Esdaile*, 54 L. T. 637); a temporary rent-charge for improvements authorized by this act (S. L. Act, 1887, *post*, p. 710; *Re Sudeley*, 37 Ch. D. 123; see *Re Knatchbull*, 29 Ch. Div. 588; *Re Dalison*, 1892, 3 Ch. 525); sewering expenses of a local authority, charged under statute on settled land and payable by instalments (*Re Legh*, 1902, 2 Ch. 274); a charge under 46 & 47 Vict. c. 61, s. 29. Tenants for life who had paid instalments of an instalment mortgage were held entitled to be recouped out of the proceeds of the sale of the property (*Re Nepean*, 1900, 1 Ir. R. 298; compare *Re Dalison*, 1892, 3 Ch. 522; *Re Legh, sup.*). The word would not include a jointure (*Re Knatchbull*, 27 Ch. D. 353). Moneys arising from a sale of heirlooms may be applied in discharge of incumbrances on the settled land (*Re Marlborough, Marlborough* v. *Marjoribanks*, 32 Ch. Div. 1). Capital moneys may be applied in the discharge of an incumbrance on part of the settled estate (*Re Chaytor*, 25 Ch. D. 651; but see *Re Sebright*, 33 Ch. D. 437). Money may be raised out of one part of settled land to pay off incumbrances on another part, though the two parts were settled by different instruments (*Re Monson*, 1898, 1 Ch. 427); or, by reason of the subsequent failure of some of the limitations in one case, devolve ultimately to different persons (*Re Freme, Freme* v. *Logan*, 1894, 1 Ch. 1; see also *Re Coote, Coote* v. *Cadogan*, 81 L. T. 535). Compare *Hampden* v. *Buckinghamshire*, 1893, 2 Ch. 531, and other cases quoted under sect. 53, *post*, p. 697. As to whether capital money arising from a portion of the settled estate exclusively subject to a charge can be applied in discharge of incumbrances affecting the other portion, see *Re Stamford* (43 Ch. D. 95). Where under a settlement a term was created for the purpose (subject to an annuity to the life tenant) of discharging incumbrances, but to cease on their discharge, the purchase-money on a sale under the act was applied in discharging the incumbrances, the court holding that they ought not to be kept on foot and that the term ceased (*Re Richardson, R.* v. *R.*, 1900, 2 Ch. 778).

45 & 46 Vict. c. 38, s. 21.

(*h*) Under sub-sect. (iii.) the works in payment for which capital money may be applied are works within sect. 25, and they do not include ordinary repairs (*Clarke* v. *Thornton*, 35 Ch. D. 311; *Re Tucker*, 1895, 2 Ch. 469; but see *Re Houghton*, 30 Ch. D. 101). Capital moneys were applied for improvements which the settlement had given the trustees power to make, but if made had thrown upon income (*Clarke* v. *Thornton, sup.*; *Re Stamford*, 56 L. T. 484; compare the trust created in *Re Partington, Reigh* v. *Kane*, 1902, 1 Ch. 711). Where a settled estate comprised land subject to a charge from which the remaining portion of the estate was exempt, capital moneys arising from the charged portion were under the circumstances applied for the improvement of the remainder (*Re Stamford*, 43 Ch. D. 84). Where the settlement was composed of two instruments, evidence was required that the proposed improvements were proper under both instruments (*Re Byng*, 1892, 2 Ch. 228).

Sub-sect. (iii.).

(*i*) As to the settlement of land purchased, see sect. 24, *post*. The decisions on the Lands Clauses Act are not applicable in construing this sub-section (*Re Gerard*, 1893, 3 Ch. 252). This sub-section does not authorize the purchase of an equity of redemption (*Re Radnor*, 1898, W. N. 174).

Sub-sect. (vii.).

(*k*) Compare sect. 34 of S. E. Act, 1877, and cases thereunder, *ante*, p. 639. Under the present sub-section payment has been made to two persons who had a joint general power of appointment (*Re Winstanley*, 54 L. T. 840). When the purchase-money of settled land has been paid into court under the L. C. C. Act, 1845, the court (sect. 32, *post*, p. 684, applying) has ordered payment out to trustees for sale as being persons empowered to give an absolute discharge (*Re Rutland*, 31 W. R. 947; 49 L. T. 196; *Re Rathmines*, 15 L. R. Ir. 576); and also to trustees appointed under sect. 38 of this act (*Re Wright*, 24 Ch. D. 662; *Re Harrop, id.* 717; *Re Bolton*, 52 L. T. 728; *Re Wootton*, 1890, W. N. 158). But the power is discretionary, and the court may refuse to allow it (*Re Smith, Ex p. L. & N. W. R. Co.*, 40 Ch. Div. 386). See also sect. 14 of the S. L. Act, 1890.

Sub-sect. (ix.).

(*l*) As to the meaning of the words "incidental to" in sub-sect. (x.),

Sub-sect. (x.).

45 & 46 Vict. c. 38, s. 21.

Costs.

see *Cardigan* v. *Curzon-Howe* (41 Ch. Div. 375); *Re Stamford* (43 Ch. D. 90). The tenant for life's costs of defending an action to restrain him from selling which was dismissed with costs were allowed, so far as not recovered from the plaintiff, out of capital moneys (*Re Llewellin, Llewellin* v. *Williams*, 37 Ch. Div. 317). So also the proper costs of an unsuccessful attempt by a tenant for life to sell (*Re Smith*, 1891, 3 Ch. 65). Where four persons, out of twenty-five who together constituted the tenant for life, employed separate solicitors for the purposes of a sale, their respective costs were paid out of the purchase-money (*Smith* v. *Lancaster*, 1894, 3 Ch. 439). So also the commission charged by an estate agent for procuring a lease of settled land (*Re Maryon Wilson*, 1901, 1 Ch. 934). As a general rule the cost of obtaining the concurrence of the mortgagees of the life estate cannot be paid out of the capital moneys where there are no special circumstances (*Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 375; see, however, *Re Beck*, 24 Ch. D. 608); nor the costs of appointing a guardian to an infant tenant for life to act in a sale (*Re Rudd*, 1887, W. N. 251). As to surveyor's costs, see *Re Stamford* (43 Ch. D. 89); *Re Eyton* (1888, W. N. 254). See further the note under sect. 46, *post*, p. 692, as to the costs of applications under this act.

Compare with the provisions of the above section the more limited provisions of sect. 34 of the S. E. Act, 1877 (*ante*, p. 639), and the note thereto.

Regulations respecting investment, devolution, and income of securities, &c.

22.—(1.) Capital money arising under this act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the court shall be made on the application of the tenant for life, or of the trustees.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(5.) Capital money arising under this act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this act. 45 & 46 Vict. c. 38, s. 22.

The option referred to in sub-sect. 1 cannot be exercised by the tenant for life unless there are trustees, who must accordingly be appointed before completion (*Hatten* v. *Russell*, 38 Ch. D. 345; *Mogridge* v. *Clapp*, 1892, 3 Ch. 400; *Re Fisher and Grazebrook*, 1898, 2 Ch. 660). The discretion of the tenant for life as to what investments should be made of capital money, if exercised *bonâ fide*, cannot be controlled by the trustees or the court (*Re Coleridge*, 1895, 2 Ch. 704). But the trustees are not bound to invest on mortgage until they are themselves satisfied that the "direction" of the tenant for life has been given upon proper (1) report as to value, (2) investigation of title, and (3) advice as to the form of mortgage (*Re Hotham, Hotham* v. *Doughty*, 1902, W. N. 148). They are entitled to select their own brokers (*Re Cleveland*, 1902, 2 Ch. 350).

Where money has been paid into court, it may be paid out to the trustees of the settlement (S. L. Act, 1890, s. 14, *post*, p. 716). See before the last-mentioned act *Cookes* v. *Cookes* (34 Ch. D. 498).

Trustees under this act who have received capital moneys will not be authorized to transmit the same abroad for investment without the consent of all persons interested (*Re Lloyd, Edwards* v. *Lloyd*, 54 L. T. 643).

Under sub-sect. 5, money arising from the sale of heirlooms devolves as the heirlooms would have (*Re Marlborough, Marlborough* v. *Marjoribanks*, 32 Ch. Div. 1). And if the money be invested in land, such land will not be subject to the charges to which the other settled land is subject (*Re Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712). Where money arising from sale of part of estate A was applied by a tenant for life in discharge of a mortgage on estate B settled on the same trusts, and on his death the estates devolved on different persons, the owners of estate A had no claim to a charge on estate B (*Re Freme, Freme* v. *Logan*, 1894, 1 Ch. 1). A tenant for life of freeholds, with a testamentary power of appointing them among his children, made a will in exercise of the power, and subsequently granted a lease in consideration of a premium, which was capital money under sect. 4 of the S. L. Act, 1884. On the testator's death the premium did not pass under the appointment (*Re Moses, Beddington* v. *Beddington*, 1902, 1 Ch. 100).

Crown.

Where proceeds of sale of land in the hands of trustees on the death of the tenant for life reverted to the settlor, who died without an heir, the Crown was held entitled to such proceeds as *bona vacantia* (*Re Bond, Panes* v. *A.-G.*, 1901, 1 Ch. 15).

For form of summons under the section, see R. S. L. Act, Forms 9—11, *post*, p. 722.

Investment in land in England.

23. Capital money arising under this act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same.

Settlement of land purchased, taken in exchange, &c.

24.—(1.) Land acquired by purchase, or in exchange, or on partition shall be made subject to the settlement in manner directed in this section.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and

45 & 46 Vict. c. 38, s. 24.

subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge (*m*).

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land.

(*m*) Sub-sect. 5 includes not only charges taking priority over the settlement, but also charges created by the settlement itself (*Re Stamford*, 43 Ch. D. 93). Where the purchase-money of heirlooms was invested in freehold land, the land was held not to be subject to the charges subsisting on the other land comprised in the settlement (*Re Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712).

VII.—Improvements.

Improvements with Capital Trust Money.

Description of improvements authorized by act.

25. Improvements authorized by this act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

45 & 46 Vict. c. 38, s. 25.

(ii.) Irrigation; warping:
(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:
(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:
(v.) Groynes; sea walls; defences against water:
(vi.) Inclosing; straightening of fences; re-division of fields:
(vii.) Reclamation; dry warping:
(viii.) Farm roads; private roads; roads or streets in villages or towns:
(ix.) Clearing; trenching; planting:
(x.) Cottages for labourers, farm-servants, and artizans, employed on the settled land or not:
(xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes:
(xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:
(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:
(xiv.) Tramways; railways; canals; docks:
(xv.) Jetties, piers, and landing-places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:
(xvi.) Markets and market-places:
(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land:
(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid:
(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:
(xx.) Reconstruction, enlargement, or improvement of any of those works.

For other authorized improvements, see S. L. Act, 1890, s. 13, *post*, p. 715; Housing of the Working Classes Act, 1890, s. 74; Agricultural Holdings (England) Act, 1883, s. 29. The improvements authorized by the S. L. Acts were intended to be improvements calculated to render the land more remunerative (*Re Gerard*, 1893, 3 Ch. 262). Under sect. 25

45 & 46 Vict. c. 38, s. 25.

of S. L. Act, 1882, the following improvements have been held authorized. A sea wall (*Re Bethlehem Hospitals*, 30 Ch. D. 541, sub-sect. iv.); fencing (*Re Verney*, 1898, 1 Ch. 508, sub-sect. vi.); farm buildings (*Re Newton*, 1890, W. N. 24; 61 L. T. 787, sub-sect. xi.); re-roofing farm buildings (*Re Verney*, 1898, 1 Ch. 512, sub-sects. xi., xx.; see, however, *Re Newton*, *sup.*); water supply works (*Re Lytton*, 38 Ch. Div. 20, sub-sect. xii.; see, however, *Re Tucker*, 1895, 2 Ch. 468); improvements at a mineral spring (*Re Hotchkin*, 35 Ch. D. 41, sub-sects. xiii., xx.); pumps for mines (*Re Mundy*, 1891, 1 Ch. 399. sub-sects. xix., xx.); reconstructing the drainage of leasehold houses (*Re Thomas*, *Weatherall* v. *Thomas*, 1900, 1 Ch. 319, sub-sects. i., xx.). As to the drainage of a mansion-house, see *Re Houghton* (30 Ch. D. 102); *Re Tucker* (1895, 2 Ch. 468). See also as to drainage works executed under Public Health Acts upon freeholds, *Re Barney*, *Harrison* v. *Barney* (1894, 3 Ch. 562); and upon leaseholds *Re Lever*, *Cordwell* v. *Lever* (1897, 1 Ch. 32); *Re Copland*, *Johns* v. *Carden* (1900, 1 Ch. 326). Even where the settlement authorized the application of income for the purpose, capital moneys were allowed to be applied for improvements (*Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Stamford*, 56 L. T. 484; *Re Thomas*, *Weatherall* v. *Thomas*, 1900, 1 Ch. 323). But where improvement powers in a settlement differed from those in the S. L. Acts, and the tenant for life resorted to the settlement powers, he was bound to continue payments prescribed by them (*Re Sudbury*, *Vernon* v. *Vernon*, 1893, 3 Ch. 74; see *Vine* v. *Raleigh*, 1891, 2 Ch. 25).

The following works have been held not to be within the section:—Repairs (*Clark* v. *Thornton*, 35 Ch. D. 307); drainage of mansion house (*Re Tucker*, 1895, 2 Ch. 468); additions to a mansion to improve its appearance (*Re Gerard*, 1893, 3 Ch. 252); the building of stables (*ib.*); a private chapel (*ib.*); an agent's house (*ib.*); heating apparatus for a mansion (*Re Gaskell*, 1894, 1 Ch. 485); silos (*Re Broadwater*, 53 L. T. 745; 33 W. R. 738).

The making of an absolute order under sect. 55 of the Improvement of Land Act, 1864, is not alone sufficient to show that the particular works are improvements within this section (*Re Newton*, 61 L. T. 787); but the Commissioners' sanction may be evidence of this (*Re Verney*, 1898, 1 Ch. 508).

As to the application of capital money in building in particular, reference should be made to the Settled Land Act, 1890, s. 13, and the note thereto (*post*, p. 715). The general jurisdiction of the court as to the expenditure of money on land has not been ousted by the S. L. Acts (*Re Montagu*, *Derbyshire* v. *Montagu*, 1897, 1 Ch. 685). But they afford a guide as to what expenditure should be allowed (*Re De Teissier*, 1893, 1 Ch. 153). The orders made under the general jurisdiction should be compared with the above section. Thus, as regards the general jurisdiction, the C. A. has laid down that in cases not amounting to salvage the court cannot order money to be raised out of a settled estate and applied in pulling down and rebuilding houses on the estate (*Re Montagu*, *Derbyshire* v. *Montagu*, 1897, 2 Ch. 8). Orders have been made where a case of salvage was established (*Conway* v. *Fenton*, 40 Ch. D. 512; *Re Jackson*, *Jackson* v. *Talbot*, 21 Ch. D. 786; see *Hibbert* v. *Cooke*, 1 Sim. & Stu. 552; *Frith* v. *Cameron*, 12 Eq. 169; *Re Houshold*, 27 Ch. D. 553); and otherwise refused (*Re De Teissier*, *sup.*; *Re De Tabley*, *Leighton* v. *Leighton*, 1896, W. N. 162; *Re Montagu*, *sup.*; *Re Willis*, *W.* v. *W.*, 1902, 1 Ch. 15; *Re Legh*, 1902, 2 Ch. 274; *Re Hawker*, 66 L. J. Ch. 341). Compare also the decisions as to the expenditure on building, &c. of money paid into court under the Settled Estates Act, 1877, *ante*, p. 639. It seems, however, that questions as to the application of capital money under the S. L. Acts must be determined entirely by those acts and not by decisions under other acts (*Re Gerard*, 1893, 3 Ch. 257; compare *Re Aldam*, 1902, 2 Ch. 56).

Approval by Land Commissioners of

26.—(1.) Where the tenant for life is desirous that capital money arising under this act shall be applied in or towards

45 & 46 Vict. c. 38, s. 26.

payment for an improvement authorized by this act, he may submit for approval to the trustees of the settlement, or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

scheme for improvement and payment thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(i.) A certificate of the Land Commissioners (*n*) certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in court, then, after a scheme is approved by the court, the court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement (*o*).

(*n*) Now the Board of Agriculture (52 & 53 Vict. c. 30).

(*o*) Under S. L. Act, 1890, s. 15 (*post*, p. 716, where see note), the court may authorize capital money to be applied for improvements already executed, though no scheme had been previously submitted; (see before last-mentioned act, *Re Hotchkin*, 35 Ch. Div. 41; *Re Broadwater*, 53 L. T. 745).

The trustees may approve a scheme though they have no capital moneys in hand, and, if the works are properly executed at the cost of the tenant for life, they may reimburse the latter out of capital moneys subsequently coming to their hands (*Re Norfolk, Norfolk* v. *Herries*, 1900, 1 Ch. 461; compare *Re Lisburne*, 1901, W. N. 91). But the court will not, before the works are executed, make a prospective order under sub-sect. 2 (iii) (*Re Millard*, 1893, 3 Ch. 116).

If the trustees do not approve the scheme it may be submitted to the court, and the court may authorize the trustees to comply (*Clarke* v. *Thornton*, 35 Ch. D. 313).

During a tenant for life's minority trustees may prepare and approve their own schemes (*Re Greys Court*, 1901, W. N. 60). Where the money was in court and the infant tenant in tail appeared, the court, though there were no trustees, authorized a payment under this section (*Clarke* v. *Thornton*, 35 Ch. D. 316). Where a scheme had been approved, and in

45 & 46 Vict. c. 38, s. 26.

carrying it out additional expense was of necessity incurred, it was allowed out of capital money (*Re Lytton's Will*, 38 Ch. Div. 20).

As regards land improvement charges, this section was held not to be retrospective (*Re Knatchbull*, 27 Ch. D. 349), but see now S. L. Act, 1887, *post*, p. 710, and cases there quoted. For forms under this section, see R. S. L. Act, Forms 12—16 (*post*, p. 723).

Concurrence in improvements.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this act, or in contributing to the cost thereof.

Obligation on tenant for life and successors to maintain, insure, &c.

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

Improvements effected by means of land improvement charges are within this section (S. L. Act, 1887, s. 2, *post*, p. 711).

45 & 46 Vict. c. 38, s. 29.

Execution and Repair of Improvements.

Protection as regards waste in execution and repair of improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

Improvement of Land Act, 1864.

Extension of 27 & 28 Vict. c. 114, s. 9.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that act, but only as regards applications made to the Land Commissioners after the commencement of this act, all improvements authorized by this act.

VIII.—Contracts.

Power for tenant for life to enter into contracts.

31.—(1.) A tenant for life—

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this act; and any such consideration, if paid in money, shall be capital money arising under this act; and

(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this act; and

(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

45 & 46 Vict. c. 38, s. 31.

(v.) May enter into a contract for or relating to the execution of any improvement authorized by this act, and may vary or rescind the same; and

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4.) Any preliminary contract under this act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

On a summons under this section nothing can be decided against persons not parties to the contract (*Re Ailesbury*, 1893, W. N. 140).

A tenant for life may convey so as to effectuate a contract made by his predecessor (S. L. Act, 1890, s. 6, *post*, p. 712). In connection with sub-sect. (4), see Conv. Act, 1882, s. 4 (*ante*, p. 613); and in connection with sub-sects. (5) and (6), see *Re Cleveland* (1902, 2 Ch. 352).

For form of summons, see R. S. L. Act, Form 17 (*post*, p. 724).

IX.—Miscellaneous Provisions.

Application of money in court under Lands Clauses and other acts. 8 & 9 Vict. c. 18. 23 & 24 Vict. c. 106. 32 & 33 Vict. c. 18. 40 & 41 Vict. c. 18.

32. Where, under an act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other act, public, local, personal, or private, money is at the commencement of this act in court, or is afterwards paid into court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the act under which the money is in court, that money may be invested or applied as capital money arising under this act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this act) according to the same procedure, as if the modes of investment or application authorized by this act were authorized by the act under which the money is in court.

Orders have been made under this section for payment out to trustees of money which was in court under the Lands Clauses Act (*Re Harrop*, 24 Ch. D. 717; *Re Rutland*, 31 W. R. 947); under a local act (*Re Wright*, 24 Ch. D. 662; *Re Rathmines*, 15 L. R. Ir. 576); or under a private estates act (*Re Bolton*, 52 L. T. 728). Compare the cases quoted, *ante*, pp. 639, 675. In the last case the court declined to direct the trustees to give notice of the investments to the remaindermen. Purchase-money of

lands belonging absolutely to a charity, in court under the Lands Clauses Act, was held within this section (*Re Byron's Charity*, 23 Ch. D. 171; *Re Bethlehem Hospitals*, 30 Ch. D. 541). Similarly purchase money of glebe land (*Ex p. Castle Bytham*, 1895, 1 Ch. 348). Money which under a power may be laid out in the purchase of land is within the section (*Re Soltau*, 1898, 2 Ch. 629). The court has under this section absolute discretion as to costs (*Re Hanbury*, 31 W. R. 784; 52 L. J. Ch. 687), and the costs will in general be paid by the corporation taking the land (*Ib.*; *Re Harrop*, 24 Ch. D. 717). **45 & 46 Vict. c. 38, s. 32.**

As to the bearing of this section on the procedure under the S. E. Act, 1877, relating to the examination of married women, see *Re Arabin* (52 L. T. 728).

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this act. **Application of money in hands of trustees under powers of settlement.**

This section has been held to apply to money bequeathed to trustees in trust to lay out the same in land to be settled (*Re Mackenzie*, 23 Ch. D. 750; *Re Maberly*, *Maberly* v. *Maberly*, 33 Ch. D. 455; *Re Mundy*, 1891, 1 Ch. 399). The words "money liable to be laid out in the purchase of land," mean money subject to some disposition under which it may be laid out in the purchase of land (*Re Soltau*, 1898, 2 Ch. 632). And the section has been held to apply to money which, under a power, might be applied in the purchase of land generally (*Ib.*); or of particular land (*Re Hill*, *Hill* v. *Pilcher*, 1896, 1 Ch. 962); or of freehold ground rents (*Re Thomas*, *Weatherall* v. *Thomas*, 1900, 1 Ch. 319). Also to a sinking fund formed by the tenant for life under a provision in the settlement to repay money raised for improvements (*Re Sudbury*, *Vernon* v. *Vernon*, 1893, 3 Ch. 74). Also to money ordered to be applied under sect. 34 of the S. E. Act, 1877 (*Re Tennant*, 40 Ch. D. 594; see *Re Tesseyman*, 1897, W. N. 168; 77 L. T. 484); and to money in court in an administration action, liable under the settlement to be laid out in land (*Clarke* v. *Thornton*, 35 Ch. D. 312; see *contra*, *Burke* v. *Gore*, 13 L. R. Ir. 367).

When the tenant for life is an infant the trustees may, under sect. 60 (*post*, p. 702), exercise the option given by this section to the tenant for life (*Re Newcastle*, 24 Ch. D. 140). Where there was no tenant for life, purchase-money arising under the S. E. Act, 1877, was ordered by the court to be applied as capital money (*Re Tesseyman*, 1897, W. N. 168; 77 L. T. 484). The tenant for life can direct how the moneys are to be invested or applied (*Re Gee*, *Pearson-Gee* v. *Pearson*, 1895, W. N. 90; 64 L. J. Ch. 606).

34. Where capital money arising under this act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the court, as the case may be, and in the case of the court on the application of any party interested in that money, may, notwithstanding anything in this act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have **Application of money paid for lease or reversion.**

45 & 46 Vict. c. 38, s. 34.

had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

This section is substantially identical with sect. 74 of the Lands Clauses Act, 1845, and decisions under that act have been treated as authorities on this section (*Cottrell* v. *Cottrell*, 28 Ch. D. 628). On a sale of leaseholds the tenant for life was only allowed during the leasehold term an income equal to the rent previously received by him (*Ib.*; see *Re Griffith*, 49 L. T. 161). So in the case of a sale of ground rents (*Re Bowyer*, 1892, W. N. 48; and see *Askew* v. *Woodhead*, 14 Ch. D. 27). This section does not apply to chattels which are sold under sect. 37 (*Re Marlborough*, *Marlborough* v. *Marjoribanks*, 30 Ch. D. 133).

For form of summons, see R. S. L. Act, Form 18 (*post*, p. 724).

Cutting and sale of timber, and part of proceeds to be set aside.

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this act, and the other fourth part shall go as rents and profits.

Proceeds of sale of timber were applied as directed by this section (*Re Newcastle*, 1883, W. N. 99). Where, however, a tenant for life had obtained the consent of the trustees to a sale of the settled land with the timber, but not any consent to cutting the timber, he was not entitled to any part of the purchase-money of the timber (*Re Llewellin*, *Llewellin* v. *Williams*, 37 Ch. D. 317).

As between the real and personal representatives of the remainderman there is no equity for re-conversion in the case of proceeds of timber cut under order of the court (*Hartley* v. *Pendarves*, 1901, 2 Ch. 498).

For form of summons, see R. S. L. Act, Forms 6, 7 (*post*, p. 721).

Proceedings for protection or recovery of land settled or claimed as settled.

36. The court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

Under this section the costs of proceedings prosecuted before the House of Lords to establish a claim to an earldom were paid out of the settled property (*Re Aylesford*, 32 Ch. D. 162); also, under the general jurisdiction of the court, the costs of parliamentary opposition previous to 1883 (*Re Ormrod*, 1892, 2 Ch. 318).

The above section is somewhat wider than sect. 17 of the S. E. Act, 1877, which is now repealed (S. L. Act, 1882, s. 64, *post*, p. 706). As to the repealed section, see *Re Willan* (45 L. T. 745); *Re De la Warr* (16 Ch. D. 589).

Heirlooms.

37.—(1.) Where personal chattels are settled on trust so as to

devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them. 45 & 46 Vict. c. 38, s. 37.

(2.) The money arising by the sale shall be capital money arising under this act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this act directed with respect to other capital money arising under this act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the court.

In selling under this section a tenant for life is a trustee, and regard must be had to the interests of all entitled (*Re Radnor*, 45 Ch. Div. 402). The interest, however, of anyone liable to be cut off by a tenant in tail is entitled to little weight (*Ib.* 424); all the circumstances must be considered (*Ib.* 416; *Re Beaumont*, 58 L. T. 916); including the intention of the settlor, and the wishes of the remaindermen (*Re Hope, De Cetto* v. *Hope*, 1899, 2 Ch. 691; see as to "sentiment," *Ib.* 688). The tenant for life must make out a case for the sale (*Ib.* 689). The court would not sanction a sale proposed wantonly or maliciously (*Re Radnor*, 45 Ch. D. 413); nor a sale without any colour of necessity (*Re Marlborough, Marlborough* v. *Marjoribanks*, 32 Ch. Div. 4). Incumbrances created by the tenant for life on his interest should not, as a rule, be taken into account (*Re Radnor*, 45 Ch. D. 410; *Re Beaumont*, 58 L. T. 918; see *Re Hope, De Cetto* v. *Hope*, 1899, 2 Ch. 679).

A sale of heirlooms cannot be sanctioned *ex post facto* (*Re Ames, A.* v. *A.*, 1893, 2 Ch. 479). Chattels settled to devolve with a title were ordered to be sold where they were useless and a cause of expense (*Re Rivett-Carnac*, 30 Ch. D. 136; see *Re Houghton, Ib.* 102). Where heirlooms were directed to be kept in a certain house, an order for sale of the house was refused, without some direction as to the disposal of these heirlooms. These were subsequently ordered to be sold (*Re Brown*, 27 Ch. D. 179; see *Re Wortham*, 75 L. T. 293). An order has been made for sale of some chattels, and removal of the remainder to another mansion (*Browne* v. *Collins*, 62 L. T. 566). On a sale of heirlooms a tenant for life may be given leave to bid (*Re Brown, sup.*).

Trustees with a power of sale over land are trustees for the purposes of this act, including the sale of heirlooms (*Constable* v. *Constable*, 32 Ch. D. 233). Moneys arising from the sale of heirlooms may be applied in discharge of incumbrances on the settled land (*Re Marlborough, sup.*); or in payment for improvements (*Re Houghton*, 30 Ch. D. 102); or in payment for repair of other heirlooms (*Re Waldegrave, Waldegrave* v. *Selborne*, 81 L. T. 632). They were placed to a separate account (*Browne* v. *Collins, sup.*). Land purchased with the proceeds of sale of heirlooms was held not subject to the charges subsisting on the other settled land (*Re Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712).

For form of summons, see R. S. L. Act, Forms 6 and 7 (*post*, p. 721).

X.—Trustees.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this act, or where in any other case it is Appointment of trustees by court.

45 & 46 Vict. c. 38, s. 38.

expedient, for purposes of this act, that new trustees of a settlement be appointed, the court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for the purposes of this act (*p*).

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this act become and be the trustees or trustee of the settlement (*q*).

(*p*) The provisions with reference to the appointment of new trustees contained in the Conv. Act, 1881, ss. 31 *et seq.*, applied to trustees for the purposes of the S. L. Acts (S. L. Act, 1890, s. 17; see before that act, *Re Wilcock*, 34 Ch. D. 508; *Re Kane*, 21 L. R. Ir. 112). See now Trustee Act, 1893, ss. 10, 47, *post*.

As to who are "trustees of a settlement within the definition in this act," see sect. 2 (8) (*ante*, p. 659), and S. L. Act, 1890, s. 16, (*post*, p. 716). The trustees are intended to be a check on the tenant for life; and accordingly the solicitor of the tenant for life will not be appointed (*Re Kemp*, 24 Ch. Div. 485; *Wheelwright* v. *Walker*, 23 Ch. D. 763; *Re Stamford*, *Payne* v. *Stamford*, 1896, 1 Ch. 288); unless as a matter of convenience, as where he is already one of the trustees of a deed forming part of the settlement (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 360); nor will the tenant for life himself be appointed, nor a person who may become a tenant for life (*Re Harrop*, 24 Ch. D. 719; see *Re Jackson*, 1902, 1 Ch. 258). The court refused to appoint two persons related to each other (*Re Knowles*, 27 Ch. D. 707; see, however, *Re Wells*, 48 L. T. 859; 31 W. R. 764). The existing trustees of the instrument creating the settlement were appointed (*Re Morgan*, 24 Ch. D. 114; see *Re Harrop*, *id.* 717; *Re Kemp*, *id.* 487); but they will not necessarily be appointed (*Re Nicholas*, 1894, W. N. 165).

Where an infant domiciled in a British colony was deemed to be tenant for life (sect. 59, *post*, p. 702), persons domiciled in the same colony were appointed trustees (*Re Simpson*, 1897, 1 Ch. 256; see *Re Lloyd*, *Edwards* v. *Lloyd*, 54 L. T. 643).

It would seem that on an appointment of trustees under this section the court has no jurisdiction to place restrictions on the exercise of their powers (*Re Dudley*, 35 Ch. D. 343; see note to sect. 60, *post*, p. 702). Trustees have been appointed under the following circumstances:—Where they were required for the purpose of receiving notices under sect. 45 (*Wheelwright* v. *Walker*, 23 Ch. D. 763; *Re Taylor*, 49 L. T. 420; see *Re Bentley*, *Wade* v. *Wilson*, 33 W. R. 610; *Williams* v. *Jenkins*, 1894, W. N. 176); or for receiving out under sect. 21 (ix.), money paid into court under the Lands Clauses Act (*Re Wright*, 24 Ch. D. 662; *Re Belfast Improvement Acts*, *Exp. Reid*, 1898, 1 I. R. 1); or when the tenant for life was an infant, see sect. 60 (*Re Morgan*, 24 Ch. D. 114; *Re Price*, *Leighton* v. *Price*, 27 Ch. D. 552). Trustees were appointed of a compound settlement consisting of several instruments (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; *Re Mundy and Roper*, 1899, 1 Ch. 298). The court is not bound to appoint trustees if satisfied that a sale is impossible (*Williams* v. *Jenkins*, 1894, W. N. 176). And the court has refused to appoint trustees to enable an investment to be made under sect. 33, which was not authorized by the will and might interfere with its objects (*Burke* v. *Gore*, 13 L. R. Ir. 367). A reference to chambers was directed (*Re Carne*, 1899, 1 Ch. 330).

(*q*) Trustees appointed under this section can, under sect. 40, give a good discharge for money paid to them (*Cookes* v. *Cookes*, 34 Ch. D. 502). 45 & 46 Vict. c. 38, s. 38.

On an original appointment of trustees under this section no duty is chargeable (*Re Potter*, 1889, W. N. 69; see *Re Kennaway*, *id.* p. 70).

For form of summons, see R. S. L. Act, Form 19 (*post*, p. 724). As to the form of order generally, see *Re Harrop* (24 Ch. D. 719); *Re Simpson* (1897, 1 Ch. 256); Seton, 6th ed. 1825; and in the case of separate trustees of several settlements created by one will, *Re Skerritt* (1899, W. N. 240). An order appointing new trustees was drawn up *nunc pro tunc* where a trustee died before the drawing up (*Re Jones*, *Bullis* v. *Jones*, 1891, W. N. 114).

Number of trustees to act.

39.—(1.) Notwithstanding anything in this act, capital money arising under this act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

(2.) Subject thereto, the provisions of this act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

A power in a settlement to "the trustees or trustee" to receive and give receipts was held to authorize a sole surviving trustee to receive capital money (*Re Garnett Orme and Hargreave*, 25 Ch. D. 595).

Trustees' receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this act, or that no more than is wanted is raised.

Under this section, trustees appointed under sect. 38 can give a good discharge (*Cookes* v. *Cookes*, 34 Ch. D. 498; *Hatten* v. *Russell*, 38 Ch. D. 342; *Pyne* v. *Phillips*, 1895, W. N. 8). Compare the provision as to trustees' receipts, Trustee Act, 1893, s. 20 (*post*).

Protection of each trustee individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

As to the indemnity of trustees generally, see note to Trustee Act, 1893, s. 24, *post*, p. 762.

45 & 46 Vict. c. 38, s. 42.

Protection of trustees generally.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

The trustees have no such duty to control the tenant for life in the case of a sale as would make them liable if it was an improper one. But they may properly commence proceedings in the case of a sale they think improvident (*Hatten* v. *Russell*, 38 Ch. D. 344); and ought to do so in the case of a fraudulent sale (*Wheelwright* v. *Walker*, 23 Ch. D. 762). They were intended to impose a check upon the powers conferred on the tenant for life (*Re Kemp*, 24 Ch. Div. 487; *Re Hotchkin*, 35 Ch. D. 44). On a summons by the tenant for life desiring to exercise some power, they should not as a rule support the application, but hold an even hand (*Re Hotchkin*, 35 Ch. Div. 43; *Re Broadwater*, 53 L. T. 745). In one case when they appeared by the same counsel as the tenant for life on an appeal which was dismissed, they were not given their costs out of the estate (*Re Broadwater*, *sup.*). A trustee, who is respondent to an appeal by a tenant for life, may be heard in support of the appeal (*Re Ailesbury*, 1892, 1 Ch. 526).

In the case of a purchase, exchange, partition, or lease of land, trustees have a special protection under the above section. In the case of an investment on mortgage of capital money under sect. 21 (1) (*ante*, p. 673) and sect. 22 (2) (*ante*, p. 676), the trustees must satisfy themselves that the "direction" of the tenant for life has been given upon proper (1) report as to value, (2) investigation of title, and (3) advice as to the form of mortgage (*Re Hotham*, *Hotham* v. *Doughty*, 1902, W. N. 148).

Trustees' reimbursement.

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

See Trustee Act, 1893, s. 24 (*post*), and note thereto.

Reference of differences to court.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this act, or respecting any matter relating thereto, the court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the court thinks fit.

See the cases quoted under sect. 42, *sup.*; and, as to costs, the note to sect. 46, *post*, p. 691. For form of summons, see R. S. L. Act, Form 20, *post*, p. 724.

Notice to trustees.

45.—(1.) A tenant for life when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice

of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same. 45 & 46 Vict. c. 38, s. 45.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

No notice need be given in respect of a lease not exceeding twenty-one years (S. L. Act, 1890, s. 7, *post*, p. 712). As to the nature of the notice and as to waiver of it, see S. L. Act, 1884, s. 5 (*post*, p. 708), which section, however, does not in terms apply to a mortgage or charge. As to notice in cases to which the section does not apply, see *Re Ray* (25 Ch. D. 464).

A notice under this section is good if given before completion (*Marlborough* v. *Sartoris*, 32 Ch. D. 621). No notice need be given where persons have been appointed under sect. 60 to carry out a sale (*Re Dudley*, 35 Ch. D. 338). The committee of a lunatic cannot give a notice without leave of the court (*Re Ray*, 25 Ch. D. 464).

As between the tenant for life and a purchaser from him, the notice is a matter with which the purchaser is not concerned (*Marlborough* v. *Sartoris*, 32 Ch. D. 623; *Mogridge* v. *Clapp*, 1892, 3 Ch. 395; see *Re Fisher and Grazebrook*, 1898, 2 Ch. 661). As to whether a purchaser can safely complete who has actual knowledge that no notice has been given, see *Hatten* v. *Russell* (38 Ch. D. 344); *Mogridge* v. *Clapp* (1892, 3 Ch. 396, 401; *Re Fisher and Grazebrook*, *sup.*). Where a tenant by the curtesy granted a building lease, as absolute owner, there being no trustees for the purpose of the S. L. Act, the lessee got a good selling title, being protected by sub-sect. 3 of this section (*Mogridge* v. *Clapp*, 1892, 3 Ch. 382; see *Chandler* v. *Bradley*, 1897, 1 Ch. 315).

As between the tenant for life and a remainderman, the tenant for life has been restrained from selling until proper notices had been given (*Wheelwright* v. *Walker*, 23 Ch. D. 752; *Re Bentley*, *Wade* v. *Wilson*, 33 W. R. 610).

XI.—Court; Land Commissioners; Procedure.

Regulations respecting payments into court, applications, &c.

46.—(1.) All matters within the jurisdiction of the court under this act, shall, subject to the acts regulating the court, be assigned to the Chancery Division of the court.

(2.) Payment of money into court effectually exonerates therefrom the person making the payment.

(3.) Every application to the court shall be by petition, or by summons at chambers.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life (*r*).

45 & 46 Vict. c. 38, s. 46.

(5.) On any application notice shall be served on such persons, if any, as the court thinks fit.

(6.) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement (*s*).

39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68.

(7.) General rules for purposes of this act shall be deemed rules of court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

(8.) The powers of the court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and rules for regulating proceedings in that court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine (*t*).

(9.) General rules, and rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this act, to take effect on or after the commencement of this act (*u*).

(10.) The powers of the court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this act mentioned, not exceeding in value five hundred pounds, be exercised by any county court within the district whereof is situate any part of the land which is to be dealt with in the court, or from which the capital money to be dealt with in the court arises under this act, or in connexion with which the personal chattels to be dealt with in the court are settled (*x*).

(*r*) As to service, see R. S. L. Act, Nos. 4, 5, and 6, *post*, p. 717.

Sub-sect. (6). Costs.

(*s*) Sub-sect. 6 gives the court discretion as to costs of parties to applications under the act; and sect. 47 (*post*) mentions the sources from which such costs may be paid. There are also special provisions as to costs in sect. 32, *ante*, p. 684 (see *Re Hanbury*, 31 W. R. 784), sect. 36, *ante*, p. 686, and sect. 44, *ante*, p. 690. In all cases not provided for by the act or rules, the existing practice of the court as to costs applies to proceedings under the act (S. L. Act Rules, No. 15, *post*, p. 719). Questions under the act have been decided in specific performance actions, where the rules as to costs in those actions have been followed (*Hatten* v. *Russell*, 38 Ch. D. 334; *Marlborough* v. *Sartoris*, 32 Ch. D. 616). In one case an action was brought by a tenant for life against trustees and others to determine questions as to his title to sell under this act, in which he was given party and party costs (*Sebright* v. *Thornton*, 1885, W. N. 176; where see as to costs of mortgagees). As to costs of actions commenced by originating summons, in which questions under the act were determined, see *Re Atkinson*, *Atkinson* v. *Bruce*, (30 Ch. D. 613); *Re Strangways*, *Hickley* v. *Strangways*

(34 Ch. D. 433); *Re Llewellin, Llewellin* v. *Williams* (37 Ch. D. 328); *Re Powell, Allaway* v. *Oakley* (1884, W. N. 67). 45 & 46 Vict. c. 38, s. 46.

The costs of a summons taken out in an administration action to decide questions under this act may be made costs in that action (*Constable* v. *Constable*, 54 L. T. 610; see *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540), or may be paid out of the estate (*Taylor* v. *Poncia*, 25 Ch. D. 651).

In the case of ordinary applications under the act, only the costs of a summons are to be allowed unless a petition be directed by the judge (S. L. Act Rules, No. 2, *post*, p. 717). The costs of petitions were allowed in *Re Houghton* (30 Ch. D. 102); *Re Bethlehem Hospitals* (30 Ch. D. 541, where see judgment).

As regards summonses, the costs of all parties of a summons by tenant for life, either wholly or partially successful, were paid out of the settled estate (*Re Morgan*, 24 Ch. D. 117; *Re Paget*, 30 Ch. D. 165; see *Re Ailesbury*, 1892, 1 Ch. 548). For form of usual order in such case, see S. L. Act Rules, Form 3, *post*, p. 720. The tenant for life, however, may have to pay his own costs (*Re Tucker*, 1895, 2 Ch. 468), or the costs of the mortgagees of his life estate (*Re Smith*, 1891, 3 Ch. 76; *Sebright* v. *Thornton*, 1885, W. N. 176; compare *Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 375). The costs of an unsuccessful summons by tenant for life may be paid out of the estate (*Re Knatchbull*, 27 Ch. D. 349; see *Re James*, 51 L. T. 596; *Re Sebright*, 33 Ch. D. 442); but the tenant for life may, if not successful, have to pay all the costs, if there is no fund available for the purpose (*Re Beaumont*, 58 L. T. 916; see *Re Bristol*, 1893, 3 Ch. 161); or if the fund is held not within the S. L. Acts (*Re Bath and Wells*, 1899, 2 Ch. 138). The costs of an unsuccessful summons by persons claiming to be tenant for life were paid out of the estate (*Re Horne*, 39 Ch. D. 84; see *Re Atkinson, Atkinson* v. *Bruce*, 30 Ch. D. 613).

Where on a summons taken out by the trustees it was decided that a tenant for life could not sell under the act, the tenant for life had to pay his own costs (*Re Collinge*, 36 Ch. D. 519). Where two trustees appeared by different counsel on opposite sides, both, having acted reasonably, were given costs out of the estate (*Re Ailesbury*, 1892, 1 Ch. 548). Trustees, however, who appeared by the same counsel as the tenant for life, on an application by him, had to pay their own costs (*Re Broadwater*, 53 L. T. 745).

Under S. L. Act Rules, No. 14, *post*, p. 719, a person paying capital money into court may deduct costs of paying in (see Form 10). A purchaser taking out a summons in an action for leave to pay the purchase-money into court was allowed to deduct his costs (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540).

Costs of appeal.

All the costs of an appeal were given out of the estate when it was a case proper to be decided by the Appeal Court (*Re Jones*, 26 Ch. Div. 744; see *Re Ailesbury*, 1892, 1 Ch. 548). A person claiming to be tenant for life had to pay all the costs of an unsuccessful appeal (*Re Strangways, Hickley* v. *Strangways*, 34 Ch. Div. 433). A tenant for life paid his own costs of an unsuccessful appeal, and a remainderman paid his own costs, the trustees being given costs out of the estate (*Re Sebright*, 33 Ch. D. 445). An unsuccessful appeal by a tenant for life was dismissed with costs (*Re Hope, De Cetto* v. *Hope*, 1899, 2 Ch. 679). And where the trustees and remainderman appealed against an order sanctioning a sale under sect. 37, the appeal was dismissed with costs (*Re Radnor*, 45 Ch. Div. 423).

A tenant for life successfully applying to be let into possession was, in one case, not ordered to pay the costs of remaindermen (*Re Newen, Newen* v. *Barnes*, 1894, 2 Ch. 297; see, however, *Re Hunt, Pollard* v. *Geake*, 1900, W. N. 65; 1901, W. N. 144). In another case where no complaint was made against the trustees he had to pay their costs as well as his own (*Re Bagot, Bagot* v. *Kittoe*, 1894, 1 Ch. 177).

Scale.

Costs were allowed on the higher scale in *Re Chaytor* (25 Ch. D. 651).

Charges and expenses.

Under the words "charges and expenses," the expenses of an abortive attempt to sell have been ordered to be paid out of the settled property (*Re Smith*, 1891, 3 Ch. 65).

45 & 46 Vict. c. 38, s. 46.

(*t*) The powers of the High Court may, as regards land and estates in the County Palatine of Durham, be exercised by the Palatine Court (52 & 53 Vict. c. 47, s. 10).

(*u*) General rules as to applications in the High Court made under this section are given p. 717, *post*.

(*x*) As to applications in the county court, see County Court Rules, 1889, Ord. 38.

Payment of costs out of settled property.

47. Where the court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the court, be raised and paid out of capital money arising under this act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the court thinks fit.

See general note as to costs under sect. 46 (*ante*, p. 692), *Re Smith* (1891, 3 Ch. 165), *Williams* v. *Jenkins* (1894, W. N. 176; 13 R. 92); and see form of summons in *Re Aylesford* (32 Ch. D. 163). See also *Hamilton* v. *Tighe* (1898, 1 Ir. R. 123).

Constitution of Land Commissioners; their powers, &c.

27 & 28 Vict. c. 114.

48.—(6.) The Land Commissioners shall, by virtue of this act, have, for the purposes of any act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any act making provision as last aforesaid; and the provisions of any act relating to fees or to security for costs to be taken in respect of the business transacted under the acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any act, public,

local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them. 45 & 46 Vict. c. 38, s. 48.

Sub-sects. 1—5 inclusive, constituting the Land Commissioners for England, have been repealed by Board of Agriculture Act, 1889, s. 13. By the same act the powers and duties of the Land Commissioners for England under this act have been transferred to the Board of Agriculture (see sects. 2 and 11 of the last-mentioned act).

Filing of certificates, &c. of commissioners.

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

XII.—Restrictions, Savings, and General Provisions.

Powers not assignable; contract not to exercise powers void.

50.—(1.) The powers under this act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

As to assignments or charges in consideration of marriage, or by way of family arrangement, see S. L. Act, 1890, s. 4, *post*, p. 712. The complete destruction of a life estate, as on a disentailment and resettlement where the old life estate is not restored, does not destroy the powers of the tenant for life as tenant for life of the original settlement (*Re Mundy and Roper*, 1899, 1 Ch. 275, 296). The bankruptcy of a tenant for life does not prevent the exercise of his powers under this act (*Re Mansel*, 1884, W. N. 209; *Re Ailesbury*, 1892, 1 Ch. 535). The court has refused to sanction the sale of a mansion-house without the consent of the tenant for life's mortgagees (*Re Sebright*, 33 Ch. D. 429); which they are free to

45 & 46 Vict. c. 38, s. 50.

give or withhold (*Cardigan* v. *Curzon-Howe*, 40 Ch. D. 341; see *Re Ailesbury*, 1893, W. N. 140).

The tenant for life's conveyance is subject to charges as mentioned in sect. 20, *ante*, p. 672, where see note.

As to a tenant for life's covenant, see *Re Hale and Smyth* (55 L. T. 151); quoted *ante*, p. 661.

In connection with the latter part of sub-sect. (1), see sect. 2 (7) (*ante*, p. 658); and compare 23 & 24 Vict. c. 145, s. 31 (*ante*, p. 543), and the note as to the extinguishment of powers appendant (*ante*, p. 319).

Prohibition or limitation against exercise of powers, void.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

This section was not intended to enlarge a particular estate not properly an estate for life (*Re Hazle*, 29 Ch. Div. 84). To make it apply there must be found in the settlement a limitation, which but for the attempted prohibition would constitute a tenant for life within this act (*Re Atkinson*, *Atkinson* v. *Bruce*, 31 Ch. Div. 581).

A condition of forfeiture for non-residence does not prevent a lease of a mansion-house (*Re Thompson*, 21 L. R. Ir. 109), or a sale (*Re Paget*, 30 Ch. D. 162; see *Re Brown*, 27 Ch. D. 179; and compare *Re Eastman*, 68 L. J. Ch. 122; 1898, W. N. 170); and does not attach to the proceeds of sale (*Re Paget*, *sup.*). But such a condition is not rendered void under this section unless it interferes with the exercise of the powers of the tenant for life (*Re Haynes*, *Kemp* v. *Haynes*, 37 Ch. D. 307; *Re Trenchard*, *T.* v. *T.*, 1902, 1 Ch. 378). A provision of this nature was held void under the section (*Re Dalrymple*, *Bircham* v. *Springfield*, 49 W. R. 627).

A proviso depriving a tenant for life of real estate of certain benefits in personal estate in the event of his "selling" or becoming "disentitled to the possession of" the real estate is void, whether contained in the settlement of the real estate (*Re Ames*, *A.* v. *A.*, 1893, 2 Ch. 479; see *Re Eastman*, *sup.*), or in the will of a person other than the settlor (*Re Smith*, *Grose Smith* v. *Bridger*, 1899, 1 Ch. 331).

A provision binding the tenant for life to recoup to the trustees money applied by them under the act for improvements would be void under this section (*Re Sudbury*, *Vernon* v. *Vernon*, 1893, 3 Ch. 78).

45 & 46 Vict. c. 38, s. 52.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this act shall not occasion a forfeiture.

Provision against forfeiture.

See note to sect. 51.

Tenant for life trustee for all parties interested.

53. A tenant for life shall, in exercising any power under this act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof, by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

The object of this section is to protect the material interests of the parties entitled, and to prevent the tenant for life from doing anything in the exercise of his powers which will damage those interests (*Re Ailesbury*, 1892, 1 Ch. 540). He should consider not merely pecuniary interests but also sentimental feelings (*Ib.* 536, 541; *Re Hope, De Cetto* v. *Hope*, 1899, 2 Ch. 679). Further, he is bound to exercise his discretion as if he were an independent trustee for himself and all the other members of the family (*Re Radnor*, 45 Ch. Div. 417). He may exercise his powers for his own benefit (*Re Sebright*, 33 Ch. D. 436; *Wheelwright* v. *Walker*, 23 Ch. D. 759); but not for his own benefit solely, or for the benefit of a stranger (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 539; *Re Chawner*, 1892, 2 Ch. 195; *Sutherland* v. *Sutherland*, 1893, 3 Ch. 169; *Middlemas* v. *Stevens*, 1901, 1 Ch. 574). The fact that he gets a benefit is not sufficient to prevent him from exercising the requisite discretion (*Re Stamford*, 56 L. T. 484). And in the absence of reason for supposing the discretion to be unfairly exercised, that discretion ought to prevail (*Re Stamford*, 43 Ch. D. 95; *Re Radnor*, 45 Ch. D. 417; *Re Ailesbury*, 1892, 1 Ch. 531; *Re Coleridge*, 1895, 2 Ch. 707).

The duty imposed by this section on the tenant for life does not affect the title of a purchaser without notice of any breach of such duty (*Re Ailesbury*, 1892, 1 Ch. 536; see *Mogridge* v. *Clapp*, 1892, 3 Ch. 396). But a lease granted by a tenant for life in consideration of a money payment to himself was void (*Chandler* v. *Bradley*, 1897, 1 Ch. 315). So also a lease granted solely for the benefit of his wife (*Sutherland* v. *Sutherland*, 1893, 3 Ch. 169). A tenant for life will be personally answerable for the improper or improvident exercise of his powers (*Re Ailesbury*, 1892, 1 Ch. 536; *Re Marlborough, Marlborough* v. *Marjoribanks*, 32 Ch. D. 14; see *Hatten* v. *Russell*, 38 Ch. D. 345; *Wheelwright* v. *Walker*, 23 Ch. D. 762; *Norton* v. *Johnstone*, 30 Ch. D. 651). And a tenant for life has been restrained from mortgaging one part of the settled land to the prejudice of annuities charged thereon in order to raise money to pay off incumbrances on another part (*Hampden* v. *Buckinghamshire*, 1893, 2 Ch. 531; compare *Re Monson*, 1898, 1 Ch. 427; and other cases quoted under sect. 21, sub-sect. 2, *ante*, p. 675). See as to the bearing of sect. 53 on the payment off out of capital moneys of incumbrances payable (under the trusts of the settlement) out of rents and profits, *Re Knatchbull*, 29 Ch. Div. 588; *Re Richardson, R.* v. *R.*, 1900, 2 Ch. 778.

Under this section a tenant for life has rather the responsibilities than the rights of a trustee (*Re Llewellin, Llewellin* v. *Williams*, 37 Ch. D. 325; see *Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 379; *Re Gerard*, 1893, 3 Ch. 265), and accordingly is not entitled to all costs and expenses (*Sebright* v. *Thornton*, 1885, W. N. 176; *Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 375; see *Re Beck*, 24 Ch. D. 608; *Re Llewellin*, *sup.*). See further, as to the costs of the tenant for life, the note to sect. 21, sub-sect. (x.) (*ante*, p. 675), and the note to sect. 46 (*ante*, p. 692).

General protection of

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good

45 & 46 Vict. c. 38, s. 54.

purchasers, &c.

faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this act.

Where a person pays a sum of money to the tenant for life to obtain a lease he is not protected by this section (*Chandler* v. *Bradley*, 1897, 1 Ch. 315; see also *Sutherland* v. *Sutherland*, 1893, 3 Ch. 193; *Re Handman and Wilcox*, 1902, 1 Ch. 608). But the mere knowledge on the part of a person dealing with the tenant for life that there are no trustees seems not to prevent his being protected by this section (*Mogridge* v. *Clapp*, 1892, 3 Ch. 396, 401; see *Re Fisher and Grazebrook*, 1898, 2 Ch. 661). The section only applies to the grant of a lease, not to a subsequent transfer (*Re Handman and Wilcox*, 1902, 1 Ch. 601).

Exercise of powers; limitation of provisions, &c.

55.—(1.) Powers and authorities conferred by this act on a tenant for life or trustees or the court or the Land Commissioners are exerciseable from time to time.

(2.)—Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(3.) Where any provision in this act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this act.

A tenant for life selling may enter into the usual covenants for title (*Re Ray*, 1896, 1 Ch. 468, 479; see also *Re Llewellin*, *Llewellin* v. *Williams*, 37 Ch. D. 327; *Re Smith*, 1891, 3 Ch. 65).

Saving for other powers.

56.—(1.) Nothing in this act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this act are cumulative (*y*).

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this act, the provisions of this act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this act (*z*).

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon. 45 & 46 Vict. c. 38, s. 56.

(*y*) The restriction in a private act on a trustee's power of sale did not limit the tenant for life's power under this act (*Re Chaytor*, 25 Ch. D. 651). As to the joint operation of powers in the settlement and the powers in the act, see *Re Newcastle* (24 Ch. D. 129); and compare *Re Sudbury, Vernon* v. *Vernon* (1893, 3 Ch. 74). Where an order has already been made under the S. E. Act, 1877, the powers of this act are not cumulative (*Re Poole*, 50 L. T. 585; 32 W. R. 956; see *Re Barrs-Haden*, 49 L. T. 661; 32 W. R. 194).

(*z*) A case of conflict within sub-sect. 2 was held to arise in *Clarke* v. *Thornton* (35 Ch. D. 315), where the statutory power of a tenant for life to have capital money expended in improvements was held to override a power given by the settlement to trustees to apply income for that purpose (see *Re Stamford*, 56 L. T. 484); also in a case where a provision for payment of the rents and profits "after payment thereout of all incidental expenses and outgoings" was held not to prevent the application of capital moneys in reconstructing the drains of leasehold houses (*Re Thomas, Weatherall* v. *Thomas*, 1900, 1 Ch. 319; compare *Re Sudbury, Vernon* v. *Vernon*, 1893, 3 Ch. 74; and see *Re Partington, Reigh* v. *Kane*, 1902, 1 Ch. 711).

It has been said, however, that the provisions referred to in this sub-section are provisions connected with the execution of the power (*e.g.*, consent of a third person) not with the results of such execution (*Lonsdale* v. *Lowther*, 1900, 2 Ch. 697). So a power of leasing given by the settlement and more beneficial in result to the tenant for life was presumed to have been exercised in preference to the statutory power (*Ib.*). The consent of the tenant for life is not necessary to the exercise by trustees of an absolute trust for sale (*Taylor* v. *Poncia*, 25 Ch. D. 646); but was held necessary to the exercise by trustees of a power of sale (*Re Clitheroe*, 31 Ch. Div. 135; *Re Osborne and Bright*, 1902, 1 Ch. 335). An order for sale overrides the necessity for any such consent (*Taylor* v. *Poncia*, *sup.*). Where the tenant for life is an infant, the consent required by sub-sect. 2 may be given by the trustees under sect. 60 (*Re Newcastle*, 24 Ch. D. 140). The consent of one of several persons constituting the tenant for life is sufficient (S. L. Act, 1884, s. 6, *post*, p. 708), but not where the several persons are tenants for life of separate undivided shares (see *Re Osborne and Bright*, *sup.*).

57.—(1.) Nothing in this act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this act. Additional or larger powers by settlement.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this act, unless a contrary intention is expressed in the settlement.

XIII.—Limited Owners generally.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession (*a*), have the powers of Enumeration of other limited

45 & 46 Vict. c. 38, s. 58.

a tenant for life under this act, as if each of them were a tenant for life as defined in this act (namely):

owners, to have powers of tenant for life.

(i.) A tenant in tail, including a tenant in tail who is by act of parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services (*b*):

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event (*c*):

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this act shall bind the Crown (*d*):

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent (*e*):

(v.) A tenant for the life of another, not holding merely under a lease at a rent (*f*):

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose (*g*):

(vii.) A tenant in tail after possibility of issue extinct:

(viii.) A tenant by the curtesy (*h*):

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event (*i*).

(2.) In every such case, the provisions of this act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

Sub-sect. (1).

(*a*) In sub-sect. (1) the words "in possession" are used by way of distinction from in remainder and reversion (*Re Jones*, 26 Ch. Div. 744; *Re Morgan*, 24 Ch. D. 116). So an infant may be "in possession" by his guardian (*Re Morgan, sup.*). But where there was a trust of the whole income for a term for management and accumulation, with a trust after

the determination of the term to settle the land, the life estate under the executory settlement was held to be *in futuro*, and not within this section (*Re Strangways, Hickley* v. *Strangways*, 34 Ch. Div. 423). 45 & 46 Vict. c. 38, s. 58.

(*b*) As to clause (i.), see *Re Bolton* (52 L. T. 728).

(*c*) A case was held within clause (ii.) where there was a trust to pay the income to a person for the maintenance of an infant till twenty-one, then to the infant absolutely, but if he died under twenty-one over (*Re Morgan*, 24 Ch. D. 114; see *Re James*, 51 L. T. 596; 32 W. R. 898).

(*d*) As to the words "base fee," in clause (iii.), see Fines and Recoveries Act, 1833, s. 1 (*ante*, p. 263). A tenant for life of a base fee can sell the fee simple (*Re Morshead*, 1893, W. N. 180).

(*e*) These words do not include a person entitled to receive, if he shall so long live, the rents payable under a lease for years (*Re Hazle*, 29 Ch. Div. 79). As to the reason for the insertion of the words, see *Re Mundy and Roper*, 1899, 1 Ch. 298.

(*f*) Where income was directed to be accumulated during a person's life, the next of kin entitled under the Thellusson Act were held to be within this clause (*Vine* v. *Raleigh*, 1896, 1 Ch. 37). Clause (v.).

(*g*) A person to whom a property is devised so long as he shall reside, and in default over, is within clause (vi.) (*Re Paget*, 30 Ch. D. 161); which has been applied also to a trust to permit a person to occupy a house so long as she desires (*Re Edwards*, 1897, 2 Ch. 412; see *Re Carne*, 1899, 1 Ch. 324; *Re Llanover, Herbert* v. *Freshfield*, 1902, W. N. 149), and to a widowhood interest (*Re Eastman*, 68 L. J. Ch. 122). The words "trust for accumulation" applied where there was an antecedent term supporting such a trust (*Re Clitheroe*, 31 Ch. Div. 141); and include a trust for payment of debts without express direction for accumulation (*Williams* v. *Jenkins*, 1893, 1 Ch. 700; see *Re Richardson, R.* v. *R.*, 1900, 2 Ch. 778; *Re Money-Kyrle, M.* v. *M.*, *Ib.* 839). Where the whole income is during a term directed to be applied in a certain manner or accumulated, a tenant for life who is given an immediate estate subject to the term is within this sub-section (*Re Martyn, Coode* v. *Martyn*, 69 L. J. Ch. 733; 83 L. T. 146; see *Re Woodhouse, Annesley* v. *Woodhouse*, 1898, 1 Ir. R. 69); *secus*, where the life estate only commences after the determination of the term (*Re Strangways, Hickley* v. *Strangways*, 34 Ch. Div. 431). A trust to pay rents during a person's life to him, his wife, and children, or one or more of them, is not within this clause (*Re Atkinson, Atkinson* v. *Bruce*, 31 Ch. Div. 577; see *Re Parry*, 1884, W. N. 43). Clause (vi.).

(*h*) The estate by the curtesy (clause viii.) is deemed to arise under a settlement made by the wife (S. L. Act, 1884, s. 8, *post*, p. 710). For the case of a lease under this act by a tenant by the curtesy, see *Mogridge* v. *Clapp* (1892, 3 Ch. 382); see also *Bates* v. *Kesterton* (1896, 1 Ch. 159); *Re Pocock and Prankerd*, *Ib.* 306. As to an estate by the curtesy generally, see the note, *ante*, p. 371. Clause (viii.).

(*i*) In clause (ix.) "entitled" means entitled according to the limitations of the settlement, without regard to incumbrances (*Re Jones*, 26 Ch. Div. 738). The clause includes a direction to pay surplus rents, after keeping down interest on mortgages (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 525), or expenses under extensive powers of management (*Clarke* v. *Thornton*, 35 Ch. D. 307; see *Re Jones*, 26 Ch. Div. 738; *Re Cookes*, 1885, W. N. 177; *Re Bentley, Wade* v. *Wilson*, 33 W. R. 610). A trust for a married woman for life without power of anticipation and after her death as she should by will appoint and in default to her in fee is within this clause (*Re Pocock and Prankerd*, 1896, 1 Ch. 302). A trust, however, to apply the whole or a part of the income for the maintenance of an infant, the surplus to be accumulated not necessarily for his benefit, does not entitle the infant to the income within this clause (*Re Horne*, 39 Ch. Div. 84). Where trustees have a discretion to pay income to a husband, wife and children, or one or more of them, there is no "direction for payment" to the husband, or the husband and wife, within this clause (*Re Atkinson, Atkinson* v. *Bruce*, 31 Ch. Div. 577). Clause (ix.).

45 & 46 Vict. c. 38, s. 58. Sub-sect. (2).

The effect of sub-sect. (2) is to bring within the act instruments which do not fall within the definition of settlement in sect. 2 (*Re Pocock and Prankerd*, 1896, 1 Ch. 306).

XIV.—Infants; Married Women; Lunatics.

Infant absolutely entitled to be as tenant for life.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this act the land is settled land, and the infant shall be deemed tenant for life thereof.

Under this section an infant was deemed tenant for life when his title had vested, absolutely (*Re Price, Leighton* v. *Price*, 27 Ch. D. 552), or subject to divesting on death under twenty-one (*Re James*, 51 L. T. 596; 32 W. R. 898).

An infant entitled contingently on attaining twenty-one is not "entitled in possession," though there is a trust to apply income for maintenance (*Re Horne*, 39 Ch. D. 84). An interest in land belonging to a partnership which had descended to an infant on the death of one partner was within this section (*Re Wells*, 48 L. T. 859; 31 W. R. 764; see *Re Greenville*, 11 L. R. Ir. 138).

Tenant for life, infant.

60. Where a tenant for life, or a person having the powers of a tenant for life under this act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this act, the powers of a tenant for life under this act may be exercised on his behalf by the trustees of the settlement (*k*), and if there are none, then by such person and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders (*l*).

(*k*) The trustees of the settlement may give, on behalf of the infant, the consent required by sect. 56 (*Re Newcastle*, 24 Ch. D. 140). During the minority of a tenant for life the trustees may prepare and approve their own schemes under sect. 26 (*Re Greys Court*, 1901, W. N. 60). As to trustees exercising the powers of sect. 42 of the Conv. Act, 1881, see *Re Helyar, Helyar* v. *Beckett*, 1902, 1 Ch. 391. It has been suggested that the first part of this section gives the trustees of the settlement unrestricted power to exercise the powers of the tenant for life (*Re Dudley*, 35 Ch. D. 343; see *Re Newcastle*, 24 Ch. D. 140). Where, however, it was necessary to obtain the sanction of the court under sect. 10 (*ante*, p. 668), the court imposed conditions by reason of the infant being nearly of age (*Cecil* v. *Langdon*, 54 L. T. 418; and see *Re Powell, Allaway* v. *Oakley*, 1884, W. N. 67). Where the trustees have already powers of leasing under an order under the S. E. Act, 1877, that order must be suspended before they can exercise the powers given by this act (*Re Poole*, 32 W. R. 956; 50 L. T. 585).

(*l*) Where an infant is entitled to property and there are no trustees of the settlement, two courses appear to be open:—(1) To obtain the appointment of trustees under sect. 38; and (2) to obtain the appointment of persons to exercise the powers of a tenant for life on behalf of the infant. If the first course be adopted the trustees will be within the words "the trustees of the settlement" in the above section (*Re Dudley*, 35 Ch. D. 342); and the court has no jurisdiction to restrict the exercise of their powers (*Ib.* 343). The right order would seem to be to appoint trustees generally (see *Re Morgan*, 24 Ch. D. 117; *Re Simpson, Re Whitchurch*, 1897, 1 Ch. 256). Special directions, however, were given in *Re*

Price, Leighton v. *Price* (27 Ch. D. 552), that the trustees might sell out of court; and in *Re Wells* (48 L. T. 859; 31 W. R. 764) that powers under the particular sections might be exercised. See *Re James* (51 L. T. 596; 32 W. R. 898). 45 & 46 Vict. c. 38, s. 60.

If the second course be adopted the court can restrict the exercise of the powers (*Re Dudley*, 35 Ch. D. 342). The court has refused to appoint under this section a co-owner to exercise the infant's powers for the purpose of a sale (*Re Greenville*, 11 L. R. Ir. 138). Where a person has been ordered to sell under this section no notice to trustees is necessary, and therefore none need be appointed to receive a notice (*Re Dudley*, 35 Ch. D. 338); but the purchase-money must in such a case be paid into court (*Ib.*).

As to leases of an infant's land, see further the note *ante*, p. 628.

For form of summons, see R. S. L. Act, Form 22 (*post*, p. 725).

61.—(1.) The foregoing provisions of this act do not apply in the case of a married woman. Married woman, how to be affected.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this act.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this act.

(4.) The provisions of this act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or intereet arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this act.

A married woman may become entitled as *feme sole* under the following statutes:—Matrimonial Causes Acts, 1857, ss. 21, 25; 1858, ss. 6, 8; and 1878, s. 4; and the M. W. P. Act, 1882 (*ante*, pp. 342 *et seq.*); see *Re Bentley, Wade* v. *Wilson* (33 W. R. 610); *Bates* v. *Kesterton* (1896, 1 Ch. 159).

62. Where a tenant for life, or a person having the powers of a tenant for life under this act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this act; Tenant for life, lunatic.

45 & 46 Vict. c. 38, s. 62. and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

A general authority may be given to the committee to take proceedings under this act to sell (*Re Gaitskell*, 40 Ch. Div. 416). Trustees should be appointed, if there are none, to receive notice under sect. 45 (*Re Taylor*, 49 L. T. 420; 52 L. J. Ch. 728). Notices cannot be given by the committee without the leave of the court (*Re Ray*, 25 Ch. D. 464). On a sale of the fee the committee may be authorised to enter into the covenants usual in a conveyance (*Re Ray*, 1896, 1 Ch. 468; see *Re Fox*, 33 Ch. Div. 37). As to the jurisdiction in lunacy, see now Lunacy Act, 1890, ss. 108, 120; and as to applications in lunacy, see sect. 338.

In the case of a lunatic not so found, the power of leasing vested in him by the S. L. Acts may be exercised by the person appointed to act under sect. 116 of the Lunacy Act, 1890 (*Re Salt*, 1896, 1 Ch. 117); but not his statutory power of sale (*Re Baggs*, 1894, 2 Ch. 416); sect. 53 of the S. L. Act, 1882, not having the result of making him a trustee within sect. 128 of the Lunacy Act, 1890 (*Ib.*).

XV.—Settlement by way of Trusts for Sale.

Provision for case of trust to sell and re-invest in land.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, act of parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this act are for purposes of this act trustees of the settlement.

(2.) In every such case the provisions of this act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises,

and to the land therein comprised, subject and except as in this section provided (that is to say): 45 & 46 Vict. c. 38, s. 63.

(i.) Any reference in this act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(iii.) Capital money arising under this act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

See S. L. Act, 1884, sect. 6 (1) and sect. 7 (*post*, p. 708). Where leave has not been given under the last-mentioned section, trustees for sale can determine how land should be placed on market (*Re Harding*, 1891, 1 Ch. 64). Sect. 11 (*ante*, p. 668) applies to cases within this section (*Re Ridge, Hellard* v. *Moody*, 31 Ch. Div. 504). The only instrument to be considered

45 & 46 Vict. c. 38, s. 63.

the settlement under this section is the instrument which contains the trust for sale (*Re Earle and Webster*, 24 Ch. D. 144). If the only person entitled under that instrument is entitled absolutely, this section has no application (*Ib.*). If the trust for sale is a postponed trust it is not within this section (*Re Horne*, 39 Ch. Div. 84). But where by will or settlement land is subject to an immediate direction for sale the proceeds to be held in trust for one for life with remainders over, then so long as the sale is properly postponed the person entitled to the life interest is tenant for life within this section (*Re Searle, Searle* v. *Baker*, 1900, 2 Ch. 829). Where there is a discretionary power of maintenance, the surplus to be accumulated, no one is beneficially entitled to the income within this section (*Re Horne, sup.*; see *Re Powell, Allaway* v. *Oakley*, 1884, W. N. 67). A married woman equitable tenant for life under a settlement by way of trust for sale was let into possession, and leave was given her to exercise all the powers of a tenant for life except sale and exchange (*Re Bagot, Bagot* v. *Kittoe*, 1894, 1 Ch. 177).

No consent of the tenant for life (see sect. 56) is necessary to a sale by trustees in cases within this section (S. L. Act, 1884, s. 6 (1), *post*, p. 708; *Taylor* v. *Poncia*, 25 Ch. D. 646).

XVI.—Repeals.

Repeal of enactments in schedule.

64.—(1.) The enactments described in the schedule to this act are hereby repealed.

(2.) The repeal by this act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this act.

XVII.—Ireland.

Modifications respecting Ireland.

65.—(1.) In the application of this act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The court shall be her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that court shall, subject to the acts regulating that court, be assigned to the Chancery Division of that court; but general rules under this act for Ireland may direct that those matters or any of them be assigned to the land judges of that division.

(4.) Any deed inrolled under this act shall be inrolled in the record and writ office of that division.

40 & 41 Vict. c. 57.

(5.) General rules for purposes of this act for Ireland shall be deemed rules of court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this act, to take effect on or after the commencement of this act.

(6.) The several Civil Bill Courts in Ireland shall, in addition

to the jurisdiction possessed by them independently of this act, have and exercise the power and authority exerciseable by the court under this act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds. 45 & 46 Vict. c. 38, s. 65.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those courts under this act. 40 & 41 Vict. c. 56.

(8.) Rules and orders for purposes of this act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this act, to take effect on or after the commencement of this act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

THE SCHEDULE.

REPEALS. Sect. 64.

23 & 24 Vict. c. 145, in part.	An act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills	in part; namely,— Parts I. and IV. (being so much of the act as is not repealed by the Conveyancing and Law of Property Act, 1881).
27 & 28 Vict. c. 114, in part.	The Improvement of Land Act, 1864	in part; namely,— Sections seventeen and eighteen: Section twenty-one, from "either by a party" to "benefice) or" (inclusive); and from "or if the land owner" to "minor or minors" (inclusive); and "or circumstance" (twice): Except as regards Scotland.
40 & 41 Vict. c. 18 in part.	The Settled Estates Act, 1877	in part; namely,— Section seventeen.

III.—The Settled Land Act, 1884.

47 & 48 Vict. c. 18.

1. This act may be cited as the Settled Land Act, 1884. 47 & 48 Vict. c. 18, s. 1. Short title.

2. The expression "the Act of 1882" used in this act means the Settled Land Act, 1882. Interpretation.

47 & 48 Vict. c. 18, s. 3. Construction of act.

3. The Act of 1882 and this act are to be read and construed together as one act, and expressions used in this act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein.

Fine on a lease to be capital money.

4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that act.

See *Re Moses, Beddington* v. *B.*, 1902, 1 Ch. 100; and the note, *ante*, p. 677.

Notice under 45 & 46 Vict. c. 38, s. 46, may, as to a sale, exchange, partition, or lease, be general.

5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this act, is not made sufficient by virtue of this act.

As to consents of tenants for life.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that act.

(3.) This section applies to dealings before, as well as after, the passing of this act.

See *Re Harding*, 1891, 1 Ch. 60; *Re Osborne and Bright*, 1902, 1 Ch. 335; and the note, *ante*, p. 699.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:— 47 & 48 Vict. c. 18, s. 7.

Powers given by sect. 63 to be exercised only with leave of the court.

(i.) Those powers are not to be exercised without the leave of the court.

(ii.) The court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given (*m*).

(iii.) The court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

(v.) An order under this section may be registered and re-registered, as a lis pendens, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882" (*n*).

(vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a lis pendens.

(vii.) An application to the court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.

(viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.

(x.) This section is not to affect any dealing which has taken place before the passing of this act, under any trust or power to which this section applies.

(*m*) Leave to sell was given to the tenant for life (*Re Harding*, 1891, 1 Ch. 60). Leave was given to a married woman, equitable tenant for life, to exercise all powers except those of sale and exchange (*Re Bagot, Bagot* v. *Kittoe*, 1894, 1 Ch. 177). The court refused to sanction a "building lease" in which the work agreed to be done was such as a landlord is usually expected to do (*Re Daniell*, 1894, 3 Ch. 503).

(*n*) As to registering a *lis pendens*, see *ante*, p. 499.

47 & 48 Vict. c. 18, s. 8.

Curtesy to be deemed to arise under settlement.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

See S. L. Act, 1882, sect. 58 (1) (viii.), *ante*, p. 700; *Mogridge* v. *Clapp*, 1892, 3 Ch. 382; *Bates* v. *Kesterton*, 1896, 1 Ch. 159.

IV.—The Settled Land Acts (Amendment) Act, 1887.

50 & 51 Vict. c. 30.

50 & 51 Vict. c. 30, s. 1.

45 & 46 Vict. c. 38.

Whereas by the twenty-first section of the Settled Land Act, 1882 (in this act referred to as the Act of 1882), it is provided that capital money arising under that act may be applied in payment for any improvement by that act authorized:

Be it therefore enacted as follows:

Amendment of sect. 21 of the Settled Land Act, 1882.

1. Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this act, and a rent charge, whether temporary or perpetual, has been or may be created in pursuance of any act of parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882.

In the case of temporary rent charges created under the Improvement of Land Act, 1864, it was decided under the S. L. Act, 1882 (before the passing of the above act), that such rent charges could not be paid off out of capital moneys (*Re Knatchbull*, 29 Ch. Div. 588).

Under the above act capital moneys may now be applied, either (1) in payment from time to time of the instalments of such rent charges (*Re Sudeley*, 37 Ch. D. 123), including, it would seem, interest as well as principal (see *Re Egmont*, 45 Ch. Div. 395, disapproving on this point, *Re Sudeley*, *sup.*; *Re Newton*, 61 L. T. 787); or (2) in redeeming the rent charges by one payment (*Re Egmont*, *sup.*), in which case the payment may include not only the balance of principal, but a bonus to compensate the lender for loss of interest (*Ib.*).

The powers of this act were applied where the trustees of a settlement had themselves purchased the rent charges under sect. 60 of the Act of 1864 (*Re Howard*, 1892, 2 Ch. 233); and where the improved portions of the settled estates had been sold (*Ib.*); but the Court refused to apply money arising under the Lands Clauses Act (and applicable as capital money under sect. 32 of the S. L. Act, 1882) in redeeming a charge on glebe lands (*Re Castle Bytham*, 1895, 1 Ch. 348).

This act does not enable the tenant for life to be recouped out of capital moneys the instalments of the rent charges actually paid by him, whether before the act came into operation (*Re Howard*, *sup.*); or since (*Re Dalison*, 1892, 3 Ch. 522; *Re Bristol*, 1893, 3 Ch. 161; compare *Re Nepean*, 1900, 1 Ir. R. 298); nor a sum paid by him on a transfer of the charge in order to reduce the interest (*Re Verney*, 1898, 1 Ch. 508).

Where the works paid for by means of the rent charge were not within the description of improvements authorized by the S. L. Act, 1882, the application of capital moneys was not allowed (*Re Newton*, 61 L. T. 787).

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

50 & 51 Vict. c. 30, s. 2.

Sect. 28 of Settled Land Act, 1882, to apply to improvements within preceding section.

See *Re Verney*, 1898, 1 Ch. 508.

V.—The Settled Land Act, 1889.

52 & 53 Vict. c. 36.

1. This act shall be construed as one with the Settled Land Acts, 1882 to 1887, and may be cited together with those acts as the Settled Land Acts, 1882 to 1889, and separately as the Settled Land Act, 1889.

52 & 53 Vict. c. 36, s. 1.

Construction and short title.

2. Any building lease, and any agreement for granting building leases, under the Settled Land Act, 1882, may contain an option, to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease or agreement for the lease, such price to be the best which, having regard to the rent reserved, can reasonably be obtained, and to be either a fixed sum of money, or such a sum of money as shall be equal to a stated number of years' purchase of the highest rent reserved by the lease or agreement.

Option of purchase in building lease.

45 & 46 Vict. c. 38.

3. Such price when received shall for all purposes be capital money arising under the Settled Land Act, 1882.

Price to be capital money.

VI.—The Settled Land Act, 1890.

53 & 54 Vict. c. 69.

Preliminary.

1. This act may be cited as the Settled Land Act, 1890.

53 & 54 Vict. c. 69, s. 1.

2. The Settled Land Acts, 1882 to 1889, and this act are to be read and construed together as one act, and may be cited as the Settled Land Acts, 1882 to 1890.

Short title.

Acts to be construed together.

3. Expressions used in this act are to have the same meanings as those attached by the Settled Land Acts, 1882 to 1889, to similar expressions used therein.

Interpretation.

53 & 54 Vict. c. 69, s. 4.

Definitions.

Instrument in consideration of marriage, &c. to be part of the settlement.

4.—(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882.

45 & 46 Vict. c. 38.

(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this act, unless inconsistent with the nature or terms of the disposition.

See S. L. Act, 1882, sect. 1 (1), *ante*, p. 658; sect. 50, *ante*, p. 695. This section is not a positive enactment that every instrument of the kind described shall be one of the instruments creating the settlement for all the purposes of the Act; but is limited to the purpose of excluding the operation of sect. 50 of the S. L. Act, 1882 (*Re Du Cane and Nettlefold*, 1898, 2 Ch. 96; see, however, *Re Tibbits*, 1897, 2 Ch. 149). See also *Re Ailesbury*, 1893, W. N. 140.

Exchanges.

Creation of easements on exchange or partition.

5. On an exchange or partition any easement, right, or privilege of any kind may be reserved or may be granted over or in relation to the settled land or any part thereof, or other land or an easement, right, or privilege of any kind may be given or taken in exchange or on partition for land or for any other easement, right, or privilege of any kind.

Completion of Contracts.

Power to complete predecessor's contract.

6. A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title.

This section does not apply to leases (*Kemeys-Tynte* v. *Kemeys-Tynte*, 1892, 2 Ch. 213); see sect. 12 (i.) of S. L. Act, 1882, *ante*, p. 669. The general power to make contracts is given by sect. 31 of S. L. Act, 1882, *ante*, p. 683.

Leases.

Provision as to leases for twenty-one years.

7. A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life—

(i.) Without any notice of an intention to make the same having been given under section forty-five of the Act of 1882; and

45 & 46 Vict. c. 38.

(ii.) Notwithstanding that there are no trustees of the settle-

ment for the purposes of the Settled Land Acts, 1882 to 1890; and 53 & 54 Vict. c. 69, s. 7.

(iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

See *Mogridge* v. *Clapp*, 1892, 3 Ch. 395.

8. In a mining lease— Provision as to mining leases.

(i.) The rent may be made to vary according to the price of the minerals or substances gotten, or any of them:

(ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period.

See S. L. Act, 1882, sect. 9, *ante*, p. 667; *Lonsdale* v. *Lowther*, 1900, 2 Ch. 687; and as to a minimum rent, *Re Aldam*, 1902, 2 Ch. 46.

9. Where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereout of a perpetual rent or rentcharge, the reservation shall operate to create a rentcharge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881 (*o*), and the rentcharge so created shall go and remain to the uses on the trusts and subject to the powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it is reserved. Power to reserve a rent-charge on a grant in fee simple. 44 & 45 Vict. c. 41.

(*o*) *Ante*, p. 591.

Mansion and Park.

10.—(1.) From and after the passing of this act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed. Restriction on sale of mansion.

(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the court.

(3.) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together

53 & 54 Vict. c. 69, s. 10.

exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section.

When the tenant for life was insolvent and had heavily mortgaged his life interest, the court sanctioned a sale (which included the principal mansion and large family estates), even though the next remainderman was in a position to keep up the estates if he came into them (*Re Ailesbury*, 1892, 1 Ch. 506; *Bruce* v. *Ailesbury*, 1892, A. C. 356). In giving its consent under this section the court had regard to public interests, and the interests of tenants on the estates (*Ib.*). A subsequent action to restrain the sale on the ground of fraud was dismissed (*Bruce* v. *Ailesbury*, 1892, W. N. 149). And in connection with the sale trustees of the compound settlement were appointed (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 345). But owing to a claim made in respect of an annuity granted by the tenant for life, his title was subsequently held too doubtful to force on the purchaser (*Re Ailesbury*, 1893, W. N. 140).

The following cases have been decided under sub-sect. 2 or under S. L. Act, 1882, s. 15, which was similar to sub-sect. 2. Notwithstanding a clause of forfeiture for non-residence, a mansion house may be sold (*Re Paget*, 30 Ch. D. 161) or let (*Re Thompson*, 21 L. R. Ir. 109). So a mansion house may be sold though directed to be kept as a residence, and expressly excluded from the power of sale (*Re Brown*, 27 Ch. D. 179). A house held subject to a trust for sale on the death of the tenant for life was allowed to be sold by him (*Re Wortham*, 75 L. T. 293). A lease granting a right of way over a park was held void under this section, there having been no "consent" or "order" (*Sutherland* v. *Sutherland*, 1893, 3 Ch. 169). The court has refused to order a sale until all facts bearing on the question were known, and also whether the mortgagees of the life interest consented (*Re Sebright*, 33 Ch. Div. 429). For forms of summons, see R. S. L. Act, Forms 4, 5, 6 and 7 (*post*, p. 720).

The Raising of Money.

Power to raise money by mortgage.

11.—(1.) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee-simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

"Required" means reasonably required having regard to the circumstances of the settled land; and is not confined to a mortgagee calling in money (*Re Clifford, Scott* v. *Clifford*, 1902, 1 Ch. 87). So one part of the settled land may be mortgaged in order to pay off incumbrances on another part (*Hampden* v. *Buckinghamshire*, 1893, 2 Ch. 531; *Re Monson*, 1898, 1 Ch. 427). But such a course will be restrained where it would act unfairly on some of the persons interested (*Hampden* v. *Buckinghamshire, sup.*; see also *Annesley* v. *Woodhouse*, 1898, 1 Ir. R. 69).

Expenses incurred by a local authority and charged on settled land by sect. 257 of the P. H. Act, 1875, are an "incumbrance" within this section; and if the tenant for life pays them, he can raise the money by a mortgage of the land (*Re Smith*, 1901, 1 Ch. 689).

Dealings as between Tenant for Life and the Estate.

53 & 54 Vict. c. 69, s. 12.

Provision enabling dealings with tenant for life.

12. Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

Application of Capital Money.

Application of capital money.

13. Improvements authorised by the Act of 1882 shall include the following; namely:

(i.) Bridges;

(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let (*p*);

(iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;

(iv.) The rebuilding of the principal mansion house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land.

Sub-sect. (ii).

(*p*) The jurisdiction under sub-sect. (ii) depends not on whether there is to be an immediate letting, but on whether there is a present intention to let as distinguished from an intention to occupy (*Stanford* v. *Roberts*, 1901, 1 Ch. 440). See *Re De Teissier*, *De Teissier* v. *De Teissier*, 1893, 1 Ch. 153; *Re Gerard*, 1893, 3 Ch. 260, 264, 267. The additions and alterations referred to in the sub-section must be structural (*Re Clarke*, 1902, 2 Ch. 327). Additions and alterations in stables came within it (*Re Gerard*, 1893, 3 Ch. 260); and a new floor for the basement of a house (*Stanford* v. *Roberts*, *sup.*); also a new roof and a change in the main entrance (*Re Gaskell*, 1894, 1 Ch. 485). But not heating apparatus (*Re Gaskell*, *sup.*); nor electric lighting installation (*Re Clarke*, 1902, 2 Ch. 327); except under special circumstances (*Re Freake*, *Kinnaird* v. *Freake*, 1902, 1 Ch. 97).

Sub-sect. (iv).

Sub-sect. (iv) might apply to stables (*Re Gerard*, 1893, 3 Ch. 260, 261, 264, 268). As to what is "rebuilding," see *Re De Teissier*, 1893, 1 Ch. 158; *Re Walker*, 1894, 1 Ch. 189, where the rebuilding was executed before the Act of 1890; *Re Wright*, 83 L. T. 159. The "annual rental of the settled land" includes the rent of all the land in the settlement (*Re Gerard*, 1893, 3 Ch. 268); and the income of any capital moneys (*Re De Teissier*, 1893, 1 Ch. 153); and the amount of the rent usually paid for a farm for the moment unoccupied (*Re Walker*, 1894, 1 Ch. 189). The sub-section was applied in *Re Legh*, 1902, 2 Ch. 274. See further the note to S. L. Act, 1882, s. 25, *ante*, p. 679.

53 & 54 Vict. c. 69, s. 14.

Capital money in court may be paid out to trustees.

14. All or any part of any capital money paid into court may, if the court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

See S. L. Act, 1882, s. 22, *ante*, p. 674.

Court may order payment for improvements executed.

15. The court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the court.

See S. L. Act, 1882, s. 26 (*ante*, p. 680), requiring a previous scheme.

The court in exercising the jurisdiction of sect. 15 will be very vigilant and careful, and must consider what is fair as between tenant for life and remainderman (*Re Tucker*, 1895, 2 Ch. 471). An order has been made where the works were done by the trustees (*Re Thomas, Weatherall* v. *Thomas*, 1900, 1 Ch. 323); and where the work was done by tenant for life, but no scheme had been prepared because trustees had then no capital money (*Re Lisburne*, 1901, W. N. 91; see *Re Norfolk, inf.*).

On the other hand, under the discretion conferred by this section the court refused to authorize the application of capital money for improvements (*Cardigan* v. *Curzon-Howe*, 9 T. L. R. 244; *Re Partington, Reigh* v. *Kane*, 1902, 1 Ch. 711). And the court has refused to make an order for repayment of instalments of an Improvement of Land Act rentcharge paid by the tenant for life before he had required provision to be made under the S. L. Act, 1887 (*Re Dalison*, 1892, 3 Ch. 522; *Re Bristol*, 1893, 3 Ch. 161; see *Re Verney*, 1898, 1 Ch. 508); or to make an order in the case of works done prior to 1883 (*Re Ormerod*, 1892, 2 Ch. 318); or to make a prospective order as to applying future capital money (*Re Bristol*, 1893, 3 Ch. 161). See as to trustees approving a scheme by anticipation, *Re Norfolk, Norfolk* v. *Herries* (1900, 1 Ch. 461); and compare *Re Lisburne* (1901, W. N. 91).

Trustees.

Trustees for the purposes of the act.

16. Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,

(i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then

(ii.) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with

power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not. 53 & 54 Vict. c. 69, s. 16.

See, before this act, *Wheelwright* v. *Walker*, 23 Ch. D. 752. For further definition of "trustees," see S. L. Act, 1882, s. 2 (8), *ante*, p. 659.

A tenant for life of settled land which is subject to a trust for sale exerciseable after his death can be a trustee (*Re Jackson*, 1902, 1 Ch. 258); where it was said that "under" in sub-sect. (ii) meant "bound by."

[*Sect.* 17, *as to the appointment, discharge and retirement of trustees, has been replaced by sect.* 47 *of the Trustee Act*, 1893, post.]

18. The provisions of section eleven of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding one hundred pounds per annum. Extension of meaning of "working classes" in 48 & 49 Vict. c. 72.

Sect. 74 of the Housing of the Working Classes Act, 1890, has been substituted for sect. 11 of the Act of 1885.

19. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof. Power to vacate registration of writ.

RULES UNDER THE SETTLED LAND ACT, 1882.

1. The expression "the act" used in these rules means the Settled Land Act, 1882. Interpretation.

Words defined by the act when used in these rules have the same meanings as in the act.

The expression "the tenant for life" includes the tenant for life as defined by the act, and any person having the powers of a tenant for life under the act.

2. All applications to the court under the act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons. Application to be by summons.

3. The forms in the appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the act are to be entitled according to Form I. in the Appendix. Forms.

4. The persons to be served with notice of applications to the court shall, in the first instance, be as follows:— Service.

In the case of applications by the tenant for life under sections 15 and 34, the trustees.

In the case of applications under section 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under section 44, the tenant for life, or the trustees, as the case may be.

Rules.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may, after the petition has been filed, apply by summons in chambers (Appendix, Form 23) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served (*a*).

(*a*) The court dispensed with service on the children of the tenant for life who were sufficiently represented by the trustees (*Re Brown*, 27 Ch. D. 186).

Title.

7. It shall be sufficient upon any application under the act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. 8 in the Appendix.

Sales.

8. Any sale authorised or directed by the court under the act, shall be carried into effect out of court, unless the judge shall otherwise order, and generally in such manner as the judge may direct.

Leases, &c., under sect. 10.

9. Where the court authorises generally the tenant for life to make from time to time leases or grants for building or mining purposes under section 10 of the act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the court authorises any such lease or grant in any particular case, or where the court authorises a lease under section 15 of the act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

Payment into court.

10. Any person directed by the tenant for life to pay into court any capital money arising under the act may apply by summons at chambers for leave to pay the money into court. (Appendix, Forms 9, 10, 11.)

11. The summons shall be supported by an affidavit setting forth—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into court.
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into court may contain directions for investment of the money on any securities authorised by section 21, sub-section 1 of the act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent, to be verified by the affidavit of a solicitor. But if the transaction in respect of which

the money arises, is not completed at the date of payment into court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the court may be invested. Rules.

13. Money paid into court under the act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the act. (Appendix, Forms 9, 10 and 11.)

14. Any person paying into court any capital money arising under the act shall be entitled first to deduct the costs of paying the money into court.

15. In all cases not provided for by the act or these rules, the existing practice of the court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the act. Practice generally.

16. The fees and allowances to solicitors of the court in respect of proceedings under the act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings. Fees.

17. The fees to be taken by the officers of the court in respect to proceedings under the act shall be those provided by the Rules of the Supreme Court as to court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

APPENDIX.

Form I.—Title of Proceedings.

In the High Court of Justice, Chancery Division,
Vice-Chancellor Bacon,
or
Mr. Justice Chitty,
[*or other judge before whom the application is to be heard.*]

In the matter of the estate [*or*, of the timber upon the estate], situate at in the county of , [*or*, of the chattels], settled by a settlement made by an indenture dated the day of , and made between [*or*, by the will of dated *or, as the case may be*].

And in the matter of the Settled Land Act, 1882.

Form II.—Formal Part of Summons.

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of 18 , at o'clock in the forenoon, on the hearing of an application—

(*a.*) On the part of *A. B.*, the tenant for life [*or*, tenant in tail, *or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (*b.*) On the part of *A. B.*, the tenant for life [*or as the case may be*] under the above-mentioned settlement an infant, by *X. Y.*, his testamentary guardian [*or*, guardian appointed by order dated the , *or* next friend].

Or, (*c.*) On the part of *C. D.* and *E. F.*, the trustees of the above-mentioned settlement for the purposes of the above-mentioned act.

Or, (*d.*) On the part of *G. H.*, the tenant for life in remainder [*or*,

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tenant in tail in remainder, *or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A. B.* [*or as the case may be*].

Or, (*e.*) On the part of *I. J.*, the purchaser of the lands [*or*, the timber upon the lands, *or* chattels, *or as the case may be*] settled by the above-mentioned settlement.

Or, (*f.*) On the part of *I. J.*, the lessee under a mining lease dated the 18 , granted under the powers of the above-mentioned act of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (*g.*) On the part of *I. J.*, the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned act of the lands settled by the above-mentioned settlement.

Or, (*h.*) On the part of *K. L.*, interested under the contract hereinafter mentioned.

Dated the day of 18 .

This summons was taken out by of , solicitor for the applicant.

To

(*Add the names of the persons* (*if any*) *on whom the summons is to be served.*)

Form III.—Summons under Section 10 for General Leasing Powers.

Title and formal parts as in Forms I. and II. *a* or *b*.

1. That the applicant [*or in the case of an infant* that the said *X. Y.* during the infancy of the said *A. B.*], and each of his successors in title [*or in the case of an infant*, each of the successors in title of the said *A. B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned act, may pursuant to section 10 of the said act be authorized from time to time to make building [*or* mining] leases of the lands comprised in the said settlement for the term of years [*or* in perpetuity] on the conditions specified in the said act [*or* on other conditions than those specified in sections 7 to 9 of the said act].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

Form IV.—Summons under Sections 10 or 15 for Authority to grant a particular Lease where the Tenant for Life has entered into a Contract.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the conditional contract, dated the 18 , and made between the applicant [*or* the said *X. Y.*] of the one part and of the other part, for a [building *or* mining] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or* 15] of the above-mentioned act be approved, and that the said *A. B.* [*or X. Y.*] may be authorized to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III.* 2.)

Form V.—Summons under Sections 10 or 15 for Authority to grant a particular Lease when no Contract has been entered into.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the [building *or* mining] lease intended to be granted to of the lands [*or* of the mansion house, &c.] settled by the said settlement may, pursuant to section 10 [*or* 15] of the above-mentioned act be approved, and that the applicant [*or* the said *X. Y.*] may be authorized to execute the same.

2. (*Add application for costs as in Form III.* 2.)

Form VI.—Summons under Sections 15, 35, or 37 for a Sale out of Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant [*or in the case of an infant* the said *X. Y.*] may be authorized to sell the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C. D.* and *E. F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber*, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said act], *or, if this Form is not applicable as in Form III.* 2.

Form VII.—Summons under Sections 15, 35, or 37 for Sale by the Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels], settled by the above-mentioned settlement, may be sold under the direction of the court.

2. (*Application for costs as in Form III.* 2.)

Form VIII.—Affidavit verifying Title.

Title as in Form I.

I, , of , make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which *A. B.* is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail, *or* tenant in fee simple, with an executory gift over, *or as the case may be*].

2. (*If it is the fact.*) The said *A. B.* is an infant of the age of years or thereabouts.

3. *C. D.*, of , and *E. F.*, of , are trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be trustees thereof for purposes of the above-mentioned act].

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Form IX.—Summons under Section 22 by Purchaser for Payment into Court of Purchase-money of Settled Land, Timber, or Chattels.

Title as in Form I.

Formal parts as in Form II. *e.*

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement, dated the and made between [*or* will, &c.] proceeds of sale of the A. estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase-money of the said A. estate [*or as the case may be*] settled by the said settlement [*or* will, &c.].

2. That such directions may be given for the investment of the said sums when paid into court, and the accumulation or payment of the dividends of the securities, representing the same, as the court may think proper.

Form X.—Summons under Section 22 for Payment into Court by Lessee under a Mining Lease (see Section 11).

Title as in Form I.

Formal parts as in Form II. *f.*

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement, dated the and made between [*or* the will, &c.] mineral rents under lease, dated the and in the matter of the Settled Land Act, 1882," the sum of £ being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending the less £ the costs of payment into court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into court to the credit aforesaid, so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned act directed to be set aside as capital money arising under the said act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit, and that the dividends on the said when purchased may be paid to *A. B.*, the tenant for life under the above-mentioned settlement, during his life or until further order.

Form XI.—Summons under Section 22 for Payment into Court by Mortgagee (see Section 18).

Title as in Form I.

Formal parts as in Form II. *g.*

1. That the applicant may be at liberty to pay into court to the credit of "Money advanced on mortgage of lands settled by the settlement dated the and made between [*or* the will, &c.] and in the matter of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII.* 2) (*r*).

(*r*) This reference is inaccurate; see, however, Form IX. 2, and Form X. 3.

Form XII.—Summons under Section 26 (1).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III.* 2.)

Form XIII.—Summons under Section 26, Sub-section (2) (ii) for appointment of an Engineer or Surveyor.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *M. N.* of engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of section 26, sub-section (2) (ii) of the above-mentioned act.

2. (*Add application for costs as in Form III.* 2.)

Form XIV.—Nomination of an Engineer or Surveyor by the Trustees.

Title as in Form I.

We *C. D.* of and *E. F.* of the trustees of the above-mentioned settlement for the purposes of the above-mentioned act, hereby nominate of engineer [*or* surveyor], for the purposes of section 26, sub-section (2) (ii) of the said act.

(Signed) *C. D.*
E. F.

Form XV.—Summons under Section 26, Sub-section (2) (iii).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *C. D.* and *E. F.* the trustees of the above-mentioned settlement, for the purposes of the above-mentioned act may be directed to apply the sum of £ out of the capital money arising under the said act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C. D.* and *E. F.* under the said act.

2. (*Add application for costs as in Form III.* 2.)

Form XVI.—Summons under Section 26, Sub-section (3).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the sum of £ may be ordered to be raised out of the in court to the credit of and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by order dated the .

2. (*Add application for costs as in Form III.* 2.)

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Form XVII.—Summons under Section 31.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant may be at liberty to enforce [*or* carry into effect *or* vary *or* rescind *as the case may be*] the contract entered into between the applicant of the one part, and of the other part.
2. Or that such directions may be given relating to the said contract as the judge may think fit.
3. (*Add application for costs as in Form III.* 2.)

Form XVIII.—Summons under Section 34 for application of Money paid for a Lease or Reversion.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *d*.

1. That the sum of £ being the proceeds of sale of a lease for years [*or* life *or* a reversion *or other interest describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the court may think fit.
2. (*Add application for costs as in Form III.* 2.)

Form XIX.—Summons under Section 38 for the Appointment of New Trustees.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, *c*, or *d*.

1. That *G. H.* and *I. J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned act.
2. (*Add application for costs as in Form III.* 2.)

See *Re Harrop*, 24 Ch. D. 719; *Re Simpson, Re Whitchurch*, 1897, 1 Ch. 256; Seton, 5th ed. 1512.

Form XX.—Summons under Section 44.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *c*.

1. That it may be declared that (*set out the declaration required*).
2. (*Add application for costs as in Form III.* 2, *or as the circumstances require.*)

Form XXI.—Summons under Section 56 for Advice and Direction.

Title as in Form I.

Formal parts as in Form II. *a* to *h*.

For the opinion, advice, and direction of the judge on the following questions:—
1. Whether
2. Whether
3. Whether

(*or if the questions involve complicated facts.*)
for the opinion, advice, and direction of the judge on the facts and questions submitted by the statement left in my chambers this day.
(*Add application for costs as in Form III.* 2.)

Form XXII.—Summons under Section 60 for Appointment of Persons to exercise Powers on Behalf of Infant.

Title as in Form I.

Formal parts as in Form II. *b.*

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-mentioned act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.

2. (*Add application for costs in Form III.* 2.)

Form XXIII.—Summons for Directions as to Service of a Petition.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of , 18 .

TITLES OF SUMMONSES.

The following regulations as to the title of summonses were adopted by the Practice Masters. See Annual Practice for 1901, Table of Titles, &c.:—

7. If under the Settled Land Act, 1882, a summons must be entitled in accordance with the Rules of the Supreme Court (December, 1882) under that act, and in the form given in the appendix to such rules as varied by the form, Appendix L., No. 25, R. S. C. 1883.

1886, J. No. .
or 1886, R. No. .

Settled Land Acts, 1882 and 1884.

In the matter of the Blackacre Estate [*or*, of the timber on the estate], situate at , in the county of [*or* of the chattels] settled by the settlement, dated the day of , made on the marriage of John Jones and Mary his wife [*or*, by the will of George Roberts, dated].

And in the matter of the Settled Land Act, 1882.

1886, S. No. .

Infant.

In the matter of the Blackacre Estate [*or*, of the timber of the estate] situate at , in the county of , settled land within the meaning of the Settled Land Act, 1882, s. 59, by reason of John Smith, the person seised of or entitled to such land, being an infant.

In the matter of the Settled Land Act, 1882.

1886, R. No. .

Tenant by curtesy.

In the matter of the Blackacre Estate, at , in the county of , settled by a settlement within the meaning of the Settled Land Act, 1884, s. 8, by Mary Roberts, deceased, the late wife of John Roberts.

In the matter of the Settled Land Act, 1884.

The address and description of the applicant and of the next friend (if any) and of the respondents should in all cases be stated in the summons, and if the applicants apply as, or the respondents are summoned as trustees, or in a representative capacity, the fact should appear.

If the applicants or respondents are females, it should be shown on the summons whether they are spinsters, married women, or widows.

THE INFANT SETTLEMENTS ACT, 1855.

18 & 19 VICT. c. 43.

An Act to enable Infants, with the Approbation of the Court of Chancery, to make binding Settlements of their Real and Personal Estate on Marriage. [2nd July, 1855.]

18 & 19 Vict. c. 43, s. 1.

WHEREAS great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property (*a*); for remedy whereof it is enacted as follows:

Infants may, with the approbation of the Court of Chancery, make valid settlements or contracts for settlements of their real and personal estate upon marriage.

1. From and after the passing of this act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

(1) Law independently of the act. Settlement by infant voidable.

(*a*) An infant's contract of settlement on marriage has been held not to fall within the Infants' Relief Act, 1874 (*Duncan* v. *Dixon*, 44 Ch. D. 211). It is voidable, not void (*Ib.*; *Cooke* v. *Cooke*, 35 Ch. D. 209; *Cooper* v. *Cooper*, 13 App. Cas. 108); *i.e.*, it is valid until repudiated, not invalid until confirmed (*Duncan* v. *Dixon*, 44 Ch. D. 213; see *Smith* v. *Lucas*, 18 Ch. D. 543; *Burnaby* v. *Equitable Society*, 28 Ch. D. 423; *Oakes* v. *Turquand*, L. R. 2 H. L. 375). It was said by Lord *Herschell*, in a case where a male infant's contract in a marriage settlement was in question, that such a contract was not absolutely void, but voidable only; "that is to say, that after he came of age it was as binding as if he had been of age at the time when he executed it, subject only to this, that the law enabled him to avoid his obligations provided he did so within a reasonable time" (*Edwards* v. *Carter*, 1893, A. C. 364). On the other hand, in a case relating to a female infant's settlement, *Lindley*, L. J., said that the great bulk of an infant's contracts are only voidable. "That means that when the infant comes of age he can elect either to

affirm or disaffirm the contract. If he does nothing within a reasonable time after he attains twenty-one, the presumption is that he has affirmed the contract" (*Viditz* v. *O'Hagan*, 1900, 2 Ch. 97; and see the judgment of *Chitty*, J., *Re Hodson*, *Williams* v. *Knight*, 1894, 2 Ch. 421; and *Re Bankes*, *Reynolds* v. *Ellis*, 1902, 2 Ch. 343). 18 & 19 Vict. c. 43, s. 1.

Contracts of settlement made independently of this act by a male infant were held not binding as regards his own real estate (*Trowell* v. *Shenton*, 8 Ch. Div. 325), or his own personal estate (*Nelson* v. *Stocker*, 4 De G. & J. 458), or his wife's personal estate (*Kingsman* v. *Kingsman*, 6 Q. B. Div. 122). The affirmation of such a contract under the law before the Infants' Relief Act, 1874, was discussed in *Trowell* v. *Shenton* (8 Ch. Div. 325). Male infant.

Again, contracts of settlement made independently of this act by a female infant were held not binding as regards her non-separate property whether real (*Milner* v. *Harewood*, 18 Ves. 275; see *Mills* v. *Fox*, 37 Ch. D. 162) or personal (*Cunningham* v. *Antrobus*, 16 Sim. 436). But where there was affirmation by her when adult, such settlements were binding. See as to real estate, *Cooke* v. *Cooke*, 38 Ch. D. 202; *Barrow* v. *Barrow*, 4 K. & J. 409; and as to personal estate, *Davies* v. *Davies*, 9 Eq. 468; *Wilder* v. *Pigott*, 22 Ch. D. 263; *Re Hodson*, *Williams* v. *Knight*, 1894, 2 Ch. 421. See also *ante*, p. 315. And further, if the settlement contained a covenant by an adult husband to settle his wife's property, such covenant bound the wife's personal estate to the extent of the husband's interest therein (*Fisher* v. *Shirley*, 43 Ch. D. 290); even if she repudiated the settlement (*Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307; *Buckland* v. *Buckland*, 1900, 2 Ch. 534); and not only bound his interest in her real estate, but prevented him from concurring with her in defeating the settlement (*Pimm* v. *Insall*, 1 Mac. & G. 449; *Ex p. Blake*, 16 Beav. 463; *Sharpe* v. *Foy*, 4 Ch. 35). Female infant.

Again, contracts of settlement made independently of this act by a female infant were held not binding as regards her separate estate (*Simpson* v. *Jones*, 2 R. & M. 365). But where there was affirmation by her when adult, such settlements were binding (*Smith* v. *Lucas*, 18 Ch. D. 531); *e.g.*, affirmation by appointing new trustees (*Merryweather* v. *Jones*, 4 Giff. 509; see *Haywood* v. *Tidy*, 63 L. T. 679).

It is clear that voidable contracts of settlement executed by male and female infants may be repudiated by the infants after majority (*Cooper* v. *Cooper*, 13 App. Cas. 108; *Edwards* v. *Carter*, 1893, A. C. 360); but unless repudiated within a reasonable time they will be binding (*Edwards* v. *Carter*, *sup.*). The settlor cannot wait for repudiation until property falls in to which the settlement would apply (*Edwards* v. *Carter*, *sup.*; see *contra*, *Re Jones*, *Farrington* v. *Forrester*, 1893, 2 Ch. 461); nor, it seems, can a settlement be from time to time repudiated as to property subsequently falling in (*Viditz* v. *O'Hagan*, 1899, 2 Ch. 576). In a case where a female infant on her marriage with a foreigner executed a settlement and lived abroad where by the law of the matrimonial domicil she could always repudiate but could never ratify the settlement, and she repudiated it about thirty years later, the settlement was held not binding, notwithstanding that she had in the interval acted upon it (*Viditz* v. *O'Hagan*, 1900, 2 Ch. 87). Repudiation.

Where a person elects to repudiate a settlement made by him or her when an infant, any interest to which he or she is entitled in property brought into settlement by the other person may be impounded to make good the loss to the other beneficiaries (*Carter* v. *Silber*, 1891, 3 Ch. 553; *Hamilton* v. *Hamilton*, 1892, 1 Ch. 396). In the case, however, of a woman, property subject to a restraint on anticipation cannot be impounded (*Hamilton* v. *Hamilton*, *sup.*). Impounding to make good repudiation.

(2) The disability of infancy is the only disability with which the act deals. It does not affect the disability of coverture (*Seaton* v. *Seaton*, 13 App. Cas. 70, 79). Nor does it enable an infant to execute during infancy a power conferred upon her by a settlement approved by the court (*Re* Effect of the act.

18 & 19 Vict. c. 43, s. 1.

Armit, I. R. 5 Eq. 352; see, however, as to the decision in this case, *Re D'Angibau, Andrews* v. *Andrews*, 15 Ch. Div. 228). An order under this section which has not been acted upon will not prevent the transfer of the fund to the infant after twenty-one (*Sams* v. *Cronin*, 22 W. R. 204).

The power of making a settlement given by sect. 1 is not limited to a settlement upon the wife, or the husband or the children (*Re Scott, Scott* v. *Hanbury*, 1891, 1 Ch. 298). Where a settlement made by an infant in execution of a general power of appointment was sanctioned by the court, and the objects failed, there was a resulting trust for the appointor, who was held by the appointment to have made the property her own (*Ib.*; see note to sect. 27 of the Wills Act, 1837, *ante*, p. 469). An infant's disentailing deed was sanctioned (*Mills* v. *Fox*, 37 Ch. D. 153). A legacy bequeathed to the wife after marriage was held to be "property in expectancy" within this section, and capable of being bound by the settlement (*Re Johnson, Moore* v. *Johnson*, 1891, 3 Ch. 48).

Jurisdiction under the act.

The court has no jurisdiction to compel an infant ward to make a settlement of his own property (*Leigh* v. *Leigh*, 40 Ch. Div. 290; *Buckmaster* v. *Buckmaster*, 35 Ch. Div. 21; *Seaton* v. *Seaton*, 13 App. Cas. 80; as to an undertaking given by a suitor of a ward, see *Bolton* v. *Bolton*, 1891, 3 Ch. 270). In the case of infants not wards who marry after the age at which they are capable of contracting marriage, the court has no jurisdiction to settle their property (*Re Potter*, 7 Eq. 484). The court may, however, compel a representation to be made good on the faith of which a settlement of an infant's property has been sanctioned under this act (*Mills* v. *Fox*, 37 Ch. D. 153). An application under the act does not make the infant a ward of court (*Re Dalton*, 6 D. M. & G. 201); and the court will not inquire into the propriety of the marriage (*Ib.*; but see *Re Strong*, 26 L. J. Ch. 64). In *Re Sampson and Wall* (25 Ch. Div. 482) the Court of Appeal decided that notwithstanding the words "upon or in contemplation of his or her marriage," the act enabled a settlement to be made after the marriage had taken place; but the House of Lords declined to express an opinion on the point (*Seaton* v. *Seaton*, 13 App. Cas. 61); and the decision would not authorize a settlement where a considerable interval had elapsed since the marriage (*Leigh* v. *Leigh*, 40 Ch. Div. 295). Where an infant had married before the age mentioned in sect. 4, a post-nuptial settlement was approved after she had attained that age (*Re Philips*, 34 Ch. D. 467; but see *Leigh* v. *Leigh*, *sup.*). It was said by *Stuart*, V.-C., that the court had no jurisdiction under the act to approve a settlement originally made without its concurrence (*Re Fuller*, 10th February, 1860; Morgan, 213, 5th ed.).

Post-nuptial settlements.

Ireland.

The act applies to Ireland (23 & 24 Vict. c. 83).

In case infant die under age, appointment, &c. to be void.

2. Provided always, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

The section is limited to tenants in tail (*Re Scott, Scott* v. *Hanbury*, 1891, 1 Ch. 298).

The sanction of the Court of Chancery to be given upon petition.

3. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given, upon petition presented by the infant or his or her guardian in a summary

way, without the institution of a suit (*b*); and if there be no guardian, the court may require a guardian to be appointed or not, as it shall think fit (*c*); and the court also may, if it shall think fit, require that any person interested or appearing to be interested in the property should be served with notice of such petition. 18 & 19 Vict. c. 43, s. 3.

(*b*) Applications under the act, which were formerly by petition (*Peareth* v. *Marriott*, 1866, W. N. p. 48), are now by summons (R. S. C. Ord. 55, r. 2 (10)).

Ord. 55, r. 26, provides that applications to obtain the sanction of the court to infants making settlements on marriage under the Infant Settlements Act, 1855, evidence is to be produced to show—(a) the age of the infant; (b) whether the infant has any parents or guardians; (c) with whom or under whose care the infant is living, and if the infant has no parents or guardians, what near relations the infant has; (d) the rank and position in life of the infant and parents; (e) what the infant's property and fortune consist of; (f) the age, rank and position in life of the person to whom the infant is about to be married; (g) what property, fortune, and income such person has; (h) the fitness of the proposed trustees and their consent to act. The proposals for the settlement of the property of the infant and of the person to whom such infant is proposed to be married are to be submitted to the judge.

The settlement.

As to the clauses which will be inserted in the settlement, see *Re Williams* (8 W. R. 678); *Re M'Clintock* (10 Ir. Ch. R. N. S. 469); *Ex p. Smith* (22 W. R. 294); *Rudge* v. *Winnall* (11 Beav. 98). A covenant to settle after-acquired property may be inserted (*Re Johnson, Moore* v. *Johnson*, 1891, 3 Ch. 48). As to inserting a provision restraining anticipation, and generally as to the form of settlement, compare *Re Parrott, Walter* v. *Parrott*, 33 Ch. Div. 274, and other decisions in the case of executory trusts, quoted *ante*, p. 322. As to the form of settlement where the marriage was in contempt of court, see *Re Sampson and Wall* (25 Ch. Div. 482). The costs of the settlement may be paid out of the corpus of the fund (*De Stacpoole* v. *De Stacpoole*, 37 Ch. D. 139).

(*c*) As to the appointment of guardians, see Dan. Ch. Pr., and note in Annual Practice to R. S. C. Ord. 16, r. 16.

4. Provided always, that nothing in this act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years.

Not to apply to males under twenty or females under seventeen years of age.

Where a female infant married under seventeen a settlement was approved after she attained that age (*Re Phillips*, 34 Ch. D. 467; but see *Leigh* v. *Leigh*, 40 Ch. Div. 297).

THE SALES OF REVERSIONS ACT, 1867.

31 & 32 Vict. c. 4.

An Act to amend the Law relating to Sales of Reversions.

[7th December, 1867.]

31 & 32 Vict. c. 4, s. 1.

Whereas it is expedient to amend the law, as administered in Courts of Equity, with respect to sales of reversions:

Be it enacted as follows:

No purchase, made *bonâ fide*, of reversionary interests to be set aside merely on the ground of undervalue.

1. No purchase, made bonâ fide and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue.

Before this act, even in the absence of fraud, mere inadequacy of price was sufficient to rescind contracts or dealings with reversioners for their reversionary interests (see notes to *Chesterfield* v. *Janssen*, 1 White & Tudor, L. C. Eq.). As to what were reversionary interests within this rule, see *ib.* Where A. was entitled to the income of property, subject to the payment of a life annuity, Lord *Chelmsford* held, that A.'s interest was not a reversionary interest within the rule (*Webster* v. *Cook*, 2 Ch. 542); but this has been disapproved (*Tyler* v. *Yates*, 11 Eq. 276). In the case of "expectant heirs" (as to the meaning of which, see *Beynon* v. *Cook*, 10 Ch. 391), mere inadequacy may even since this act be a ground for setting aside a sale of a reversion (*O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814; see *Nevill* v. *Snelling*, 15 Ch. D. 679; *Brenchley* v. *Higgins*, *inf.*).

The jurisdiction of the Court of Chancery over unconscionable bargains is not affected by this act; the exception in the act as to unfairness leaves the settled law as to such cases untouched (*Miller* v. *Cook*, 10 Eq. 641; *Tyler* v. *Yates*, 6 Ch. 665). The words of this section leave undervalue still a material element in cases in which it is not the sole equitable ground for relief (*per* Lord *Selborne*, *Aylesford* v. *Morris*, 8 Ch. 490); and accordingly sales of reversionary interests have been set aside when the vendors were poor ignorant men with no professional advice, and the sales were at an undervalue (*Re Fry*, *Fry* v. *Lane*, 40 Ch. D. 312), and where there was evidence of unfair dealing (*Brenchley* v. *Higgins*, 83 L. T. 751; 70 L. J. Ch. 788). Compare *Wilton* v. *Osborn* (1901, 2 K. B. 110), a case under the Moneylenders Act, 1900.

Interpretation of "purchase."

2. This word "purchase" in this act shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired.

Commencement of act.

3. This act shall come into operation on the first day of January, one thousand eight hundred and sixty-eight, and shall not apply to any purchase concerning which any suit shall be then depending.

PARTITION ACTS.

I.—The Partition Act, 1868.

31 & 32 Vict. c. 40.

An Act to amend the Law relating to Partition.

[25th June, 1868.]

Be it enacted as follows:

31 & 32 Vict. c. 40, s. 1.

1. This act may be cited as "The Partition Act, 1868." Short title.

2. In this act the term "the court" means the Court of Chancery in England, the Court of Chancery in Ireland, the Landed Estates Court in Ireland, and the Court of Chancery of the County Palatine of Lancaster, with their respective jurisdictions. As to the term "the court."

By Jud. Act, 1873, s. 34 (3), the partition or sale of real estates has been assigned to the Chancery Division of the High Court in England. Under Palatine Court of Durham Act, 1889, s. 10, the Partition Acts apply to the Palatine Court of Durham.

3. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made (*a*), then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions (*b*). Power to court to order sale instead of division.

(*a*) This and the two following sections only enable the court to decree a sale in a suit *for partition*, where, if this act had not been passed, a decree for partition might have been made. A decree for partition may be made, where the parties interested are either coparceners, or joint tenants or tenants in common in possession, whether in tail (*Brook* v. Cases where decree for partition could be made:

31 & 32 Vict. c. 40, s. 3.

Hertford, 2 P. Wms. 518); for life (*Gaskell* v. *Gaskell*, 6 Sim. 643); for life determinable on marriage (*Hobson* v. *Sherwood*, 4 Beav. 184); or for years (*Heaton* v. *Dearden*, 16 Beav. 147); but not on the application of a reversioner (*Evans* v. *Bagshaw*, 5 Ch. 340). Such a decree may be made of property which is, freehold; or copyhold (Copyhold Acts, 1841 (s. 85) and 1894 (s. 87)); or leasehold (*Foster* v. *Foster*, 1 Ch. D. 588); or consists of, manors (*Hanbury* v. *Hussey*, 14 Beav. 153); advowsons (*Johnstone* v. *Baker*, 6 D. M. & G. 439); tithes (*Bassett* v. *Knollys*, 1 Yes. Sen. 494); or rent charges (*Rivis* v. *Watson*, 5 M. & W. 255). A tenant in common has, subject to this act, a right to a decree for partition (*Mayfair Property Co.* v. *Johnston*, 1894, 1 Ch. 508). See, further, notes to *Agar* v. *Fairfax* (2 L. C. Eq.).

property held on trust;

Where, however, the whole property is vested in trustees on trust for sale, it is personalty and the court has no jurisdiction to decree partition or sale (*Biggs* v. *Peacock*, 22 Ch. Div. 284); nor where there is a trust for sale after certain events (*Swaine* v. *Denby*, 14 Ch. D. 326; see *Cass* v. *Wood*, 30 L. T. 670). But the existence of a power of sale in trustees is no bar to a partition decree (*Boyd* v. *Allen*, 24 Ch. D. 622); unless the trustees are about to exercise the power (*Re Norris*, 1883, W. N. 65). In some cases, at all events where there are active trusts to be performed by the trustees, partition will not be decreed (*Taylor* v. *Grange*, 15 Ch. Div. 165).

property in mortgage.

Where one tenant in common has mortgaged his share to another tenant, he has no right to partition or sale, except on the terms of paying off the mortgage (*Gibbs* v. *Haydon*, 47 L. T. 184; 30 W. R. 726); but a tenant in common can maintain an action for partition or sale against his co-tenant, when the co-tenant is mortgagee of the whole property (*Waite* v. *Bingley*, 21 Ch. D. 674). A property which is in mortgage may be made the subject of a partition action without interfering with the mortgage (*Ib.*; *Sinclair* v. *James*, 1894, 3 Ch. 554). In the latter case mortgagees of the whole property and also of the share of the plaintiff were dismissed from the action, there being no cause of action against them. A claim to redeem a mortgage cannot properly be made in a partition action (*Ib.*).

Cases under the act.

(*b*) Under this act the court may direct the sale of the fee simple of an estate subject to an executory devise over (*Groves* v. *Carbert*, 55 L. T. W. N. 165). The court cannot, under this act, direct a sale in a suit, where a decree for partition, though not acted on, was made before the passing of the act (*Pryor* v. *Pryor*, 10 Ch. 469).

Power of court under this section discretionary.

Sects. 3, 4, and 5 of the act are, in form at least, independent enactments, though all to be construed together. The 4th and 5th sections are not mere provisoes on the 3rd section (*Pitt* v. *Jones*, 5 App. Cas. 659). Sect. 3 confers on the court an absolute power of sale on the request of anyone interested, provided the court is satisfied that a sale would be more beneficial for the parties interested than a division (*Drinkwater* v. *Ratcliffe*, 20 Eq. 530; *Pitt* v. *Jones*, 5 App. Cas. 661). This power is discretionary (*Pemberton* v. *Barnes*, 6 Ch. 693; *Huddersfield* v. *Jacomb*, 1874, W. N. 80); and with this discretion the Court of Appeal will not ordinarily interfere (*Dyer* v. *Paynter*, 33 W. R. 806).

The *onus* lies on those who wish a sale to show that it would be more beneficial (*Huddersfield* v. *Jacomb*, 1874, W. N. 80). And when a division can reasonably be made, a sale should not be directed under this section unless there are other circumstances giving jurisdiction (*Dyer* v. *Paynter*, *sup.*). So a sale has been refused where the court considered that the proper order was for partition (*Dicks* v. *Batten*, 1870, W. N. 173; *Allen* v. *Allen*, 55 L. T. W. N. 220; *Huddersfield* v. *Jacomb*, 1874, W. N. 80). As to the meaning of "beneficial," see *Drinkwater* v. *Ratcliffe* (20 Eq. 533); *Fleming* v. *Crouch* (1884, W. N. 111). The court may order partition of part and sale of the rest (*Roebuck* v. *Chadebet*, 8 Eq. 127). As to the nature of the orders that will be made, see note to sect. 9, *post*, p. 785.

Requests under this section.

A sale may be decreed at the request of a mortgagee of part of the property (*Davenport* v. *King*, 49 L. T. 92; *Re Hawksworth*, 1 L. R. Ir. 179). As to requests by persons under disability, see now Partition Act, 1876, s. 6, *post*, p. 740. For the law before that act, see *Higgs* v.

Duke (13 Eq. 280) (married women); *Grove* v. *Comyn* (18 Eq. 387) (infants); *Halfhide* v. *Robinson* (9 Ch. 373) (persons of unsound mind). **31 & 32 Vict. c. 40, s. 3.**

4. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

Sale on application of certain proportion of parties interested.

Effect of this section.

This section is an imperative enactment to the effect that, if parties interested to the extent of one moiety or upwards request a sale, the court shall order a sale, unless it sees good reason to the contrary (*Pitt* v. *Jones*, 5 App. 661; *Drinkwater* v. *Ratcliffe*, 20 Eq. 530). A mortgagee is a party interested, and must be reckoned in the proportion of interests under this section (*Davenport* v. *King*, 49 L. T. 92); so is a tenant for life with an absolute power of appointment subject to a contingent life interest (*Parker* v. *Trigg*, 1874, W. N. 27). An order was made when the plaintiffs were the owners of one moiety and the sole defendant a lessee for seven years of the other moiety (*Mason* v. *Keays*, 78 L. T. 33).

Good reason to the contrary.

The onus is thrown on the person who says that the court ought not to order a sale to show some good reason why it should not do so: otherwise the court is bound to order it (*Pemberton* v. *Barnes*, 6 Ch. 693; *Fleming* v. *Crouch*, 1884, W. N. 111). The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for the purposes of his business, and also resides thereon, is no "good reason" why a sale should not be ordered (*Wilkinson* v. *Joberns*, 16 Eq. 14; *Roughton* v. *Gibson*, 36 L. T. 93; 46 L. J. Ch. 366); nor is the fact that a sale will reduce the income of an infant (*Rowe* v. *Gray*, 5 Ch. D. 263); nor the fact that the land has fallen in value, and the proceeds will only produce an income equal to half the rent (*Re Whitwell*, 19 L. R. Ir. 45). See as to what will not be "good reason" in the case of a mansion-house and estate (*Pemberton* v. *Barnes*, 6 Ch. 685; *Porter* v. *Lopes*, 7 Ch. D. 358; *Lys* v. *Lys*, 7 Eq. 126). But where partition was as easy as sale, and would cause no loss to the plaintiff, while a sale would cause great loss to the defendant, and the action was vindictive, there was held to be "good reason" (*Saxton* v. *Bartley*, 48 L. J. Ch. 519; 1879, W. N. 94; see *Re Langdale*, I. R. 5 Eq. 572).

5. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given, the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions.

As to purchase of share of party desiring sale.

31 & 32 Vict. c. 40, s. 5.

This section is an independent enactment, not to be construed merely as a proviso on sect. 3 (*Pitt* v. *Jones*, 5 App. Cas. 659); under it the court has a discretion to refuse a sale requested by any party, even should no other party interested undertake to buy him out (*Richardson* v. *Feary*, 39 Ch. D. 45). If such an undertaking be offered, the court cannot under this section order a sale (*Pitt* v. *Jones*, 5 App. Cas. 659); but a party requesting a sale cannot be compelled to sell his interest at a valuation (*Ib.*; *Williams* v. *Games*, 10 Ch. 204); and may still press for a sale under sect. 3 (*Pitt* v. *Jones*, 5 App. Cas. 659; *Drinkwater* v. *Ratcliffe*, 20 Eq. 531). Undertakings to purchase may be given by persons under disability (Partition Act, 1876, s. 6, *post*, p. 740).

Authority for parties interested to bid.

6. On any sale under this act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same, or as to any other matters, as to the court seem reasonable.

The party having the conduct of the sale will not as a rule be allowed to bid. In one special case he was allowed (*Pennington* v. *Dalbiac*, 18 W. R. 684); but this was not followed in a similar case (*Verrall* v. *Cathcart*, 27 W. R. 645; 1879, W. N. 100; see *Wilkinson* v. *Joberns*, 16 Eq. 14; *Gilbert* v. *Smith*, 11 Ch. Div. 82). Parties who bought under a liberty to bid, and had been allowed to set off part of the purchase-money against their shares, were charged interest at 3 p.c. on the amounts set off (*Re Dracup, Field* v. *Dracup*, 1894, 1 Ch. 59).

Application of Trustee Act. 13 & 14 Vict. c. 60.

7. Sect. 30 of the Trustee Act, 1850, shall extend and apply to cases where, in suits for partition, the court directs a sale instead of a division of the property.

This section was repealed by the Trustee Act, 1893, and replaced by a provision in sect. 31 of that Act (*post*, p. 776). Where an order for sale was made contingent on the answers to certain inquiries, the court, by the same order, declared that on such a sale infant parties would be trustees, and appointed their next friend to convey their shares (*Davis* v. *Ingram*, 1897, 1 Ch. 477).

Application of proceeds of sale. 19 & 20 Vict. c. 120.

8. Sects. 23 to 25 (both inclusive) of the act of the session of the 19th and 20th years of her Majesty's reign (c. 120), "to facilitate Leases and Sales of Settled Estates," shall extend and apply to money to be received on any sale effected under the authority of this act.

Sections 34 to 36 of the S. E. Act, 1877 (which correspond to sections 23 to 25 of the S. E. Act, 1856), are given at length *ante*, pp. 638 *et seq.*

This section applies to all sales under this act, whether of settled estates or otherwise (*Re Barker*, 17 Ch. Div. 244). Money has been paid out to trustees appointed for the purposes of the S. L. Acts (*Pyne* v. *Phillips*, 1895, W. N. 8).

Conversion.

An order for sale properly made in an administration action effects conversion as from its date and before sale (*Hyett* v. *Mekin*, 25 Ch. D. 735). In the case of sales under this act there is a similar conversion as regards the share of a person *sui juris* (*Arnold* v. *Dixon*, 19 Eq. 113; 23 W. R. 314; *Re Pickard, Turner* v. *Nicholson*, 53 L. T. 293; see *Re Morgan, Smith* v. *May*, 1900, 2 Ch. 478). As regards, however, the shares of persons under disability and who have not properly requested or consented to a sale, there is (in the case of sales under this act) an equity for reconversion in the sections of 19 & 20 Vict. c. 120 (see now

S. E. Act, 1877, ss. 34, 35, and 36, *ante*, pp. 638 *et seq.*), which are imported into the Partition Act, 1868. So held in the case of a married woman (*Mildmay* v. *Quicke*, 6 Ch. D. 553; see *Re Lloyd*, 9 P. D. 65); a lunatic (*Re Barker*, 17 Ch. Div. 241; *Grimwood* v. *Bartels*, 25 W. R. 843); an infant (*Foster* v. *Foster*, 1 Ch. D. 588; compare the similar case under sect. 69 of the Lands Clauses Act, 1845, *Kelland* v. *Fulford*, 6 Ch. D. 491). Under sect. 6 of the Partition Act, 1876 (*post*, p. 740), a request for sale may be made on the part of an infant or married woman by the next friend or guardian. Where in an action in which an infant suing by his next friend was plaintiff, other parties entitled to one moiety requested a sale, and a sale was ordered on that footing, there was an equity for reconversion of the infant's share even though according to the form of the judgment he had also requested a sale (*Re Norton, N.* v. *N.*, 1900, 1 Ch. 101). Similarly where the sale was ordered upon the request of several plaintiffs, one of whom was an infant (*Howard* v. *Jalland*, 1891, W. N. 210; see *Re Norton, sup.*). There is, however, no such equity for reconversion where a married woman has properly requested a sale under sect. 6 of the Partition Act, 1876 (*Wallace* v. *Greenwood*, 16 Ch. D. 362; see as to an infant, *Ib.*; *Re Norton, N.* v. *N.*, 1900, 1 Ch. 101). Where there is an equity for reconversion in the case of a married woman, she can signify her election to take the fund as personal estate by a separate examination (*Standering* v. *Hall*, 11 Ch. D. 652). And where the fund was under 200*l.* her separate examination has been dispensed with, payment out to her being made on affidavit of no settlement (*Wallace* v. *Greenwood*, 16 Ch. D. 362; but see *Topham* v. *Burgoyne*, 41 L. T. 670). The committee of a lunatic will only be authorized to request a sale upon the terms that the proceeds shall be subject to the same uses as the land (*Re Pares, Lillingston* v. *Pares*, 12 Ch. Div. 333; see Lunacy Act, 1890, s. 123). **31 & 32 Vict. c. 40, s. 8.**

It seems that proceeds of land sold under this act, which is in court, and belongs to a person *sui juris*, who is absolutely entitled thereto and does not deal with it, is personal estate, and in the event of his death is payable to his personal representatives. So held in the case of a person *sui juris* who had become entitled as heir-at-law to an infant's share of such proceeds (*Mordaunt* v. *Benwell*, 19 Ch. D. 302); and in the case of a person who had become of unsound mind after the date of an order for payment out to her (*Re Pickard, Turner* v. *Nicholson*, 53 L. T. 293). Where at the time of an order for sale under this act an undivided share of the land was vested in the trustees of the will of a former owner of such share (which will contained no power to invest in real estate), and a share of the proceeds was subsequently ordered to be paid to such trustees as persons "absolutely entitled," such share devolved among the beneficiaries named in the will as personal estate (*Re Morgan, Smith* v. *May*, 1900, 2 Ch. 474). But it was said that if the fund had remained in court, it would have devolved as real estate (*Ib.* 478).

Where land in which persons under disability were interested was sold under this act, the court refused to order payment of the proceeds to trustees (*Higgs* v. *Dorkis*, 13 Eq. 280; see *Aston* v. *Meredith*, 13 Eq. 492; *Re Morgan, Smith* v. *May, sup.*).

Parties to partition suits.

9. Any person who, if this act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; but all persons who, if this

31 & 32 Vict. c. 40, s. 9.

act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit, and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the court to add to the decree or order.

As to who may maintain an action for partition, see *ante*, p. 731.

Parties. In actions under this act, trustees represent their beneficiaries (R. S. C. Ord. 16, r. 8; *Simpson* v. *Denny*, 10 Ch. D. 28; *Goodrich* v. *Marsh*, 1878, W. N. 186; see *Stace* v. *Gage*, 8 Ch. D. 451). An annuitant is not a necessary party (*Poole* v. *Poole*, 1885, W. N. 15). As to mortgagees, see cases quoted *ante*, p. 732. An order was made where the plaintiffs were the owners of one moiety and the sole defendant a lessee for seven years of the other moiety (*Mason* v. *Keays*, 78 L. T. 33).

Pleading. In pleading it is sufficient if the statement of claim asks a sale and distribution of proceeds. It need not ask partition (39 & 40 Vict. c. 17, s. 7, *post*, p. 741). It should indicate under which section of this act the sale is claimed (*Evans* v. *Evans*, 48 L. T. 567; 52 L. J. Ch. 304); and if a sale is claimed under sect. 3, on the ground that it is more beneficial, this should be expressly pleaded (*Ib.*). Where the property had been misdescribed the pleading was amended, and a judgment was given referring to the order post-dated (*Winkley* v. *Winkley*, 44 L. T. 572). A claim to redeem a mortgage on the plaintiff's share cannot be added to the claim for partition or sale (*Sinclair* v. *James*, 1894, 3 Ch. 554).

Receiver. Before the hearing, a receiver may in a proper case be appointed (*Porter* v. *Lopes*, 7 Ch. D. 358).

Hearing. At the hearing, an immediate order for sale had been made on admission by the defendant of the title as set out in the statement of claim (*Burnell* v. *Burnell*, 11 Ch. D. 213); but where infants are interested the claim should be verified by affidavit (*Willis* v. *Willis*, 61 L. T. 610; see *Crook* v. *Crook*, 1890, W. N. 26). Where all persons interested, and who were in existence, were parties, and the title was proved by affidavit at the hearing, an immediate order for sale was made without preliminary inquiry (*Lees* v. *Coulton*, 20 Eq. 20). And often this is the shortest and least expensive course (*Re Stedman*, *Coombe* v. *Vincent*, 58 L. T. 709). But, *semble*, it can only be adopted where the property is small, and the title simple (*Wood* v. *Gregory*, 43 Ch. D. 82; *Hawkins* v. *Herbert*, 60 L. T. 142; 37 W. R. 300). The usual course is to direct inquiries, and an immediate order for sale may be made conditional on the result (*Powell* v. *Powell*, 10 Ch. 130); the words "further consideration" in this section not being used in their technical sense (*Ib.*; see *Mildmay* v. *Quick*, 20 Eq. 538). The form of order usually made when (under sect. 4) persons interested in a moiety or upwards request a sale is given in Seton, 6th ed. 1855. In Seton, 6th ed. 1853, is given a form for use where a sale is requested under sect. 3 (see *Re Hardiman*, *Pragnell* v. *Batten*, 16 Ch. D. 360; *Waite* v. *Bingley*, 21 Ch. D. 674; *Sykes* v. *Schofield*, 14 Ch. D. 629). Preliminary inquiries may be directed on admissions in the pleadings (R. S. C. Ord. 32, r. 6), without evidence (*Gilbert* v. *Smith*, 2 Ch. Div. 686). Where in such a case the defendants were infants, no affidavit was required, the court holding that the inquiries would be a sufficient protection to the infants (*Ripley* v. *Sawyer*, 31 Ch. D. 494); not following *Senior* v. *Hereford* (4 Ch. D. 494); see *Fitzwalter* v. *Waterhouse* (52 L. J. Ch. 83).

Service. Under this section notice of the decree must be served on all necessary parties who are not before the court at the hearing. Under sect. 3, however, of Partition Act, 1876 (*post*), such service may be dispensed with.

Final order for sale. No final order for sale will be made unless all persons interested are parties (*Dodd* v. *Gronow*, 17 W. R. 511), or have been served with notice

of the judgment (*Peters* v. *Bacon*, 8 Eq. 125; *Peal* v. *Watts*, 11 Eq. 213; *Hurry* v. *Hurry*, 10 Eq. 346; see *Silver* v. *Udall*, 9 Eq. 227); or such service has been dispensed with under sect. 3 of the Partition Act, 1876, *post*, p. 738 (*Re Hardiman, Pragnell* v. *Batten*, 16 Ch. D. 360); or unless the absent parties can be presumed to be dead, as where they have not been heard of for a long time (*Jackson* v. *Lomas*, 23 W. R. 744; *Rawlinson* v. *Miller*, 1 Ch. D. 52). A sale before the certificate in answer to inquiries has been approved is invalid, and the purchaser is entitled to be discharged (*Powell* v. *Powell*, 10 Ch. 130; see *Rawlinson* v. *Miller*, 1 Ch. D. 54). Where the action has been begun in a district registry, the inquiries may be held there, but the application for a sale must be made in the High Court (*Sykes* v. *Schofield*, 14 Ch. D. 629). 31 & 32 Vict. c. 40, s. 9.

R. S. C. Ord. 51, r. 1a, provides that in all cases where a sale or partition is ordered, the court or a judge shall, in addition to existing powers, have power for good reason to authorize the same to be carried out, either by laying proposals before the judge or by proceedings altogether out of court, the proceeds being dealt with as the judge may order; but no proceedings altogether out of court are to be authorized unless the judge is satisfied that all persons interested are before the court or are bound. As to when a sale is "altogether out of court," see *Cumberland Banking Co.* v. *Maryport Co.* (1892, 1 Ch. 92). Sale out of court.

Under this rule an order for sale out of court may be made, even where an infant is interested (*Willis* v. *Willis*, 61 L. T. 610); or a person of unsound mind (*Crook* v. *Crook*, 1890, W. N. 26). Before the making of the rule this was otherwise (*Strugnell* v. *Strugnell*, 27 Ch. D. 258). A form of order for sale out of court is given in Seton, p. 1867, 6th ed.; and see *Willis* v. *Willis*, 61 L. T. 610. The reserve price and the auctioneer's remuneration should be fixed by the chief clerk, and the money should be paid into court (*Pitt* v. *White*, 57 L. T. 650; *Willis* v. *Willis*, *sup.*; *Re Stedman, Coombe* v. *Vincent*, 58 L. T. 709).

For effectuating a sale under this act, the estate tail of a lunatic may be barred upon terms (*Re Pares, Lillingston* v. *Pares*, 12 Ch. Div. 333. The court declined to sanction a sale reserving minerals (*Law* v. *Stoney*, 1876, W. N. 141). Various forms of orders under the act are given in Seton, p. 1853 *et seq.*, 6th ed. For form of order when infants are interested, see *Davis* v. *Ingram* (1897, 1 Ch. 477). For order where there have been permanent improvements, see *Parker* v. *Trigg* (1874, W. N. 27); *Williams* v. *Williams* (1899, W. N. 66), and cases there referred to; and where there are annuitants interested, see *Poole* v. *Poole* (1885, W. N. 15). Form of order.

10. In a suit for partition the court may make such order as it thinks just, respecting costs up to the time of the hearing. Costs in partition suits.

The rule as to costs in a partition suit before this act was that no costs were given until the hearing; and that the costs of the partition should be borne by the parties in proportion to the value of their respective interests; without any costs of subsequent proceedings (*Agar* v. *Fairfax*, 17 Ves. 557; *Richardson* v. *Feary*, 39 Ch. D. 50).

In cases under this act the general rule is that the entire costs are borne by the estate, that is, by each share in proportion to its value, the shares being ascertained at the date of the chief clerk's certificate (*Belcher* v. *Williams*, 45 Ch. D. 510; see *Cannon* v. *Johnson*, 11 Eq. 90; *Ball* v. *Kemp-Welch*, 14 Ch. D. 512; *Graham* v. *Clinton*, 81 L. T. 717). Where partition only was asked for, this rule has been followed (*Bowes* v. *Marquis of Bute*, 27 W. R. 750); but under special circumstances the old rule may be adopted (*Richardson* v. *Feary*, 39 Ch. D. 50), or the court may exercise its discretion (*Porter* v. *Lopes*, 7 Ch. D. 367; *Re Hawkesworth*, 1 L. R. Ir. 179; *Jennings* v. *Foster*, 1884, W. N. 200; see *Osborn* v. *Osborn*, 6 Eq. 338; *Miller* v. *Marriott*, 7 Eq. 1; *Leach* v. *Westall*, 17 W. R. 313; *Simpson* v. *Ritchie*, 16 Eq. 103). As to costs of adverse litigation in respect of one share, see *Jennings* v. *Foster* (1884, W. N. 200); *Mildmay* v. *Quicke*

31 & 32 Vict. c. 40, s. 10.

(46 L. J. Ch. 667); *Belcher* v. *Williams* (45 Ch. D. 510). When there are incumbrances on the shares only one set of costs in respect of each share will be allowed out of the fund (*Catton* v. *Banks*, 1893, 2 Ch. 221; *Ancell* v. *Rolfe*, 1896, W. N. 9; *Re Vase, Langrish* v. *Vase*, 1901, W. N. 124; see, however, *Belcher* v. *Williams*, 45 Ch. D. 510; and see *Wilkinson* v. *Joberns*, 16 Eq. 14). As to costs of trustees, see *Hervey* v. *Olliver* (57 L. T. 239). The costs must be taxed as between party and party, unless by consent of all parties (*Ball* v. *Kemp-Welch*, 14 Ch. D. 512). The costs of perusing the conveyance by the solicitors of the parties not conducting the sale are costs in the action, under the Solicitors' Remuneration Act, 1881 (General Order, 1882, r. 2 (c); *Humphreys* v. *Jones*, 31 Ch. Div. 30). As to the lien of a solicitor on the shares for his costs, see *Lloyd* v. *Jones* (40 L. T. 514); and as to his costs of appearing where he had obtained a charging order, see *Mildmay* v. *Quicke* (6 Ch. D. 556).

[*Sect.* 11 *of the Partition Act*, 1868, *read in connection with sect.* 11 *of* 21 & 22 *Vict. c.* 27, *gave power to make general orders for carrying this act into effect. But these provisions have been repealed by* 44 & 45 *Vict. c.* 59, *s.* 3, *as to England; where the power to make rules of court is now given by sect.* 17 *of the Jud. Act*, 1875. *As to Ireland and the County Palatine of Lancaster, power to make general orders was given by sect.* 11 *of* 31 & 32 *Vict. c.* 40, *and sects.* 9 *and* 10 *of* 21 & 22 *Vict. c.* 27.]

Jurisdiction of county courts in partition. 28 & 29 Vict. c. 99.

12. In England the county courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one of "The County Courts Act, 1865."

See now sect. 67 of County Courts Act, 1888. Where in a case commencing in a County Court the proceeds of sale exceeded 500*l.*, the matter was transferred to the High Court (*Rawlinson* v. *Miller*, 1 Ch. D. 52).

II.—The Partition Act, 1876.

39 & 40 Vict. c. 17.

39 & 40 Vict. c. 17, s. 1.

1. This act may be cited as the Partition Act, 1876, and shall be read as one with the Partition Act, 1868.

Short title.

Application of act.

2. This act shall apply to actions pending at the time of the passing of this act as well as to actions commenced after the passing thereof, and the term "action" includes a suit, and the term "judgment" includes decree or order.

Power to dispense with service of notice of decree or

3. Where in an action for partition it appears to the court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868, required to be served, or cannot be so served

without expense disproportionate to the value of the property to which the action relates, the court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the judge in chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the court (including persons under any disability) shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the court under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.

39 & 40 Vict. c. 17, s. 3.

order in special cases.

There must be either service or advertisement of the judgment; the court cannot dispense with both (*Hacking* v. *Whalley*, 51 L. J. Ch. 944; 1882, W. N. 135; *Phillips* v. *Andrews*, 56 L. T. 108; see, however, *Barton* v. *Barton*, 1877, W. N. 23). For form of order dispensing with service, see *Re Hardiman, Pragnell* v. *Batten* (16 Ch. D. 360).

4. Where an order is made under this act dispensing with service of notice on any person or class of persons, and property is sold by order of the court, the following provisions shall have effect:

Proceedings where service is dispensed with.

(1.) The proceeds of sale shall be paid into court to abide the further order of the court:

(2.) The court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time:

(3.) The court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made (*c*):

(4.) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the court shall distribute the proceeds in accordance with the rights of those persons:

(5.) If at the expiration of the time so fixed or extended the

39 & 40 Vict. c. 17, s. 4.

interests of all the persons interested have not been ascertained, and it appears to the court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court shall distribute the proceeds in such manner as appears to the court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the court, and with such reservations (if any) as to the court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the court to have any primâ facie rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

(c) Where the order dispensing with service of notice of the judgment did not provide for issuing advertisements, the court, on an application to distribute, directed advertisements to issue, and postponed the distribution for six months (*Phillips* v. *Andrews*, 56 L. T. 108). This sub-section applies only to persons beneficially interested, not to trustees (*Crossman* v. *Richards*, 1888, W. N. 167).

Provision for case of successive sales in same action.

5. Where in an action for partition two or more sales are made, if any person who has by virtue of this act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time.

Request by married woman, infant, or person under disability.

6. In an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability, but the court shall not be bound to comply with any such request

or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit. 39 & 40 Vict. c. 17, s. 6.

The authority to act on behalf of the person under disability must be to act in the action (*Rimington* v. *Hartley*, 14 Ch. D. 632); and the authority must be given in some special manner (*Wallace* v. *Greenwood*, 16 Ch. D. 365).

In the case of a married woman, or an infant, a request by counsel is not sufficient (*Wallace* v. *Greenwood*, 16 Ch. D. 362; *Howard* v. *Jalland*, 1891, W. N. 210; *contra*, *Crookes* v. *Whitworth*, 10 Ch. D. 289). A written request, signed by the married woman, authorizing and requesting her solicitor to instruct counsel to ask for sale has been held sufficient (*Grange* v. *White*, 18 Ch. D. 612). The request of an infant may be made by his next friend or guardian *ad litem*, but the sale must be shown to be for his benefit (*Rimington* v. *Hartley*, 14 Ch. D. 630; *Miles* v. *Jarvis*, 50 L. T. 48; *contra*, *Platt* v. *Platt*, 28 W. R. 533). An action may be brought, or a request made by the next friend of a person of unsound mind, not so found, but it must be shown that the sale is for his benefit (*Porter* v. *Porter*, 37 Ch. D. 420; *Watt* v. *Leach*, 26 W. R. 475). A request by the committee of a lunatic was authorized in *Re Pares*, *Lillington* v. *Pares* (12 Ch. Div. 333).

As to the effect of a request under this section as regards conversion of the property into personal estate, see note *ante*, p. 735.

7. For the purposes of the Partition Act, 1868, and of this act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition. Action for partition to include action for sale and distribution of the proceeds.

THE APPORTIONMENT ACT, 1870.

33 & 34 Vict. c. 35.

An Act for the better Apportionment of Rents and other Periodical Payments. [1st August, 1870.]

33 & 34 Vict. c. 35, s. 1.

Whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have been passed in the eleventh year of the reign of his late Majesty King George the Second (chapter nineteen), and in the session of Parliament holden in the fourth and fifth years of his late Majesty King William the Fourth (chapter twenty-two), and in the session of Parliament held in the sixth and seventh years of his late Majesty King William the Fourth (chapter seventy-one), and in the session of Parliament held in the fourteenth and fifteenth years of her present Majesty (chapter twenty-five), and in the session of Parliament held in the twenty-third and twenty-fourth years of her present Majesty (chapter one hundred and fifty-four):

And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences:

Be it therefore enacted as follows:

Short title.

1. This Act may be cited for all purposes as "The Apportionment Act, 1870."

Rents and periodical payments shall accrue from day to day and be apportionable in respect of time.

2. From and after the passing of this act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

As to questions of apportionment arising before 1st August, 1870, see the Apportionment Act, 1834; Shelford's R. P. Stat. 8th ed. 542; Tudor's L. C. Real Prop., 50—54, 4th ed.

The question frequently raised under the old law whether such a determination of the interest had occurred as would give rise to an apportionment (see *Shipperdson* v. *Tower*, 8 Jur. 485) cannot arise under the Act of 1870 (*Clive* v. *Clive*, 7 Ch. 433).

33 & 34 Vict. c. 35, s. 2.

Application of act,

Where the event on which apportionment is claimed occurs after the passing of the act, the act applies whether the instrument comes into operation before or after the act (*Re Cline*, 18 Eq. 213). So held in the case of a will (*Lawrence* v. *Lawrence*, 26 Ch. D. 795; *Patching* v. *Barnett*, 43 L. T. 50; see *Capron* v. *Capron*, 17 Eq. 288; *Hasluck* v. *Pedley*, 19 Eq. 271; *Constable* v. *Constable*, 11 Ch. D. 681; where codicils were executed after the act; see, however, *Jones* v. *Ogle*, 8 Ch. 192). So held also in the case of an order of court (*Re Thacker*, 1873, W. N. 10).

The act applies as between the estate of a testator and a person claiming under a specific gift of real estate (*Hasluck* v. *Pedley*, 19 Eq. 271; *Constable* v. *Constable*, 11 Ch. D. 681) and of personal estate (*Re Griffith, Carr* v. *Griffith*, 12 Ch. D. 655; *Pollock* v. *Pollock*, 18 Eq. 329; correcting *Whitehead* v. *Whitehead*, 16 Eq. 528). Similarly the act applies between tenant for life and remainderman (*Re Cline*, 18 Eq. 213; *Pollock* v. *Pollock*, *ib.* 329). For cases where the testator has given directions against apportionment, see sect. 7, *post*, p. 746.

as between vendor and purchaser,

As between vendor and purchaser the words of sect. 2 seem wide enough to give rise to an apportionment of rent when not provided for by the contract. See, however, *Re Keillor* (I. R. 6 Eq. 329), where a purchaser of land was held liable to all rent payable after the purchase; and *Black* v. *Homersham* (4 Ex. D. 24), where a purchaser of shares was held entitled to all dividends declared after the contract (see further Dart, V. & P. 6th ed. 915).

Where a condition on a sale of leaseholds provided that the purchaser should have possession on a certain day, all outgoings up to that day being cleared by the vendors, the vendors were held bound to pay an apportioned part of the current rent (*Lawes* v. *Gibson*, 1 Eq. 135).

Where land in occupation of a tenant was conveyed, it was held under the old law that while the conveyance did not pass arrears of rent previously due (*Flight* v. *Bentley*, 7 Sim. 151), it passed all the grantor's interest in rent not then due (*Flinn* v. *Calow*, 1 M. & Gr. 589).

as between landlord and tenant.

As between landlord and tenant, where, during a quarter, a succession of interest occurs in the reversion, the case falls within the proviso at the end of sect. 4, and only one action can be brought for the entire rent. But where the succession occurs among the persons entitled to the term, the reversioner can sue each person liable for his proportion of rent, but for no greater sum. So held where the trustee of a bankrupt tenant entered and subsequently assigned over during a current quarter (*Swansea Bank* v. *Thomas*, 4 Ex. D. 94; 40 L. T. 558; *Hopkinson* v. *Lovering*, 11 Q. B. D. 92). The act, in fact, not only affects the rights of recipients of rent, but apportions the liability to pay rent (*Re Howell*, 1895, 1 Q. B. 847). Where a tenant is evicted by title paramount during a quarter, the act applies, and the tenant is liable for an apportioned part up to eviction (*Elvidge* v. *Meldon*, 24 L. R. Ir. 91; see *Hartcup* v. *Bell*, 1 Cab. & El. 19). And the same rule seems to obtain where a landlord lawfully evicts his own tenant (see *Ellis* v. *Rowbotham*, 1900, 1 Q. B. 743, and sect. 3 of the act; see formerly *Oldershaw* v. *Holt*, 12 Ad. & E. 590); but not where the eviction is wrongful (*Clapham* v. *Draper*, 1 Cab. & El. 484). Where rent was payable in advance, it was not apportioned, it being said that the act was only intended to apply to sums which are accruing, but have not accrued, due when the apportionment is said to be required (*Ellis* v. *Rowbotham*, 1900, 1 Q. B. 744).

On the construction of a will, a direction to forgive a tenant all rents "due and owing" at the testator's death was held to relate to rent not up to the death, but only to the last rent day before the death (*Re Lucas, Parish* v. *Hudson*, 54 L. T. 30). On the other hand, where a tenant becomes bankrupt during a quarter, rent up to the adjudication is rent "accrued due" within sect. 42 of the Bankruptcy Act, 1883; and the landlord upon the expiry of the quarter may distrain (*Re Howell*, 1895, 1 Q. B. 844; see *Re Wilson*, 62 L. J. Q. B. 628).

In the case of a company, a claim for rent for the expired portion of a current quarter is not a debt on which a winding-up petition can be

33 & 34 Vict. c. 35, s. 2.

founded (*United Club Co.*, 60 L. T. 665). Where a company holding a lease is wound up, rent is apportioned to the date of the winding-up order (Winding-up Rules, 1890, rule 103). See before that rule *South Kensington Stores* (17 Ch. D. 161). The same rule was applied in the case of a voluntary liquidation (*Shackell* v. *Chorlton*, 1895, 1 Ch. 378).

The right specially conferred by the Landlord and Tenant Act, 1851, s. 1, upon a remainderman to an apportioned part of the rent under a lease granted by a tenant for life seems now to belong to him under the general provisions of this act.

In the ordinary case of rents issuing out of land, a mortgagee entering is entitled to rents then accrued due but not paid over. And this right has not been interfered with by the act (*Anderson* v. *Butler's Wharf*, 48 L. J. Ch. 824).

In the case of an annuity charged on the land of a tenant for life and secured by a term, it was held under the old law that, unless the annuitant had entered into possession, he could not claim arrears of his annuity out of apportioned rents belonging to the tenant for life's estate (*Paget* v. *Anglesey*, 17 Eq. 283).

Payments apportionable.

Under this act an apportionment has been made of rents (*Capron* v. *Capron*, 17 Eq. 288; *Roseingrave* v. *Burke*, I. R. 7 Eq. 186; see *South Kensington Co-operative Stores*, 17 Ch. D. 161; *Ellis* v. *Rowbotham*, 1900, 1 Q. B. 740); dividends on stock (*Pollock* v. *Pollock*, 18 Eq. 329); dividends payable by a company registered under the Cos. Act, 1862 (*Re Lysaght*, *Lysaght* v. *Lysaght*, 1898, 1 Ch. 115); an occasional bonus on shares in an unincorporated life assurance society which was held to be a public company within sect. 5 (*Re Griffith*, *Carr* v. *Griffith*, 12 Ch. D. 655); a salary (*Treacy* v. *Corcoran*, I. R. 8 C. L. 40; but not of profits arising from a newspaper (*Re Cox*, 9 Ch. D. 159); nor of the profits of a private trading partnership (*Jones* v. *Ogle*, 8 Ch. 192); nor of parish rates (*Re Wearmouth Co.*, 19 Ch. D. 640); nor an annuity payable in advance (*Trevalion* v. *Anderton*, 66 L. J. Q. B. 489).

Where directors of a company were under the articles entitled to "receive by way of remuneration in each year 5,000*l.*," they were only entitled in respect of a complete year, and the act did not apply (*Salton* v. *New Beeston Cycle Co.*, 1899, 1 Ch. 775; see *Inman* v. *Ackroyd*, 1901, 1 Q. B. 613).

No apportionment of income will be made as between tenant for life and remainderman with reference to the variation in price of stock arising from the distance of a period of sale or investment from the last payment of dividend (*Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; *Freeman* v. *Whitbred*, 1 Eq. 266; *Re Clarke*, *Barker* v. *Perowne*, 18 Ch. D. 160; *Bulkeley* v. *Stephens*, 1896, 2 Ch. 241).

The apportionment contemplated by the above act is one in respect of time. As to the apportionment (in a different sense) of rent-service and rent-charges in certain cases, see Law of Prop. Amend. Act, 1859, ss. 3, 10, *ante*, p. 527; and with respect to leases granted after the 31st December, 1881, see Conv. Act, 1881, s. 12, *ante*, p. 568.

Apportioned part of rent, &c. shall be payable when the next entire portion shall have become due.

3. The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before.

Persons shall

4. All persons and their respective heirs, executors, adminis-

trators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this act to the same by action at law or suit in equity.

33 & 34 Vict. c. 35, s. 4.

have the same remedies for recovering apportioned parts as for entire portions.

Proviso as to rents reserved in certain cases.

See *Swansea Bank* v. *Thomas*, 4 Ex. D. 94, *ante*, p. 743.

5. In the construction of this act—

The word "rents" includes rent-service, rent-charge, and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

The word "annuities" includes salaries and pensions.

The word "dividends" includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies (*a*), divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made (*b*), but the said word "dividend" does not include payments in the nature of a return or reimbursement of capital.

Interpretation of terms.

(*a*) See *Jones* v. *Ogle* (8 Ch. 192); *Re Griffith, Carr* v. *Griffith* (12 Ch. D. 655). The words include companies registered under the Companies Act, 1862 (*Re Lysaght, L.* v. *L.*, 1898, 1 Ch. 115).

(*b*) It was held under the old law that for the purpose of apportionment a dividend was to be taken as payable on the day on which it was actually payable, and not on the day on which it was declared (*Hartley* v. *Allen*, 27 L. J. Ch. 621).

6. Nothing in this act contained shall render apportionable any annual sums made payable in policies of assurance of any description.

Act not to apply to policies of assurance;

33 & 34 Vict. c. 35, s. 7.

nor where stipulation made to the contrary.

7. The provisions of this act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place.

It was held under the similar words of sect. 3 of Apportionment Act, 1834, that inference from the whole tenor and context of the will was not sufficient to exclude the operation of the act (*Tyrrell* v. *Clark*, 2 Drew. 86). But an express gift of the income of property will have that effect (*Re Cleveland, Wolmer* v. *Forester*, 1894, 1 Ch. 165; *Re Lysaght, Lysaght* v. *Lysaght*, 1898, 1 Ch. 115; *Re Meredith, Stone* v. *Meredith*, 67 L. J. Ch. 409; 78 L. T. 492; *Roseingrave* v. *Burke*, 7 I. R. Eq. 190; see *Jones* v. *Ogle*, 8 Ch. 115).

TRUSTEES.

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I.—THE TRUSTEE ACT, 1893.

56 & 57 VICT. c. 53.

PART I.

INVESTMENTS.

56 & 57 Vict. c. 53, s. 1.

Authorized investments.

1. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say (*a*):

(a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom:

(b) On real or heritable securities in Great Britain or Ireland (*b*):

(c) In the stock of the Bank of England or the Bank of Ireland:

(d) In India Three and a half per cent. stock and India Three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India:

(e) In any securities the interest of which is for the time being guaranteed by Parliament:

(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

(g) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and

56 & 57 Vict. c. 53, s. 1.

having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock:

(h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (g), either alone or jointly with any other railway company:

(i) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(j) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company:

(k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or provisional order:

(n) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years

last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied: 56 & 57 Vict. c. 53, s. 1.

(o) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court (*c*),

and may also from time to time vary any such investment.

(*a*) This section replaces sect. 3 of the Trustee Investment Act, 1889. The questions raised under the last-mentioned act as to varying existing investments (see *Hume* v. *Lopes*, 1892, A. C. 112) are now set at rest. As to a trustee's liability for continuing an investment which has ceased to be authorised, see Trustee, &c. Act, 1894, s. 4, *post*, p. 795; *Re Chapman, Cocks* v. *Chapman*, 1896, 2 Ch. 763.

Who are trustees.

As to who are trustees within the section, see the definition of "trust" and "trustee" in sect. 50, *post*, p. 790. A corporation incorporated by special act for the purposes of a particular charity was held to be a trustee of the funds of the charity within the Trustee Investment Act, 1889 (*Re Manchester Royal Infirmary*, 43 Ch. D. 420). That act was held not applicable in the case of trustees of a building society (*Re National, &c. Building Society*, 43 Ch. D. 431); but now the funds of such a society may be invested in any trustee investments (Building Societies Act, 1894, s. 17).

Appropriation.

Where a testator directed his trustees to set apart and invest in any of the investments authorised by his will a sum sufficient to provide an annuity, it was held that the power of investment given by the act of 1889 did not enable them to set apart investments authorised by that act (*Re Owthwaite, Owthwaite* v. *Taylor*, 1891, 3 Ch. 494).

Colonial stocks.

By the Colonial Stock Act, 1900, s. 2, trustees may invest in any Colonial stock which is registered in the United Kingdom in accordance with the Colonial Stock Acts, 1874 and 1892, as amended by the act of 1900, and with respect to which there have been observed such conditions (if any) as the Treasury may prescribe. By the same section the restrictions of sect. 2 (2) of the Trustee Act, 1893, are applied to Colonial stocks, and provision is made for a list to be kept by the Treasury of Colonial stocks in respect of which the provisions of the act have been complied with.

Real securities.

(*b*) Under the Trusts (Scotland) Amendment Act, 1884, bonds of the Greenock Harbour Trustees were held not to be "real or heritable securities" (*Hutton* v. *Annan*, 1898, A. C. 289). As to investments by trustees on real securities, see further sects. 8 and 9, *post*, and Lewin, 10th ed. 361.

(*c*) It is provided by R. S. C. Ord. 22, r. 17, sub-sect. 1, and rule 17a as follows:—

Cash under the control of or subject to the order of the court may be invested in the following stocks, funds, or securities, namely:—

Two and Three-quarters per Cent. Consolidated Stock (to be called after the 5th April, 1903, Two and a Half per Cent. Consolidated Stock):

Consolidated Three Pounds per Cent. Annuities:

Reduced Three Pounds per Cent. Annuities:

Two Pounds Fifteen Shillings per Cent. Annuities:

Two Pounds Ten Shillings per Cent. Annuities:

Local Loans Stock under National Debt and Local Loans Act, 1887:

Exchequer Bills:

Bank Stock:

India Three and a Half per Cent. Stock:

India Three per Cent. Stock:

Indian guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment:

56 & 57 Vict. c. 53, s. 1.

Stocks of Colonial Governments guaranteed by the Imperial Government:

Mortgage of freehold and copyhold estates respectively in England and Wales:

Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.:

Three per Cent. Metropolitan Consolidated Stock:

Inscribed Two and a Half per Cent. Debenture Stock issued by the Corporation of London, and secured by a trust deed dated 24th June, 1897:

Debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stocks or shares:

Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, or under the Isle of Man Loans Act, 1880, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of the investment.

Purchase at a premium of redeemable stocks.

2.—(1.) A trustee may under the powers of this act invest in any of the securities mentioned or referred to in section one of this act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2.) Provided that a trustee may not under the powers of this act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g), (i), (k), (l), and (m) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this act.

Discretion of trustees.

3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

Application of preceding sections.

4. The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

Enlargement of express powers of investment.

5.—(1.) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a

reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and 56 & 57 Vict. c. 53, s. 5.

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864. 27 & 28 Vict. c. 114.

(2.) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3.) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875. 38 & 39 Vict. c. 83.

(4.) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880. 43 & 44 Vict. c. 8.

(5.) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865. 28 & 29 Vict. c. 78.

Power to invest, notwithstanding drainage charges.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge. 10 & 11 Vict. c. 32.

Trustees not to convert inscribed stock into certificates to bearer.

7.—(1.) A trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following acts, that is to say:

(a) The India Stock Certificate Act, 1863;
(b) The National Debt Act, 1870; 26 & 27 Vict. c. 73.
(c) The Local Loans Act, 1875; 33 & 34 Vict. c. 71.
(d) The Colonial Stock Act, 1877. 38 & 39 Vict. c. 83.

(2.) Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorised to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject 40 & 41 Vict. c. 59.

56 & 57 Vict. c. 53, s. 7.

them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted.

Loans and investments by trustees not chargeable as breaches of trust.

8.—(1.) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

(2.) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3.) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted.

(4.) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this act, except where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888.

This section replaces sect. 4 of the Trustee Act, 1888.

The words "reasonably believed" do not apply to the instructing and employing (*Re Somerset, Somerset* v. *Poulett*, 1894, 1 Ch 253; *Re Walker, Walker* v. *Walker*, 62 L. T. 452; 59 L. J. Ch. 386; see *Re Stuart, Smith* v. *Stuart*, 1897, 2 Ch. 583). A trustee cannot be said to have reasonably believed a man to be an able and practical surveyor when in fact the trustee knows nothing about it (*Re Walker, supra*). A report advising a loan of larger amount on the property in question together with other property is not sufficient (*Ib.*).

Trustee Act, 1894, s. 4.

By the Trustee Act, 1894, s. 4 (*post*, p. 795), a trustee is not liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law.

Liability for loss by reason

9.—(1.) Where a trustee improperly advances trust money on a mortgage security which would at the time of the invest-

ment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest. 56 & 57 Vict. c. 53, s. 9. of improper investments.

(2.) This section applies to investments made as well before as after the commencement of this act except where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888.

This section replaces sect. 5 of the Trustee Act, 1888.

To get the benefit of this section the trustee must establish the propriety of the investment independently of its value (*Re Walker, supra;* see *Blyth* v. *Fladgate*, 1891, 1 Ch. 353). The court ascertained the "smaller sum," and held trustees liable for the excess only in *Re Somerset, Somerset* v. *Poulett*, 1894, 1 Ch. 253. See the order, Seton, 6th ed. 1144.

PART II.

Various Powers and Duties of Trustees.

Appointment of New Trustees.

10.—(1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid (*d*). Power of appointing new trustees.

(2.) On the appointment of a new trustee for the whole or any part of trust property—

(a) The number of trustees may be increased (*e*); and

(b) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part (*f*); and

56 & 57 Vict. c. 53, s. 10.

(c) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(d) Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust

(4.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained (*g*).

(6.) This section applies to trusts created either before or after the commencement of this act.

This section replaces sect. 31 of the Conv. Act, 1881, sect. 5 of the Conv. Act, 1882, and sect. 6 of the Conv. Act, 1892.

(*d*) This section applies to trustees for the purposes of the S. L. Acts (sect. 47, *post*); and also to trustees of land held for religious or educational purposes (Trustees Appointment Act, 1890, s. 3; see *Re Coates to Parsons*, 34 Ch. D. 370). Where an appointment can be made under this section, application should not be made to the court (*Re Gibbons*, 45 L. T. 756; 30 W. R. 287; *Re Higginbottom*, 1892, 3 Ch. 132. See *Re Soulby*, 21 W. R. 256; *Re Jackson*, 16 W. R. 572; *Re Shafto*, 29 Ch. D. 247).

An appointment made under this section will be free from any fetter to which a power in the trust instrument is subject (*Cecil* v. *Langdon*, 28 Ch. Div. 1; *Re Lloyd*, 57 L. J. Ch. 246).

Vacancies. Where a trustee had resided for twelve months abroad, a new trustee was appointed (*Re Walker and Hughes*, 24 Ch. D. 698); but where in such a case the trustee had been in London for one week during the twelve months the appointment was held void (*Re Walker*, *Summers* v. *Barrow*, 1901, 1 Ch. 259; see *Re Stamford*, *Payne* v. *Stamford*, 1896, 1 Ch. 288; *Re Arbib and Class*, 1891, 1 Ch. 601). It seems that a trustee who disclaims, refuses to act within this section (*D'Adhemar* v. *Bertrand*, 35 Beav. 19), although he has no legal estate in him (*Re Birchall*, *Birchall* v. *Ashton*, 40 Ch. Div. 436). A new trustee cannot be appointed under this section, in place of an infant (*Re Tallatire*, 1885, W. N. 191). When the trustees named in the will of a testator all die before him new trustees cannot be appointed under this section (*Nicholson* v. *Field*, 1893, 2 Ch. 511). As to a trustee becoming insane during the life of a testator, see *Newton* v. *Newton*, noticed in L. T. Jour., vol. 55, p. 56.

56 & 57 Vict. c. 53, s. 10.

Where a deed declared that certain persons should have "power to appoint new trustees," they were held to be "persons nominated for this purpose" (*Re Walker and Hughes*, 24 Ch. D. 698). Persons nominated to appoint new trustees in certain events cannot under this section appoint in any other event (*Re Wheeler and De Rochow*, 1896, 1 Ch. 315). As to the case of separate sets of trustees, see *S.C.*, p. 321. Where the person nominated for the purpose of appointing is a lunatic so found, an appointment can be made under this section by the continuing trustees (*Re Blake*, 1887, W. N. 173); in which case an appointment can also be made by the committee under an order in lunacy (see p. 797, *post*). Where a power of appointment was vested in certain persons, the survivor and the heirs of the survivor, and the heir of the survivor could not be found, there was no person "nominated for the purpose and able and willing to act," and the surviving and continuing trustee could appoint under this section (*Cradock* v. *Witham*, 1895, W. N. 75). Where the persons nominated cannot agree, the personal representative of the last surviving trustee can appoint (*Re Sheppard*, 1888, W. N. 234). A surviving trustee who is about to retire can under sub-sect. (4) appoint (see *Re Coates to Parsons*, 34 Ch. D. 370). But where the surviving trustee is abroad and will not appoint, application must be made to the court (*Re Clift*, 27 S. J. 199). So where he is incapable (*Re Lemann*, 22 Ch. D. 633). A deceased sole trustee is a "last surviving or continuing trustee," and his executor can appoint (*Re Shafto*, 29 Ch. D. 247). The personal representative is not bound to appoint under this section (*Re Knight*, 26 Ch. D. 82). A surviving trustee cannot exercise the power given by this section by his will (*Re Parker*, 1894, 1 Ch. 707). Where a surviving trustee of a will appointed by his will general executors, and also special executors to execute the trusts of the original will, an appointment by the general executors under this section of new trustees of the original will was held valid (*Ib.*).

Who can appoint.

Where the donee of the power of appointing under this section desires to appoint, the court will not interfere with him (*Re Higginbottom*, 1892, 3 Ch. 132). A judgment for the execution of the trusts will not prevent him from appointing (*Re Gadd, Eastwood* v. *Clark*, 23 Ch. D. 134; *Re Hall, Hall* v. *Hall*, 59 L. T. 901). But in that case his nominee must be approved by the court (*Ib.*; *Re Norris, Allen* v. *Norris*, 27 Ch. D. 333). Where there is no such judgment the donee might possibly appoint a person whom the court would not have sanctioned (*Re Norris*, 27 Ch. D. 341; *Re Stamford, Payne* v. *Stamford*, 1896, 1 Ch. 288). But he cannot appoint himself (*Re Skeats, Skeats* v. *Evans*, 42 Ch. D. 522; *Re Newen, Newen* v. *Barnes*, 1894, 2 Ch. 297). As to the donee appointing his own solicitor, see *Re Stamford, sup.* As to whether a corporation can be appointed a new trustee under this section, see the Interpretation Act, 1889, s. 19; *Billing* v. *Brogden*, 1888, W. N. 238; *Law Guarantee Society* v. *Bank of England*, 24 Q. B. D. 406; and the Bodies Corporate (Joint Tenancy) Act, 1899.

Who can be appointed.

The appointment may be made "by writing." But it cannot be made by will (*Re Parker*, 1894, 1 Ch. 707).

Mode of appointment.

(*e*) The power in this section to increase the number of trustees only applies where a vacancy is being filled (*Re Gregson*, 34 Ch. D. 209); but even where there is no vacancy the court can increase the number, either under sect. 25, *post* (*Ib.*), or under its general jurisdiction (*D'Adhemar* v. *Bertrand*, 35 Beav. 19). The appointment of a single trustee under sect. 27 of 23 & 24 Vict. c. 145 was held valid (*West of England Bank* v. *Murch*, 23 Ch. D. 138).

Number of trustees.

(*f*) Sub-sect. (2) (b) replaces Conv. Act, 1882, s. 5; Conv. Act, 1892, s. 6, as to which see *Savile* v. *Couper* (36 Ch. D. 520); *Re Moss' Trusts* (37 Ch. D. 513); *Re Paine* (28 Ch. D. 725); and the cases quoted under sect. 25, *post*, p. 768. It would seem doubtful whether separate trustees can be appointed out of court when the trusts may ultimately coalesce (*Re Hetherington*, 34 Ch. D. 211).

Separate sets of trustees.

(*g*) Where the instrument of trust contains an express power of appointing

Contrary intention.

56 & 57 Vict. c. 53, s. 10.

new trustees which either is subject to restrictions, or is incomplete, this does not amount to a contrary intention within sub-sect. (5), so as to prevent the statutory power from applying free from the restrictions, or in cases not mentioned in the express power (*Re Lloyd*, 57 L. J. Ch. 246; *Cecil* v. *Langdon*, 28 Ch. Div. 1; *Re Coates to Parsons*, 34 Ch. D. 370; *Cradock* v. *Witham*, 1895, W. N. 75; *Re Wheeler and De Rochow*, 1896, 1 Ch. 315).

Retirement of trustee.

11.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this act, without any new trustee being appointed in his place.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this act.

This section replaces sect. 32 of the Conv. Act, 1881. The court has jurisdiction to discharge a trustee without appointing a new trustee in his place (*Re Chetwynd, Scarisbrick* v. *Nevinson*, 1902, 1 Ch. 692).

Vesting of trust property in new or continuing trustees.

12.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2.) Where a deed by which a retiring trustee is discharged under this act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable

in books kept by a company or other body, or in manner directed by or under Act of Parliament. 56 & 57 Vict. c. 53, s. 12.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this act.

(5.) This section applies only to deeds executed after the 31st of December, 1881.

This section replaces sect. 34 of the Conv. Act, 1881.

This section applies in the case of a bare trustee (*London and County Banking Co.* v. *Goddard*, 1897, 1 Ch. 642). Where an equitable mortgage contained a declaration of trust by the mortgagor of the legal estate and a power to the mortgagees to appoint new trustees, and the mortgagees exercised that power and made a vesting declaration under this section, the legal estate was held to pass (*ib.*). See also as to sub-sect. (3), *S. C.*, p. 649.

Purchase and Sale.

Power of trustee for sale to sell by auction, &c.

13.—(1.) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by instrument coming into operation after the 31st of December, 1881.

This section replaces sect. 35 of the Conv. Act, 1881. In the case of instruments coming into operation before the 31st December, 1881, but executed after the 28th August, 1860, see 23 & 24 Vict. c. 145, ss. 1, 2 (*ante*, p. 537). The rules which, apart from the statute, apply to trustees concurring with other persons in selling, are laid down by *Jessel*, M.R., in *Re Cooper and Allen* (4 Ch. D. 814).

Power to sell subject to depreciatory conditions.

14.—(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

56 & 57 Vict. c. 53, s. 14.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4.) This section applies only to sales made after the 24th day of December, 1888.

This section replaces sect. 3 of the Trustee Act, 1888 (see *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. Div. 586).

Power to sell under 37 & 38 Vict. c. 78.

15. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of sect. 2 of the Vendor and Purchaser Act, 1874.

See V. and P. Act, 1874, *ante*, p. 545. This section replaces sect. 3 of that act.

Married woman as bare trustee may convey.

16. When any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a *feme sole*.

This section replaces sect. 6 of the V. and P. Act, 1874, *ante*, p. 546.

A married woman who was a trustee for sale was held (after order for sale and purchase-money paid into court) to be a bare trustee (*Re Docwra, Docwra* v. *Faith*, 29 Ch. D. 693; see *Re Cunningham* v. *Frayling*, 1891, 2 Ch. 567).

A married woman who was a mortgagee was held on payment off to be a bare trustee (*Re Brooke and Fremlin*, 1898, 1 Ch. 650; *Re Howgate and Osborn*, 1902, 1 Ch. 451), but not a married woman who was an ordinary trustee for sale (*Re Harkness and Allsopp*, 1896, 2 Ch. 358).

Various Powers and Liabilities.

Power to authorise receipt of money by banker or solicitor.

44 & 45 Vict. c. 41.

17.—(1.) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

(2.) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3.) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of

the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee. 56 & 57 Vict. c. 53, s. 17.

(4.) This section applies only where the money or valuable consideration or property is received after the 24th day of December, 1888.

(5.) Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

This section replaces sect. 2 of the Trustee Act, 1888.

A trustee can execute a deed by a solicitor as attorney, and can empower that solicitor to receive trust money by producing a proper deed for the purpose. But the trustee must himself appoint the solicitor, and must himself permit the production of the deed. A deed executed by the attorney of a trustee acting under a general power is not sufficient within sub-sect. (1) (*Re Hetling and Merton*, 1893, 3 Ch. 280). See further the cases quoted under sect. 56 of the Conv. Act, 1881, *ante*, p. 597.

Sub-sect. (3) is a statutory declaration of the law as to trustees allowing trust money to be received by a solicitor. Such receipt is no part of the duty of a solicitor as such (*Wyman* v. *Paterson*, 1900, A. C. 280). See further the note to sect. 24 (*post*, p. 763).

Power to insure building.

18.—(1.) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2.) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(3.) This section applies to trusts created either before or after the commencement of this act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

This section replaces sect. 7 of the Trustee Act, 1888.

Power of trustees of renewable leaseholds to renew and raise money for the purpose.

19.—(1.) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or

56 & 57 Vict. c. 53, s. 19.

concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

(2.) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3.) This section applies to trusts created either before or after the commencement of this act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

This section replaces sects. 10 and 11 of the Trustee Act, 1888, which latter sections replaced sects. 8 and 9 of 23 & 24 Vict. c. 145. As to the apportionment of the liability for the fines as between tenant for life and remainderman, see *Re Baring, Jeune* v. *Baring*, 1893, 1 Ch. 61, and the cases quoted Tudor, L. C. 4th ed. 134.

Power of trustee to give receipts.

20.—(1.) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this act.

This section replaces sect. 36 of the Conv. Act, 1881 (see the Law of Prop. Amdt. Act, 1859, s. 23, and the note thereto, *ante*, p. 416; *Hockey* v. *Western*, 1898, 1 Ch. 350).

Power for executors and trustees to compound, &c.

21.—(1.) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think

fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith. 56 & 57 Vict. c. 53, s. 21.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(4.) This section applies to executorships, administratorships and trusts constituted or created either before or after the commencement of this Act.

This section replaces sect. 37 of the Conv. Act, 1881, which itself replaced sect. 30 of 23 & 24 Vict. c. 145. The last mentioned section (which was not confined to mere money claims, *Re Warren, Weadon* v. *Reading*, 51 L. T. 561; 53 L. J. Ch. 1016) justified a compromise by an executrix with the testator's surviving partner and his creditors as to the sale of partnership real estate (*West of England Bank* v. *Murch*, 23 Ch. D. 138; see also, *Re Owens*, 47 L. T. 64).

Powers of two or more trustees.

22.—(1.) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2.) This section applies only to trusts constituted after or created by instruments coming into operation after the 31st day of December, 1881.

This section replaces sect. 38 of the Conv. Act, 1881.

Exoneration of trustees in respect of certain powers of attorney.

23. A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

This section replaces sect. 26 of the Law of Property Amendment Act, 1859.

56 & 57 Vict. c. 53, s. 23.

According to the common law, a power of attorney was instantly revoked by the death of the grantor, and acts afterwards done under it, even where it was given for value, were invalid (*Watson* v. *King*, 4 Camp. 272). In equity, however, where a power had been given for value, acts done under it after the death of the grantor, *bonâ fide* and without notice, were valid (*Bailey* v. *Collett*, 18 Beav. 179, and cases there quoted; *Hatch* v. *Searles*, 2 Sm. & Giff. 155; *Carter* v. *White*, 20 Ch. D. 228). Powers of attorney issued by the Bank of England for the transfer of stock contained a clause making a transfer valid, notwithstanding the previous death of the grantor; as to which, see *Kiddill* v. *Farnell* (3 Sm. & Giff. 428). Where a legacy was bequeathed to a married woman abroad with her husband, and the husband required the legacy to be paid under a power of attorney, the executor was justified in paying the money into court, because until reduction into possession by the husband, the wife's right might have accrued by the death of the husband (*Re Jones*, 3 Drew. 680).

As to powers of attorney, see now Conv. Act, 1881, s. 47, Conv. Act, 1882, ss. 8 and 9, *ante*, pp. 594, 614.

Implied indemnity of trustees.

24. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

This section replaces sect. 31 of the Law of Property Amendment Act, 1859.

The indemnity clause formerly expressly inserted in instruments and now implied therein by this section, did little more than what the court would have done without the clause (*Dawson* v. *Clarke*, 18 Ves. 254). As to the general right of a trustee to be indemnified by the *cestui que trust* personally, see *Hardoon* v. *Belilios*, 1901, A. C. 118; *Dodson* v. *Downey*, 1901, 2 Ch. 620.

Acts of co-trustees.

As regards the acts of co-trustees, a trustee may be liable (1) where he hands over trust money without securing its due application; (2) where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and (3) where he becomes aware of a breach of trust committed or meditated and does not proceed for restitution or redress (*Wilkins* v. *Hogg*, 8 Jur. N. S. 25). A trustee was made liable for permitting his co-trustee to retain sole possession of bonds to bearer (*Lewis* v. *Nobbs*, 8 Ch. D. 591). The usual indemnity clause would not protect a trustee in such cases (*Mucklow* v. *Fuller*, Jac. 198; *Dix* v. *Burford*, 19 Beav. 409; *Brumridge* v. *Brumridge*, 27 Beav. 5). But where a will specially provided that any trustee who should pay over to his co-trustee or should concur in any act enabling him to receive moneys for the general purposes of the will should not be obliged to see to the application thereof, nor be rendered responsible by express notice of the misapplication thereof, trustees paying over money to a co-trustee were protected (*Wilkins* v. *Hogg*, 3 Giff. 116; 10 W. R. 47; *Pass* v. *Dundas*, 43 L. T. 665). See in general as to the right of the passive trustee to indemnity from the acting trustee, *Bahin* v. *Hughes* (31 Ch. Div. 390).

56 & 57 Vict. c. 53, s. 24.

Acts of bankers, &c.

As regards mercantile agents, such as bankers and brokers, a trustee cannot delegate the care of trust moneys to strangers where there is no "moral necessity from the usage of mankind" for the employment of such agency (*Speight* v. *Gaunt*, 9 App. Cas. 5). But it was held in equity that where, according to the usual and regular course of business, moneys ought to pass through the hands of mercantile agents, that course might properly be followed by trustees (*Ex p. Belchier*, Amb. 218; *Speight* v. *Gaunt*, *sup.*). The above section gives the force of statute to this doctrine of equity; and when once the propriety of employing the agent has been established, it throws the *onus probandi* on those who seek to charge a trustee with loss arising from an agent's default (*Re Brier*, *Brier* v. *Evison*, 26 Ch. Div. 243). The liability of the trustee is not increased by his receiving remuneration (*Jobson* v. *Palmer*, 1893, 1 Ch. 71).

The trustee, however, must exercise a discretion in the choice of the agent (*Re Weall*, *Andrews* v. *Weall*, 42 Ch. D. 678); and the agent must not be employed out of the ordinary scope of his business (*Fry* v. *Tapson*, 28 Ch. D. 268). It is no part of the duty of a solicitor as such to receive trust money. And trustees were liable for permitting him to retain it for an excessive period (*Wyman* v. *Paterson*, 1900, A. C. 280; see sect. 17, sub-sect. 3, of the present act, *ante*, p. 758; *Evans Williams* v. *Byron*, 18 T. L. R. 172). Trustees were made liable for the fraud of their solicitors (*Bostock* v. *Floyer*, 1 Eq. 26; *Sutton* v. *Wilders*, 12 Eq. 373), and were not protected by indemnity clauses (*Wyman* v. *Paterson*, *sup.*; *Knox* v. *Mackinnon*, 13 App. Cas. 753; *Rae* v. *Meek*, 14 App. Cas. 558).

See, further, the cases quoted under the Judicial Trustees Act, 1896, s. 3, *post*, p. 808.

PART III.

Powers of the Court.

Appointment of New Trustees and Vesting Orders.

Power of the court to appoint new trustees.

25.—(1.) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt (*h*).

(2.) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3.) Nothing in this section shall give power to appoint an executor or administrator (*i*).

(*h*) In connection with this section see also the power of the court to appoint a judicial trustee under the Judicial Trustees Act, 1896 (*post*, p. 806).

The first half of sub-sect. (1) corresponds with and replaces sect. 32 of the Trustee Act, 1850, and sect. 9 of the Trustee Act, 1852. The second half replaces, as regards felony, part of sect. 8 of the Trustee Act,

56 & 57 Vict. c. 53, s. 25.

1852, and, as regards bankruptcy, sect. 147 of the Bankruptcy Act, 1883. Sub-sect. (2) corresponds with sect. 36 of the Trustee Act, 1850.

General note.

Of the cases referred to in the following note many were decided under the law as it existed prior to the passing of the present act. Such decisions, however, appear to be still applicable.

When persons are only constituted trustees by an order in a suit, new trustees cannot be appointed in their place by the same order (*Lees* v. *Coulton*, 20 Eq. 20).

Circumstances causing application to the court.

(1) Connected with the power.

The court, upon an application under section 32 of the Trustee Act, 1850, refused to enter into the question of the validity of the instrument creating the trust (*Re Matthews*, 26 Beav. 463). Except under special circumstances, as where a vesting order was required, the court refused to appoint a new trustee where there was a valid power in the instrument of trust (*Re Davies*, 3 Mac. & G. 278; see *Re Cooper*, 4 W. R. 729; *Re Sutton*, 1885, W. N. 122); even where the donee of the power intended to exercise it corruptly (*Re Hodson*, 9 Hare, 118). Nor as a rule would the court appoint where an appointment could be made under a statutory power (*Re Soulby*, 21 W. R. 256; *Re Gibbons*, 45 L. T. 756; see *Re Jackson*, 16 W. R. 572; *Re Shafto*, 29 Ch. D. 247; *Re Higginbottom*, 1892, 3 Ch. 132). And, there being an existing power, it was held that a judgment for the execution of the trusts did not give jurisdiction to the court to appoint; but it was said that in such a case the person appointed by the donee of the power required to be approved by the court; and that repeated appointments of improper persons might be held to amount to a refusal to exercise the power (*Re Gadd, Eastwood* v. *Clark*, 23 Ch. Div. 134; *Re Hall, Hall* v. *Hall*, 51 L. T. 901). Proper persons appointed by the donee were approved by the court, although all the beneficiaries objected (*Cecil* v. *Langdon*, 28 Ch. Div. 1).

Where the donee of the power is a lunatic so found, it would seem that the Court of Lunacy cannot appoint (see *Re Garrod*, 31 Ch. Div. 164); but the power may be exercised by the committee under an order in lunacy (Lun. Act, 1890, ss. 128, 129, *post*, p. 796; see *Re Bowmer*, 3 De G. & J. 658; *Re Garrod, sup.*; *Re Shortridge*, 1895, 1 Ch. 278); or the trustees may appoint under sect. 10 of the present act (see *Re Blake*, 1887, W. N. 173). The Chancery Division has also jurisdiction to make an appointment (*Re Heaphy*, 18 W. R. 1070; *Re Sparrow*, 5 Ch. 662). The court refused in such a case to appoint a new trustee, until a committee had been appointed and served with the petition (*Re Parker's Trusts*, 32 Beav. 580).

The court has appointed new trustees in the following cases. Where the donees of the power were unwilling to appoint (*Re Knight*, 26 Ch. D. 82), or could not agree (*Re Tempest*, 1 Ch. 485), or were in India (*Re Humphry*, 1 Jur. N. S. 921); where under a settlement by a husband for the sole benefit of the wife, the husband and wife had a joint power but were judicially separated and the husband had long resided abroad (*Re Somerset*, 1887, W. N. 122); where the power was vested in the surviving trustee, "his heirs or assigns," and the heir of the last surviving trustee could not be found (*Re Freeman*, 37 Ch. D. 148; compare *Cradock* v. *Witham*, 1895, W. N. 75); where it was doubtful whether the power applied to the case which had occurred (*Re Woodgate*, 5 W. R. 448; *Re Armstrong's Settlement*, 5 W. R. 448; *Cooper* v. *Macdonald*, 14 W. R. 755). See the provisions as to powers of appointing new trustees, sect. 10, *ante*, p. 753.

(2) Circumstances connected with the trustee.

Mental incapacity.

Before the Lunacy Act, 1890, orders were made under the Trustee Act, 1850, by the Court of Chancery alone, appointing a new trustee in the place of a person of unsound mind not so found, the incapacity arising from mental infirmity (*Re Martin*, 34 Ch. D. 618; *Re Davies*, 3 Mac. & G. 278; *Re Vickers*, 3 Ch. D. 112; *contra*, *Re Ormerod*, 3 De G. & J. 249; *Re Good Intent Society*, 2 W. R. 671). Where a vesting order was also asked, the order was in some cases made in Chancery and Lunacy (*Re Mason*, 10 Ch. 273; *Re Stewart*, 8 W. R. 297; *Re Davidson*, 20 L. J. Ch. 644; *Re Druce*, 46 L. T. 669; *Re Smyth*, 55 L. T. 37); but could not be made in

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Chancery alone (*Re Martin*, 34 Ch. D. 618); except where the person of unsound mind was also an infant (*Re Arrowsmith*, 6 W. R. 642; see Lunacy Act, 1890, s. 143, *post*, p. 802), or out of the jurisdiction (*Re Gardner*, 10 Ch. D. 29), or where an order for sale had been made (*Herring* v. *Clark*, 4 Ch. 167). Since the Lunacy Act, 1890, a new trustee has, under the Trustee Act, 1893, s. 25, been appointed in Chancery alone in the place of a person of unsound mind not so found; but a vesting order was refused (*Re M.*, 1899, 1 Ch. 79). Such a vesting order should, it seems, be applied for in lunacy (see *Re Martin*, 34 Ch. Div. 618). As to the power of appointing new trustees possessed by the Court of Lunacy, see Lunacy Act, 1890, s. 141, *post*, p. 802; *Re Owen* (4 Ch. 782); *Re Green* (10 Ch. 272); *Re Hodgson, Kenlis* v. *Hodgson* (11 Ch. Div. 889); *Re Rolls Hoare* (1888, W. N. 94); *Re Chauncey* (14 W. R. 849).

Physical incapacity.

In the case of a person who is incapable, the incapacity arising from physical infirmity or old age (*Re Lemann*, 22 Ch. D. 633; *Re Phelps*, 31 Ch. Div. 351; *Re Barber*, 39 Ch. Div. 187; *Re Campbell*, 1888, W. N. 176), or ill-health (*Re Chauncey*, 14 W. R. 849; *Re Weston*, 1898, W. N. 151, see *Re Dawson*, 3 N. R. 397), the Chancery Division has appointed a new trustee.

Infancy.

The court will appoint a new trustee in the place of an infant trustee nominated by a testator (*Re Gartside*, 1 W. R. 196; *Re Porter*, 25 L. J. Ch. 482); without prejudice, however, to any application by the infant to be restored to the trusteeship when he comes of age (*Re Shelmerdine*, 33 L. J. Ch. 474; *Re Brunt*, 1883, W. N. 220; *Re Tallatire*, 1885, W. N. 191).

Residence abroad.

The court has power under this section to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent (*Re Bignold*, 7 Ch. 223; *Re Martin Pye*, 42 L. T. 247). Where a trustee was resident in Jamaica, but there was no evidence that he did not intend to return to this country, *Kindersley*, V.-C., refused to appoint a new trustee (*Re Mais*, 16 Jur. 608; 21 L. J. Ch. 875; see *Re Stamford, Payne* v. *Stamford*, 1896, 1 Ch. 288; *Re Walker, Summers* v. *Barrow*, 1901, 1 Ch. 259, cases of powers). A bookseller domiciled in New York for several years was held "incapable of acting" within the words of a power (*Mennard* v. *Welford*, 1 Sm. & Giff. 426; but see *Re Bignold*, *sup.*). See, further, *Re Moravian Society*, 26 Beav. 101; *Re Arbib and Class*, 1891, 1 Ch. 601; *Re Watts*, 9 Hare, 106; *Re Harrison*, 22 L. J. Ch. 69; *Re Stewart*, 8 W. R. 297.

Absconding.

A new trustee will be appointed where a trustee absconds (*Hyde* v. *Benbow*, 1884, W. N. 117), or is an absconding bankrupt (*Re Renshaw*, 4 Ch. 783; *Re Druce*, 46 L. T. 669; *Re Lamb*, 28 Ch. D. 77; *Davies* v. *Hodgson*, 32 Ch. D. 225; *Re Gardiner*, 33 Ch. D. 590; *Re Mace*, 1887, W. N. 232).

Bankruptcy.

A new trustee can under this section be appointed in place of a bankrupt, even if unwilling to retire (*Re Dawson*, 1899, W. N. 134). Where the bankruptcy was recent, and it was not shown that the man was of good character and had the command of means, it was held that he ought to be removed (*Re Adams' Trust*, 12 Ch. D. 637; *Re Foster*, 55 L. T. 479; see *Re Bridgman*, 1 Dr. & Sm. 170); except, possibly, in a case where he has no money to receive (*Re Barker's Trusts*, 1 Ch. D. 43). A new trustee was appointed in place of a bankrupt (*Re Tweedy*, 28 Ch. D. 529). See also above cases as to absconding. Trust property does not pass to the bankruptcy trustee (Bankruptcy Act, 1883, s. 44, sub-s. 1).

Felony.

A new trustee can, under this section, be appointed in place of a felon, although the latter is unwilling to retire (*Re Dawson*, 1899, W. N. 134).

Surviving trustee dead intestate and no administrator.

Where a surviving trustee is dead intestate and no administration has been taken out, a new trustee may be appointed under this section (*Davis* v. *Chanter*, 6 W. R. 416). As to vesting orders in such a case, see the note to sect. 26, *post*, p. 771. A person absolutely entitled to stock was in such a case appointed trustee for his own benefit, and the stock was ordered to be transferred to him (*Re Dickson*, 1872, W. N. 223).

No existing trustees.

Where trustees appointed by will had died in the testator's life, an appointment was made (*Re Smirthwaite*, 11 Eq. 251; *Re Orde*, 24 Ch. Div. 271; *Re Williams*, 36 Ch. D. 231). Where the appointment of the

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acting trustees was void, and the donee of the power of appointment could not be found, the court appointed (*Re Freeman*, 37 Ch. D. 148).

No trustees originally appointed.

Where no trustees were originally appointed by a testator, it was doubtful whether the court could appoint under the Trustee Acts, 1850 and 1852, but it could clearly appoint under its inherent jurisdiction (*Dodkin* v. *Brunt*, 6 Eq. 580; *Re Moore, McAlpine* v. *Moore*, 21 Ch. D. 778; *Re Gillett*, 1876, W. N. 251; 25 W. R. 23). Where persons were declared constructive trustees of stock, trustees were appointed in their place, although no trustees had been originally named by the testatrix (*Re Davis*, 12 Eq. 214). Where stock was standing in the name of a corporate body which had ceased to exist, the court appointed trustees, and directed them to transfer the fund (*Hanover* v. *Bank of England*, 8 Eq. 350).

Trustees refusing to act.

Where a trustee who had executed the deed creating the trust declined to act, the court refused, under this section, to appoint a new trustee in his place without his consent (*Re Garty*, 10 L. T. 331); but new trustees have been appointed in the place of disclaiming trustees (*Re Sheppard*, 4 D. F. & J. 423; *Re Martinez*, 22 L. T. 403; *Re Pratt*, 55 L. T. 313); and it is sufficient that a disclaiming trustee should disclaim at the bar (*Foster* v. *Dawber*, 1 Dr. & Sm. 172; *Re Tyler*, 5 De G. & Sm. 56).

Trustee not removed against his will.

The court refused, under the Trustee Act, 1850, to remove a trustee who desired to continue in the trust (*Re Hodson*, 9 Hare, 121), even where he was a solicitor who misconducted himself (*Re Blanchard*, 3 D. F. & J. 131). Nor would the Court remove on the ground of lunacy where the lunacy was disputed (*Re Combs*, 51 L. T. 45). To remove a trustee resident within the jurisdiction from the trust against his wish, an action was necessary (*Re Blanchard*, 3 D. F. & J. 131; *Re Bignold*, 7 Ch. 223); and the mere fact of there being a dissension between one of the several *cestuis que trusts* and the trustee was held not a sufficient ground for removal (*Forster* v. *Davies*, 10 W. R. 180). See further, *Letterstedt* v. *Broers* (9 App. Cas. 371); *Assets Co.* v. *Trustees, &c. Corporation* (65 L. J. Ch. 74); Lewin, 800, 10th ed. But where new trustees can be appointed on petition, an action should not be brought (*Thomas* v. *Walker*, 18 Beav. 521; *Legg* v. *Mackrell*, 2 D. F. & J. 551). As to removing felon or bankrupt trustees against their will, see *Re Dawson*, *sup.*

Existing trustees will not be re-appointed.

It was finally settled, after some difference of opinion (*Re Driver*, 19 Eq. 352; *Re Dalgleish*, 4 Ch. Div. 143; *Re Pearson*, 5 Ch. Div. 982), that the court would not re-appoint existing trustees with a view to a vesting order being made under sect. 34 of the Trustee Act, 1850 (now replaced by sect. 26, sub-sect. 1, of the Trustee Act, 1893). See *Re Vicat* (33 Ch. Div. 103); *Re Dewhirst* (*id.* 416); *Re Stocken* (1893, W. N. 203).

Receiver.

Trustees were appointed although there was a receiver of the trust property (*Reeves* v. *Neville*, 10 W. R. 335).

Principles on which new trustees are selected.

In selecting a new trustee, it was said that the court would have regard to the wishes of the author of the trust expressed in or clearly collected from the instrument creating the trust. A person would not be appointed with a view to the interest of some of the *cestuis que trusts* in opposition to the interests of others. The court would have regard to the question whether the appointment would promote or impede the execution of the trust; but the mere fact of the continuing trustee refusing to act with the proposed trustee was not sufficient to prevent the appointment (*Re Tempest*, 1 Ch. 485).

Who will be appointed.

Cestui que trust.

The court would not in general appoint a *cestui que trust* to be a trustee (*Foster* v. *Abraham*, 17 Eq. 356; *Re Roskell*, Seton, 1225, 6th ed.; *Re Conybeare*, 1 W. R. 458; *Ex p. Clutton*, 17 Jur. 988); but where the *cestui que trust* was absolutely entitled, and it was desired to vest the trust funds in him, he might be appointed (*Re Currie*, 10 Ch. 93; *Re Dickson*, 1872, W. N. 223; *Re Price*, 1883, W. N. 202). A *cestui que trust* was appointed under special circumstances, *e.g.*, where there were indications in the will (*Tempest* v. *Camoys*, 58 L. T. 221); or where a stranger could not be found (*Re Clissold*, 10 L. T. 642); but in such cases an undertaking has been required that if the person appointed became the sole trustee, he would immediately take steps to appoint a co-trustee (*Re Burgess*, 1877,

W. N. 87; *Re Lightbody*, 52 L. T. 40). The husband of a *cestui que trust* was appointed on a similar undertaking (*Re Parrott*, 1881, W. N. 158; *Re Hattatt*, 21 L. T. 781; 18 W. R. 416; see *Wilding* v. *Bolder*, 21 Beav. 224). Unmarried women were formerly only appointed under special circumstances (*Re Campbell*, 31 Beav. 176; *Berkley* v. *Berkley*, 9 Ch. 720; *Re Peake*, 1894, 3 Ch. 520; see *Brook* v. *Brook*, 1 Beav. 531), but recently have been frequently appointed (*Re Dickinson*, 1902, W. N. 104). As to married women, see now M. W. P. Act, ss. 18, 24, *ante*, pp. 356, 359. Persons resident out of the jurisdiction were only appointed under special circumstances (*Re Freeman*, 37 Ch. D. 151; *Re Guibert*, 16 Jur. 852; *Re Curtis*, I. R. 5 Eq. 429). In the case of personalty, where all the *cestuis que trusts* were permanently resident abroad, such persons were appointed (*Re Liddiard*, 14 Ch. D. 310; *Re Austen*, 38 L. T. 601; *Re Drewe*, 1876, W. N. 168); and where one *cestui que trust* resided in Canada, a Canadian was appointed trustee of her share jointly with the other trustee (*Re Cunard*, 48 L. J. Ch. 129; 27 W. R. 52). In the case of realty, where all the *cestuis que trusts* were resident abroad, two Canadian and one English trustee were appointed, upon an undertaking by the Canadian trustees that they would not appoint any new foreign trustee without the consent of the court (*Re Freeman*, 37 Ch. D. 148; compare *Re Simpson*, 1897, 1 Ch. 256). Where English and Irish lands were settled on the same trusts, and the English court had appointed English trustees of the English land, the Irish court appointed the same persons to be trustees of the Irish land (*Re Maberly*, 19 L. R. Ir. 341). Where the *cestuis que trusts* were resident abroad, the court appointed an alien to be trustee where no English person could be found (*Re Hill*, 1874, W. N. 228). The agent of the property was appointed and allowed to receive a commission (*Re Freeman*, 37 Ch. D. 148). The court refused to appoint the solicitor acting for the petitioner (*Re Orde*, 24 Ch. Div. 271; see *Re Stamford*, 1896, 1 Ch. 288); but this was done where there was a difficulty in finding any one else (*Re Brentnall*, 1872, W. N. 77).

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Woman.

Person resident abroad.

Agent.

Solicitor.

As to corporations, it will be seen that they are included in the word "person" used in sects. 26 and 35 (see Interpretation Act, 1889, s. 19). In *Re Brogden, Billing* v. *Brogden* (1888, W. N. 238), *North*, J., thought that he had no power to appoint a corporation. The Bank could not formerly be compelled to register consols in the name of a corporation and an individual (*Law Guarantee Society* v. *Bank of England*, 24 Q. B. D. 406). See now the Bodies Corporate (Joint Tenancy) Act, 1899.

A corporation.

The court would not appoint a sole trustee (*Re Ellison*, 2 Jur. N. S. 62; *Re Porter*, *ib.* 349; *Re Dickinson*, 1 Jur. N. S. 724; see *D'Adhemar* v. *Bertrand*, 35 Beav. 20; *West of England Bank* v. *Murch*, 23 Ch. D. 146), except under special circumstances (*Re Reynault*, 16 Jur. 233). Two trustees of real estate were appointed by the court in the place of one (*Ex p. Tunstall*, 4 De G. & S. 421; see *Re Welsh*, 3 My. & Cr. 292; *Birch* v. *Cropper*, 2 De G. & S. 255; *Plenty* v. *West*, 16 Beav. 356); and new trustees were added to the original trustees (*Re Boycott*, 5 W. R. 15; *Grant* v. *Grant*, 34 L. J. Ch. 641; *Re Brackenbury*, 10 Eq. 45; *Re Gregson*, 34 Ch. D. 209). The court would not in general diminish the number of the trustees, but, under special circumstances, two were appointed in place of three (*Re Marriott*, 18 L. T. 749; *Bulkeley* v. *Earl of Eglinton*, 1 Jur. N. S. 994; *Re Fowler*, 1886, W. N. 183).

Number of trustees appointed.

Prior to the Trustee Act, 1893, in a case where there was a continuing trust, and one of the trustees became an absconding bankrupt, the court would not reduce the number by appointing the other trustees to be trustees in the place of themselves and the bankrupt, and vesting the property in them alone; but held that a new trustee must be appointed (*Re Lamb*, 28 Ch. D. 77; *Re Gardiner*, 33 Ch. D. 591), following the decisions in lunacy (*Re Nash*, 16 Ch. Div. 503; *Re Aston*, 23 Ch. Div. 217). Appointments and vesting orders of this nature were, however, made under special circumstances (*Re Martyn*, 26 Ch. Div. 745; *Re Watson*, 19 Ch. Div. 384; *Davies* v. *Hodgson*, 32 Ch. D. 225). Since the Trustee Act, 1893, and having regard to sects. 26 and 35 of that act, the court, in a similar case, without making any fresh appointment, has vested property in three out of

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four trustees (*Re Lees*, 1896, 2 Ch. 508; *Dugmore* v. *Suffield*, 1896, W. N. 50), and in two out of three (*Re Price*, 1894, W. N. 109; *Re Fitzherbert*, 1898, W. N. 58). A similar order has been made under the Lunacy Act, 1890, ss. 135, 136 (*Re Leon*, 1892, 1 Ch. 348). In the case of a trustee desiring to retire, the court refused to discharge him under this section without appointing another in his place, but discharged him under the general jurisdiction (*Re Chetwynd, Scarisbrick* v. *Nevinson*, 1902, 1 Ch. 692).

Severance of trusts.

Where by the same instrument different parts of the property are vested in the same trustees on different trusts, the court can (independently of sect. 10, *ante*, p. 753) appoint separate new trustees of the different parts (*Re Paine*, 28 Ch. D. 725; *Re Hetherington*, 34 Ch. D. 211; *Re Grange, Cooper* v. *Todd*, 44 L. T. 469), or of one part only, without requiring new trustees to be appointed of the remaining part (*Re Moss*, 37 Ch. D. 513, where the existing trustees retired from part of the trusts; *Re Dennis*, 12 W. R. 575; *Re Cotterill*, 1869, W. N. 183; see *Re Cunard*, 48 L. J. Ch. 129). An order was refused in *Re Nesbitt* (19 L. R. Ir. 509).

Trustee of creditor's deed.

The court has appointed new trustees of a trust deed for benefit of creditors (*Re Raphael*, 9 Eq. 233; *Re Price*, 6 Eq. 460; *Re Bache*, 1868, W. N. 223; *Re Donisthorpe*, 10 Ch. 55).

Evidence on application for appointment of new trustees.

The evidence should show that the person proposed to be appointed is a fit person. One affidavit is sufficient; the costs of a second will not be allowed (*Re Arden*, 1887, W. N. 166). The deponent's position in life must be stated, "gentleman" is not sufficient (*Re Horwood*, 55 L. T. 373; *Re Orde*, 24 Ch. Div. 271). He should not be the solicitor (*Grundy* v. *Buckridge*, 17 Jur. 731; 22 L. J. Ch. 1007; *Re Hartley*, 1879, W. N. 169). Something should be shown as to the pecuniary means of the proposed trustee (*Re Castle Sterry*, 1888, W. N. 179). "Of independent means" is sufficient, but not "gentleman" alone (*Re Horwood*, 55 L. T. 373; see *Re Smith's Policy*, 1894, W. N. 68). In general the proposed trustee should not appear by counsel to consent (*Re Draper*, 2 W. R. 440; *Re Parker*, 21 L. T. 218). His consent to act, however, should in proceedings in Chancery and in Chancery and lunacy, be evidenced by a written consent signed by him, and verified by the signature of his solicitor (R. S. C. Ord. 38, r. 19a; *Re Hume*, 35 Ch. Div. 457). As to a consent in the case of proceedings in lunacy, see Rules in Lunacy, 1892, r. 92, and form of consent, *post*, pp. 804, 805. As to evidence on application for vesting order, see note to sect. 26, *post*, p. 773.

Form of application.

All applications under the act may be made by petition except as otherwise provided under Ord. 55 (R. S. C. Ord. 54B, r. 2). An application for the appointment of a new trustee may be made by summons (R. S. C. Ord. 55, r. 13A (a)), but the appointment must be made by the judge in person (R. S. C. Ord. 55, r. 15A). The application, if not made in any pending matter, should be entitled in the matter of the trust and of the act (R. S. C. Ord. 54B, r. 4A). If a vesting order is asked for, the application should state the sections of the act under which it is proposed that the order should be made (*Ib.*).

For forms of petitions and summons for the appointment of new trustees and for vesting orders, see Dan. Ch. Forms.

Service

On an application to appoint new trustees in the place of two who were desirous of retiring, both the old trustees and all the *cestuis que trusts* were required to appear (*Re Sloper*, 18 Beav. 596); but service on the old trustee was not required, where he was physically incapable by reason of physical infirmity (*Re Weston*, 1898, W. N. 151), or mental infirmity (*Re Green*, 10 Ch. 272; *Re Stewart*, 8 W. R. 297; see *Re East*, 8 Ch. 735), or was permanently resident abroad (*Re Bignold*, 7 Ch. 223; *Re Martin Pye*, 42 L. T. 247; *Re Stewart, sup.*), or had absconded (*Re Nicholson's Trusts*, 1884, W. N. 76; *Hyde* v. *Benbow, id.* 117). Where the last trustee was dead, intestate, and a vesting order was asked, service on the heir was required (*Re Oxenham*, 1875, W. N. 6; *Re Smirthwaite*, 11 Eq. 251; see now Conv. Act, 1881, s. 30, *ante*, p. 584; and *Re Pilling*, 26 Ch. D. 432). Service on the heir was not required in *Purvis* v. *Abraham*, 1866, W. N. 126; *Re Stanley*, 1893, W. N. 30. Where an order had been made on

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petition, and two persons had been made petitioners without their consent, their names were struck out, and they were treated as not served (*Re Savage*, 15 Ch. D. 557). Where a new trustee was appointed of a term of years, service on the reversioner was required (*Re Farrant*, 20 L. J. Ch. 532; see *Re Matthew*, 2 W. R. 85). The general rule formerly was that all the *cestuis que trusts* must be served or join in the application (*Re Richards*, 5 De G. & Sm. 636; *Re Fellows*, 2 Jur. N. S. 62). But where parties were numerous service was dispensed with on some who were represented by trustees (*Re Smyth*, 2 De G. & Sm. 781; see *Re Blanchard*, 3 D. F. & J. 137), and on one who was abroad (*Re Wilson*, 31 Ch. Div. 522; *Re Lightbody*, 52 L. T. 40; see *Re Parrott*, 1881, W. N. 158). According to the present practice an express order dispensing with service is not necessary, the judge exercising his discretion according to the circumstances of each case (Practice Note, 1901, W. N. 85).

For forms of orders, see Seton, 6th ed. 1210—1218.

Forms of orders. Sub-sect. (iii.).

(*i*) Compare the definition of trust contained in sect. 50, *post*, p. 792. The court has refused to appoint a person to perform the duties of executor (*Eaton* v. *Daines*, 1894, W. N. 32; *Re Willey*, 1890, W. N. 1; see *Re Moore*, *McAlpine* v. *Moore*, 21 Ch. D. 778; and see now Judicial Trustees Act, 1896, s. 1, *post*, p. 806).

Vesting orders as to land.

26. In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee (*k*); and

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

(a) is an infant (*l*), or

(b) is out of the jurisdiction of the High Court (*m*), or

(c) cannot be found (*n*); and

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land (*o*); and

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead (*p*); and

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead (*q*); and

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement (*r*);

the High Court may make an order (in this act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the court may direct, or releasing or

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disposing of the contingent right to such person as the court may direct (*s*).

Provided that—

(a.) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the court may direct in the persons who on the appointment are the trustees; and

(b.) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person (*u*).

This section replaces sect. 34, part of sect. 7 and sects. 8—15 inclusive, of the Trustee Act, 1850, and sect. 2 of the Trustee Act, 1852.

Sub-sect. (i.).

(*k*) Where the court appointed a new trustee in place of a person incapable from physical infirmity, a vesting order was made under this subsection (*Re Weston*, 1898, W. N. 151). But where the incapacity arose from mental infirmity the Chancery Division refused to make a vesting order; which it seems should, in such a case, be applied for in Lunacy (*Re M.*, 1899, 1 Ch. 79; *Re Martin*, 34 Ch. Div. 618).

Sub-sect. (ii.) (a).

(*l*) Before the present act the case of infant trustees was dealt with in sects. 7 and 8 of the Trustee Act, 1850.

Infants.

Before the Conv. Act, 1881, infants often became by devolution or devise seised of lands as trustees, and in particular where a vendor of land had died (see *Re Lowry*, 15 Eq. 78). Now, under the Conv. Act, 1881, ss. 4 and 30 (*ante*, pp. 557, 584), the legal estate devolves on the personal representative, both where there is a contract to sell freeholds binding on the heir or devisee of a deceased vendor, and in the case of trust estates; except in the latter case where they are copyhold (Copyhold Act, 1887, s. 45; see *Re Mills*, 37 Ch. D. 312; *Re Beaufort*, 1898, W. N. 148).

The Chancery Division has jurisdiction where the infant is also a lunatic (*Re Arrowsmith*, 4 Jur. N. S. 1123; 6 W. R. 642; Lunacy Act, 1890, s. 143, *post*, p. 802). A vesting order was refused as to an equitable estate vested in an infant, and which was bound by an order for sale (*Re Williams*, 5 D. G. & Sm. 515). A vesting order was made as to the estate of an infant heir in *Dewar* v. *Maitland*, 2 Eq. 834.

Infant tenant in tail.

In the case of an infant tenant in tail, a vesting order will, if the protector consents to it, bar all estates in remainder (*Powell* v. *Matthews*, 1 Jur. N. S. 973; *Re Montagu*, *Faber* v. *Montagu*, 1896, 1 Ch. 549; and see *Hargreaves* v. *Wright*, 1 W. R. 408; *Singleton* v. *Hopkins*, 4 W. R. 107; *Re Breary*, 1873, W. N. 487). For form of order appointing a person to convey property for an infant tenant in tail, see *Re Montagu*, *sup.*

Where a testator had agreed to grant easements, and infants were entitled to the land, a person was appointed under sect. 7 of the Trustee Act, 1850, to convey to a releasee to uses for the purpose of granting the easements and subject thereto to the uses of the will (*Re Taylor*, 1866, W. N. 5).

Service.

The infant should be served (*Re Jones*, 22 W. R. 837; *Re Adams*, 1887, W. N. 175; *Re Russell*, 1866, W. N. 125; *Re Cooper*, 9 W. R. 531; *contra*, *Re Litt'e*, 7 Eq. 323; *Re Tweedy*, 9 W. R. 398; *Re Willan*, *ib.* 689; *Re Davies' Trust*, 1889, W. N. 215).

Forms.

For forms of orders vesting land, in the case of infant trustees, see Seton, 6th ed. 1228 *et seq.*; see 1718.

Sub-sect. (ii.) (b), (c).

(*m*) Before the present act, the case of trustees of land who were out of the jurisdiction or who could not be found was dealt with in sects. 9, 10, 11, 12 of the Trustee Act, 1850.

Trustees out of jurisdiction

If a lunatic trustee is out of the jurisdiction it would seem that the

Chancery Division can make a vesting order (*Re Gardner*, 10 Ch. D. 29). A trustee will be treated as out of the jurisdiction, even where he appears by counsel (*Stillwell* v. *Ashley*, Seton, 6th ed. 1247). Where a mortgagee who was a trustee absconded, the land was vested in the *cestui que trust* (*Re Barber*, 58 L. T. 303). Where one out of four trustees absconded, the land was vested in the other three, no new trustee being required (*Re Lees*, 1896, 2 Ch. 508; see the note *ante*, p. 767). **56 & 57 Vict. c. 53, s. 26. or who cannot be found.**

(*n*) Where a trustee of a will disclaimed and the heir could not be found, a person was appointed to convey the land which had been sold in an administration action (*Wilkes* v. *Groom*, 8 D. M. & G. 205). An heir who was out of the jurisdiction was declared to be a trustee and his interest vested in the executor (*Hooper* v. *Strutton*, 12 W. R. 367; see *Re Badcock*, 2 W. R. 386; *Re Skitter*, 4 W. R. 791).

Where a mortgagor under an equitable mortgage, the defendant in a foreclosure suit, had absconded, an order was made declaring him a trustee and vesting the estate in the mortgagee (*Lechmere* v. *Clamp*, 30 Beav. 218; 31 Beav. 578). But the order will not be made on motion to make the foreclosure absolute; a separate application must be made (*Smith* v. *Boucher*, 1 Sm. & G. 72). Where a mortgagor was abroad, a vesting order was refused as to the last day of the term which he had covenanted to assign to a purchaser from the mortgagee (*Re Propert*, 22 L. J. Ch. 948). **Mortgagor absconding.**

As regards the meaning of "solely seised" in sect. 9 of the Trustee Act, 1850, in a case where the legal interest in land was vested in A. and B., and A. was beneficially entitled to the whole, it was said that B. was solely seised of one moiety in trust for A. (*McMurray* v. *Spicer*, 5 Eq. 539). **Trustee solely entitled.**

Under sect. 10 of the Trustee Act, 1850, it was held that the words "seised jointly" were not to be construed strictly as referring to a joint tenancy at law only (*Re Greenwood*, 27 Ch. D. 359), and included co-parceners (*Ib.*). A mortgagee having died intestate, the estate descended upon two co-parceners, one of whom was out of the jurisdiction, the estate was vested in the other alone (*Re Templer*, 4 N. R. 494). Where one of a bankrupt's assignees had gone abroad, the court made an order declaring him a trustee, and vesting the estate in the other assignees (*Re Joyce*, 2 Eq. 576). An order was made under sect. 10 of the Trustee Act, 1850, as to one of several trustees who was a convict (*Re Hulme*, 57 L. T. 13). Where one of several mortgagees who were trustees was abroad, his interest was vested in a transferee (*Re Walker*, 3 Ch. D. 209). But where realty was mortgaged to A. and B., and A. went abroad, it was held, upon payment off of the mortgage, that the court had no jurisdiction under the Trustee Act, 1850, to vest in the purchaser the estate of A. (*Re Osborn*, 12 Eq. 392). **Trustee jointly entitled.**

In the case of a sole trustee's heir who was abroad, service was dispensed with (*Re Stanley*, 62 L. J. Ch. 469; 68 L. T. 197). In the case of persons jointly entitled, service was dispensed with on the person abroad (*Re Greenwood*, 27 Ch. D. 359). For form of orders, see Seton, 6th ed. 1230, 1231. **Service and forms.**

(*o*) Before the present act the cases of uncertainty as to which of several trustees was the survivor or whether the last trustee was dead were dealt with in sects. 13, 14 of the Trustee Act, 1850. **Sub-sect. (iii.).**

(*p*) For form of orders, see Seton, 6th ed. 1232. **Sub-sect. (iv.).**

(*q*) Under the Conv. Act, 1881, s. 30 (*ante*, p. 584), trust estates now devolve on the personal representative unless they are of copyhold tenure (50 & 51 Vict. c. 73, s. 45; see *Re Mills*, 37 Ch. D. 312). In the case of a bare trustee dying before 1882, see V. & P. Act, 1874, s. 5 (*ante* p. 546); L. T. Act, 1875, s. 48. Under the corresponding section (15) of the Trustee Act, 1850, the court vested copyholds, the sole trustee of which had died intestate without an heir, in the *c. q. t.* who was absolutely entitled (*Re Godfrey*, 23 Ch. D. 205). Where as a security for a loan land was conveyed on trust for sale and payment of the loan, and of the balance to the borrower, "his executors, administrators, and assigns," and the lender died intestate and without an heir, a vesting order was made under the same section, the deed which operated as a conversion being more than a **Sub-sect. (v.). No heir or representative.**

56 & 57 Vict. c. 53, s. 26.

mere mortgage (*Re Underwood*, 3 K. & J. 745; see *Re Keeler*, 11 W. R. 62). A bastard sold a reversionary interest in realty under a will, the trustees of which subsequently conveyed the legal estate to the bastard who died without children: an order was made vesting the legal estate in the purchaser (*Re Wilkinson*, 12 W. R. 522).

For form of order, see Seton, 6th ed. 1233.

Sub-sect. (vi.). Refusal or neglect to convey.

(*r*) Before the present act the case of trustees refusing or neglecting to convey land was dealt with by sect. 2 of the Trustee Act, 1852. A refusal was held not "wilful" within that section where the trustee entertained *bonâ fide* doubt as to the title of the applicant to call for a conveyance (*Re Mills*, 40 Ch. Div. 14). An order was made under that section to defeat an attempt at extortion on the part of a trustee (*Re O'Donnell*, 19 W. R. 522). Where one of two trustees of mortgages absconded, and refused to transfer to the continuing and a new trustee, a vesting order was made, but the court required the new trustee to be joined as co-petitioner (*Re Keeley*, 53 L. T. 487; see *Re Grayson*, 27 W. R. 534).

A. having been declared a trustee of leaseholds for the plaintiff, and ordered to execute an assignment, refused to execute. Notice of motion for an order directing A. to execute the deed within four days, or for a vesting order, was served on A., who did not appear. The motion having stood over for twenty-eight days, a vesting order was made on an *ex parte* application (*Knight* v. *Knight*, 1866, W. N. 114). And where the defendant had been declared a trustee for the purpose of executing a lease to the plaintiff and neglected to do so within twenty-eight days after formal demand, an order was made that on the consideration money being brought into court, the chief clerk should execute the lease (*Derham* v. *Kiernan*, I. R. 5 Eq. 217). See also *Warrender* v. *Foster*, Seton, 6th ed. 1272; and the power given by Jud. Act, 1884, s. 14, for the court to nominate a person to execute an instrument in place of a person who does not comply with an order to do so. The last-mentioned power was exercised in *Howarth* v. *Howarth* (11 P. D. 68, 95); *Re Cathcart* (1893, 1 Ch. 466); *Re Lumley* (1893, W. N. 13).

Where a mortgagor covenanted to surrender copyholds to his mortgagee, and neglected to surrender for twenty-eight days after demand and tender of engrossment, a vesting order was made on the petition of the mortgagee (*Re Crowe*, 13 Eq. 26). See also, as to the instrument to be tendered in the case of copyholds, *Rowley* v. *Adams* (14 Beav. 130). Separate orders may be made as to different parts of the property if convenient (*Brader* v. *Kirby*, 1872, W. N. 174).

Service and forms.

Service was not required on the recusant (*Re Crowe*, 13 Eq. 26; see *Ex p. Armstrong*, 16 Sim. 296; *Re Baxter*, 2 Sm. & Giff. App. 5). An order vesting lands, which were subject to an annuity, was made without requiring service on the annuitant (*Re Winteringham*, 3 W. R. 578). For form of order, see Seton, 6th ed. 1237.

General note as to vesting orders of land.

(*s*) The court has authority to make a vesting order of land though there may exist a person capable of conveying it to the trustees appointed by the court (*Re Manning*, Kay, App. 28).

Where the legal estate in land has vested in the Crown as a trustee it would seem in general that under the Trustee Acts the court has no jurisdiction to make a vesting order (*Re Pratt*, 55 L. T. 313; see, however, *Re Martinez*, 22 L. T. 403, where the Crown consented; *Re Minchin*, 2 W. R. 179; *Re Giraud*, 32 Beav. 385; and compare the decisions as to the Crown quoted *ante*, p. 119). But sect. 5 of the Intestates Act, 1884, provided that where an order for sale was made under that act sect. 1 of the Trustee Act, 1852, should apply. Sect. 30 of the present act would seem now to apply to such a case (see sect. 38 of the Interpretation Act, 1889).

Where new facts arise or are discovered after the making of a vesting order, see, as to the practice, *Re Havelock*, 14 W. R. 26, 174; *Re Clinton*, *Jackson* v. *Slaney*, 1882, W. N. 176.

Form of application for vesting order of land.

The application for a vesting order consequential on the appointment of a new trustee, whether the appointment is made by the court or a judge or out of court, may be made by summons (R. S. C. Ord. 55, r. 13A (*b*));

56 & 57 Vict. c. 53, s. 26.

see, as to allowing the costs of a petition in a complicated case, *Re Morris* (60 L. T. 96). In other cases under this section the application must be by petition (R. S. C. Ord. 54B, r. 2; see *Frodsham* v. *Frodsham*, 15 Ch. Div. 317; *Smith* v. *Gill*, 53 L. T. 623); but may afterwards be referred to chambers (*Re Tweedy*, 28 Ch. Div. 529; *Re Pratt*, 55 L. T. 313). The application, if not made in a pending matter, should be entitled in the matter of the trust and of the act (R. S. C. Ord. 54B, r. 4A). The application should state the section or sections of the act under which it is proposed that the order shall be made (*Ib.*).

Service.

On an application for a vesting order of leaseholds, where the lease contained no covenant against assignment, service on the reversioner was not required (*Re Matthews*, 2 W. R. 85; see *Re Farrant*, 20 L. J. Ch. 532). And where a tenant for life applied for an order vesting property in a new trustee appointed under a power, service on the remainderman was required (*Re Maynard*, 16 Jur. 1084). See, further, the cases as to service quoted above in the note to the present section, and in the note to sect. 25, *sup.*

Evidence.

In the case of a vesting order the beneficial title to the property may be proved by the affidavit of a person acquainted with the facts (*Re Hoskins*, 4 De G. & J. 436); but the legal title must be strictly proved (Dan. Ch. P. 7th ed. 1792).

Form of orders.

With regard in general to the form of orders vesting real estate the order should describe the property (*Re Ord*, 3 W. R. 386). Land may be vested to uses to bar dower (*Davey* v. *Miller*, 1 Sm. & Giff. App. 19); but a declaration against dower will not be inserted (*Ex p. Grieve*, 5 De G. & Sm. 436). Land has been vested to the use of such persons as an executor and an executrix (who was a married woman) should by deed appoint, and in default in the executor and executrix (*Re Powell*, 4 K. & J. 338); and has been vested subject to a legacy (*Re Ellerthorpe*, 18 Jur. 669). See, further, Seton, 6th ed. 1228 *et seq.* For form of order in case of an infant heir of a vendor of copyholds, see *Re Beaufort* (1898, W. N. 148); and in case of an infant tenant in tail, see *Re Montagu* (1896, 1 Ch. 549).

(*u*) Where one of several trustees is out of the jurisdiction and a new trustee is appointed in his place, the vesting order should in form vest in the new and continuing trustees such estate as was vested in the continuing and absent trustees (*Smith* v. *Smith*, 3 Drew. 72; see *Re Fisher*, 1 W. R. 505; *Re Bute*, Johns. 15; see *contra*, *Re Watts*, 9 Hare, 106; *Re Plyer*, *Ib.* 220). In the case of a last surviving trustee who had died without a personal representative, the vesting order should in form vest the property in the new trustees, "for all such estate as was vested in the last surviving trustee at the time of his death" (*Re Williams*, 36 Ch. D. 231; *Re Rackstraw*, 52 L. T. 612; *Re Rathbone*, 2 Ch. Div. 483; see *Re Sarum*, 55 L. T. 313; 1886, W. N. 140; *Re Pilling*, 26 Ch. D. 432).

Vesting orders in the case of absolute beneficial interests.

Under the Trustee Act, 1850, the Court of Lunacy refused to vest trust property directly in a person having an absolute beneficial interest (*Re Holland*, 16 Ch. Div. 672); but did so after appointing as new trustee the person so entitled (*Re Currie*, 10 Ch. D. 93). Trust property, however, was vested in persons having absolute beneficial interests where a sole trustee of copyholds died intestate and without an heir (*Re Godfrey*, 23 Ch. D. 205). See also *Re Adams* (1887, W. N. 175); *Re Barber* (58 L. T. 303); see further the decision as to vesting stock in beneficiaries quoted under sect. 35, *post*, p. 783.

Scope of Trustee Act, 1850.

The scope of the Trustee Act, 1850, was to embrace every case of inconvenience (*Bristow* v. *Booth*, L. R. 5 C. P. 91). But under it the court had no jurisdiction to decide a dispute as to title (*Re Draper*, 9 W. R. 805). It was said that the court, in acting under the Trustee Acts, never administered trusts (*Re Holland*, 16 Ch. Div. 672); certainly not in lunacy (*Re Currie*, 10 Ch. Div. 93).

Orders as to

27. Where any land is subject to a contingent right in an

56 & 57 Vict. c. 53, s. 27.

contingent rights of unborn persons.

unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

This section replaces sect. 16 of the Trustee Act, 1850, under which section orders were made discharging in favour of purchasers the rights of unborn persons (*Hargreaves* v. *Wright*, 1 W. R. 408), and vesting in purchasers the interests of unborn children (*Wake* v. *Wake*, 1 W. R. 283).

For form of order, see Seton, 6th ed. 1229.

Vesting order in place of conveyance by infant mortgagee.

28. Where any person entitled to or possessed of land, or entitled to a contingent right in land by way of security for money, is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

This section replaces portions of sects. 7 and 8 of the Trustee Act, 1850; under which sections the legal estate in copyholds outstanding in the infant heir of a mortgagee was vested (*Re Franklyn*, 1888, W. N. 217).

As to service, see note to sub-sect. (ii) (a) of sect. 26, *ante*, p. 770.

For form of order, see Seton, 6th ed. 1230.

Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal representative of mortgagee.

29. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the court may direct in any of the following cases, namely,—

(a) Where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction of the High court or cannot be found; and

(b) Where an heir or personal representative or devisee of the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and

(c) Where it is uncertain which of several devisees of the mortgagee was the survivor; and

(d) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal repre-

sentative of the mortgagee whether he is living or dead; and 56 & 57 Vict. c. 53, s. 29.

(e) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee.

This section replaces sect. 19 of the Trustee Act, 1850. And inasmuch as under the Conv. Act, 1881, s. 30 (*ante*, p. 584), mortgage estates now devolve on the personal representative, unless they are of copyhold tenure (50 & 51 Vict. c. 73, s. 45; see *Re Mills*, 37 Ch. D. 312), a reference to the "personal representative" has been added to the words of the former section. Under sect. 19 of the Trustee Act, 1850, orders were made to effectuate a transfer of a mortgage (*Re Boden*, 1 D. M. & G. 57; 9 Hare, 820; *Re Quinlan*, 9 Ir. Ch. R. 306; *contra*, *Re Meyrick*, 9 Hare, 116; see *Re Lea*, 6 W. R. 482), and a sale under a power of sale (*Re White*, 1881, W. N. 115). But an order was refused where no sale or transfer was proposed (*Re Hewitt*, 27 L. J. Ch. 302).

Bastard mortgagee.

A bastard mortgagee, having devised her real estate in terms which did not pass the legal estate in the mortgaged premises, died without issue, and the money was subsequently paid off. The Crown offering no opposition, an order was made under sect. 19 of the Trustee Act, 1850, vesting the legal estate in a purchaser (*Re Minchin*, 2 W. R. 179).

Representative uncertain.

Where the will of a mortgagee was disputed but the debt had been paid, a vesting order was made under sub-sect. (e) of the present act, it being uncertain who were his personal representatives (*Re Cook*, 1895, 1 Ch. 700).

Mortgagee in possession.

Where a mortgagee had been in possession, the legal estate outstanding in his heir was vested in his executors under sect. 9 of the Trustee Act, 1850, the heir being treated as a trustee (*Re Skitter*, 4 W. R. 791).

Service.

Where the personal representative of a mortgagee sold the mortgaged property, the legal estate outstanding in the heir of the mortgagee was vested in the purchaser, without service being required on the heir of the mortgagee or the personal representative of the deceased mortgagor (*Re Wise*, 5 De G. & Sm. 415).

For form of order, see Seton, 6th ed. 1234.

Vesting order consequential on judgment for sale or mortgage of land.

30. Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein *as heir, or under the will of a deceased person for payment of whose debts the judgment was given or order made*, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that court thinks fit in the purchaser or mortgagee or in any other person.

The words in italics were repealed by the Trustee Amendment Act, 1894, *post*, p. 795.

This section, which replaces sect. 29 of the Trustee Act, 1850, and sect. 1 of the Trustee Act, 1852, corresponds in effect with those sections, but extends the power of the court to the case of an order directing a mortgage. Under the former of such sections it was held that, where copyholds

56 & 57 Vict. c. 53, s. 30.

devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the testator's debts, the purchaser was entitled to require an order discharging the contingent rights of the unborn issue of the infant (*Wood* v. *Beetlestone*, 1 K. & J. 213). The latter of such sections was held to apply to orders for sale under the Partition Acts, 1868 and 1876, *post* (*Beckett* v. *Sutton*, 19 Ch. D. 646); and where an order had been made for sale of a lunatic's estate (*Herring* v. *Clark*, 4 Ch. 167; *Re Stamper*, *Stamper* v. *Stamper*, 46 L. T. 372). By the Intestates' Estates Act, 1884, s. 5, sect. 1 of the Trustee Act, 1852, was applied to sales of the interest of the Crown in escheated estates. The above section seems now to apply to such a case. (See sect. 38 of the Interpretation Act, 1889.)

Form of application.

Applications under this section should be made in chambers (R. S. C. Ord. 55, r. 13A (c).

Provisions for facilitating the conveyance of the lands of a deceased debtor, where a decree for sale has been made, are also contained in 11 Geo. 4 & 1 Will. 4, c. 47, ss. 11, 12, *ante*, pp. 394, 395.

Vesting order consequential on judgment for specific performance, &c.

31. Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

This section replaces sect. 30 of the Trustee Act, 1850, and sect. 7 of the Partition Act, 1868.

Under this section the judgment is made a condition precedent (*Re Colling*, 32 Ch. D. 336).

Specific performance.

A donee of a power of jointuring was ordered, in a suit by his wife for specific performance, to execute the power by a deed. On his refusal, he was declared a trustee, and the court appointed a person to execute the requisite deeds in his place (*Wellesley* v. *Wellesley*, 4 D. M. & G. 537). Where there had been a decree for specific performance of an agreement to grant a lease, and the defendant had refused to execute the lease, a person was appointed to execute in his place (*Hall* v. *Hale*, 51 L. T. 226; see, however, *Grace* v. *Baynton*, 1877, W. N. 79). So where infants were entitled to land subject to an agreement for a lease (*Hodgson* v. *Bower*; *Howell* v. *Palmer*, Seton, 6th ed. 1264, 1265).

Partition.

In a partition suit, instead of giving an infant a day to show cause, the court may declare him to be a trustee of the shares allotted to other parties (*Bowra* v. *Wright*, 4 De G. & Sm. 265). Where the shares of the parties to a partition suit were complicated, the court declared each of the parties trustees as to the shares allotted to the other of them, and by the same order appointed a new trustee in their place vesting the whole property in such new trustee and directing him to convey (*Shepherd* v. *Churchill*, 25 Beav. 21; see form of order, *Ib.* p. 23; and *Orger* v. *Sparke*, 9 W. R. 180). Where, however, upon an order for sale in a partition

action the parties and their unborn issue were declared trustees, the court refused to appoint a new trustee in their place till after the order had been drawn up (*Lees* v. *Coulton*, 20 Eq. 20). Where an order for sale in a partition action was made contingent on the answers to certain inquiries, the court by the same order declared that on such a sale infant parties would be trustees and ordered their next friend to convey their shares (*Davis* v. *Ingram*, 1897, 1 Ch. 477). **56 & 57 Vict. c. 53, s. 31.**

In partition suits where there was no order for sale, and part of the land the subject-matter of the action was vested in a lunatic, vesting orders were made in lunacy (*Re Molyneux*, 10 W. R. 512; *Re Sherard*, 1 D. J. & S. 421; *Re Watson*, 58 L. T. 509). Whether, since the Trustee Act, 1893, these orders could be made in Chancery alone seems doubtful (see the remarks of Stirling, J., in *Re M.*, 1899, 1 Ch. p. 85). In any case, however, after a sale has been directed, an order can, it would appear, be made in Chancery (see *Herring* v. *Clark*, 4 Ch. 167; *Re Watson*, 58 L. T. 509; *Caswell* v. *Sheen*, 69 L. T. 854).

Sect. 30 of the Trustee Act, 1850, was said to apply to all cases where there was a judgment against an infant for an immediate conveyance (*Mellor* v. *Porter*, 25 Ch. D. 161). Whether this included a judgment against an infant for foreclosure of an equitable mortgage, see *S. C.* For orders in foreclosure suits declaring the mortgagor a trustee for the mortgagee, see *Lechmere* v. *Clamp* and *Smith* v. *Boucher*, quoted *ante*, p. 771, and for a similar order as to the mortgagor's infant heir, see *Foster* v. *Parker* (8 Ch. D. 147). Where a sale was ordered in a foreclosure suit instituted against a mortgagor of unsound mind, an order was made vesting the property in the plaintiff as trustee for the purchaser (*Harrison* v. *Smith*, 17 W. R. 646). **Other cases.**

The words "unborn persons" in a similar position in sect. 30 of the Trustee Act, 1850, were held to include living persons who might subsequently have a right to claim under a party, *e.g.*, as his heir (*Bassett* v. *Moxon*, 20 Eq. 182).

In the case of sales of realty, where there is only an unexecuted contract for sale, a suit is necessary to declare the vendor a trustee; but in the case of an executed contract a suit is not necessary (*Re Cuming*, 5 Ch. 72, *post*, p. 799; see note, *post*, p. 792).

As to the case where a person, declared to be a trustee in a suit, refuses to convey land, see *Knight* v. *Knight* and *Derham* v. *Kierman*, quoted in note (*r*) to sect. 26, *ante*, p. 772.

Applications under this section must be in chambers (R. S. C. Ord. 55, r. 13A (c). For forms of orders, see Seton, 1261, 6th ed.; *Lees* v. *Coulton* (20 Eq. 21.)

See in connection with this section the power given by the Jud. Act, 1884, s. 14, to appoint a person to execute documents on behalf of a recusant; and *Howarth* v. *Howarth*, 11 P. Div. 68, 95; *Re Cathcart*, 1893, 1 Ch. 466; *Re Lumley*, 1893, W. N. 13. **Jud. Act, 1884, s. 14.**

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been **Effect of vesting order.**

56 & 57 Vict. c. 53, s. 33.

an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Provisions to the same effect as the above section were contained in sects. 34 and 7—15 of the Trustee Act, 1850, and sects. 12 and 8 of the Trustee Act, 1852. In the case of an order vesting the estate of an infant tenant in tail the effect is to bar the estate tail and remainders over (*Re Montagu, Faber* v. *Montagu*, 1896, 1 Ch. 549).

Power to appoint person to convey.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

This section replaces the first half of sect. 20 of the Trustee Act, 1850.

The Jud. Act, 1884, s. 14, gives power to order an officer of the court to execute documents.

Under sect. 20 of the Trustee Act persons were appointed to execute a lease (*Hall* v. *Hale*, 51 L. T. 226; *Cowper* v. *Harmer*, 57 L. T. 714; *Derham* v. *Kiernan*, I. R. 5 Eq. 217; see *contra*, *Grace* v. *Baynton*, 1877, W. N. 79); and a jointure deed (*Wellesley* v. *Wellesley*, 4 D. M. & G. 537). It was doubtful whether under that section a person could be appointed in place of an infant to convey in execution of a power given by statute, *e.g.*, 1 Will. 4, c. 47, s. 11, *ante*, p. 394 (*Wood* v. *Beatlestone*, 1 K. & J. 213).

Who may be appointed.

In a foreclosure action against the infant heir of a mortgagee, his mother was appointed to convey (*Foster* v. *Parker*, 8 Ch. D. 147). Where the legal estate was vested in a tenant for life with remainder to an infant in tail, the agent of the vendor was appointed to convey for the infant on payment of the purchase-money into court (*Hargreaves* v. *Wright*, 1 W. R. 408). Where real estate devised to married women and infants was sold under a decree in lots, the court appointed the plaintiffs' solicitor to convey their shares to the several purchasers (*Hancox* v. *Spittle*, 3 Sm. & Giff. 478; and see *Wilks* v. *Groom*, 6 D. M. & G. 205).

For form of orders, see Seton, 6th ed., 1236. As to the conveyance, see *Ex p. Foley*, 8 Sim. 395; *Caswell* v. *Sheen*, 69 L. T. 854.

Effect of vesting order as to copyhold.

34.—(1.) Where an order vesting copyhold land in any person is made under this act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance (*v*).

(2.) Where an order is made under this act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things (*w*).

This section replaces sect. 28 of the Trustee Act, 1850, so far as regards the jurisdiction of the High Court.

(*v*) An order vesting copyhold lands can be made without the consent of the lord, and will not prejudice his right to fines (*Paterson* v. *Paterson*, 2 Eq. 31; *Re Flitcroft*, 1 Jur. N. S. 418; *Re Hurst*, Seton, 5th ed., 1053; see, however, *Cooper* v. *Jones*, 25 L. J. Ch. 240, and *Re Howard*, 3 W. R. 605). Where such an order is made without the lord's consent, the person in whom the property is vested applies for admission as an ordinary surrenderee would have done (Lewin, 811, 10th ed.; see *Bristow* v. *Booth*, L. R. 5 C. P. 92). 56 & 57 Vict. c. 53, s. 34. Order vesting copyholds without consent of lord.

Where a vesting order is made with the lord's consent, surrender and admission are unnecessary. For the purpose of consenting, it is not necessary for the lord to appear in court; a verified certificate of his consent is sufficient (*Ayles* v. *Cox*, 17 Beav. 584; see *Cooper* v. *Jones*, 25 L. J. Ch. 240). For form of consent and verifying affidavit, see Dan. Ch. Forms, 5th ed. p. 1080. With consent of lord.

For form of order vesting copyholds, see Seton, 6th ed., 1235; *Re Crowe*, 13 Eq. 26. Orders have been made vesting copyholds in *Re Godfrey* (23 Ch. D. 205) and *Re Franklyn* (1888, W. N. 217).

(*w*) Where a person is appointed to convey copyholds, the person so appointed must surrender, and the surrenderee must be admitted (Lewin, 811, 10th ed.). A mandamus was granted to give effect to such an order (*Re Lane and Irving*, 12 W. R. 710). Persons have been appointed to convey in *Re Collingwood* (6 W. R. 536); *Re Cuming* (5 Ch. 72). For form of order appointing a person to convey, see *Re Hey* (9 Hare, 221); Seton, 6th ed. 1262. Order appointing person to convey copyholds.

35.—(1.) In any of the following cases, namely:— Vesting orders as to stock and choses in action.

(i.) Where the High Court appoints or has appointed a new trustee (*x*); and

(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(a) is an infant (*y*), or

(b) is out of the jurisdiction of the High Court (*z*), or

(c) cannot be found (*z*); or

(d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled (*a*), or

(e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him (*b*); or

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead (*c*),

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the court may appoint:

Provided that—

(a) Where the order is consequential on the appointment by the court of a new trustee, the right shall be

56 & 57 Vict. c. 53, s. 35.

vested in the persons who, on the appointment, are the trustees; and

(b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the court may appoint.

(2.) In all cases where a vesting order can be made under this section, the court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3.) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

(4.) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5.) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act is to be exercised (*d*).

(6.) The provisions of this act as to vesting orders shall apply to shares in ships registered under the acts relating to merchant shipping as if they were stock.

This section replaces (as to England) part of sect. 20 and sects. 22, 23, 24, 25, 26, 31 and 35 of the Trustee Act, 1850, and sects. 3, 4, 5 and 6 of the Trustee Act, 1852.

As to what is included in the words "stock" and "transfer," see sect. 50, *post*. Registered shares in ships may be vested as if they were stock (sub-sect. 6 of the present section; see formerly sect. 10 of the Merchant Shipping Act, 1854).

Sub-sect. (i.).

(*x*) This sub-section replaces sect. 35 of the Trustee Act, 1850. Under the last-mentioned section orders were made vesting the right to transfer stock standing in the name of a testator who had no personal representative (*Re Herbert*, 8 W. R. 272), and stock standing in the name of two original trustees, the survivor having died without personal representative (*Re Crowe*, 14 Ch. D. 610). The court has refused to vest in new trustees unauthorized investments (*Re Harrison*, 22 L. J. Ch. 69); but in such a case the court vested the right to call for a transfer to the trustees themselves "or to any purchaser" from them (*Re Peacock*, 14 Ch. Div. 212; see *Re New Zealand Trust Co.*, 1893, 1 Ch. 403). For form of order where one of two new trustees died before the stock was transferred to him, see *Re Glanville* (1877, W. N. 248; 1878, W. N. 21); and see generally as to forms of orders, sub-sect. iii. (a), and note (*d*), *infra*; *Re Tweedy* (28 Ch. Div. 529); *Re Hopper* (54 L. T. 267); Seton, 6th ed. 1212 *et seq.*

In a case since this act the court, on an application made in Chancery alone for appointment of new trustees and a vesting order, refused to make an order vesting stock standing in the name of a lunatic trustee (*Re M.*, 1899, 1 Ch. 79).

Sub-sect. (ii.) (a).

(*y*) Before this act the case of infancy was dealt with by sect. 3 of the Trustee Act, 1852.

56 & 57 Vict. c. 53, s. 35.

Where consols were standing in the name of an infant, who was the sole beneficial owner, but subject to an express power of maintenance, which was vested in an executor, the infant was declared a trustee, and the right to transfer the consols was vested in the executor (*Gardner* v. *Cowles*, 3 Ch. D. 304; see *Sanders* v. *Homer*, 25 Beav. 467; *Rives* v. *Rives*, 1866, W. N. 144). So also, where there was no express power, but only an order by a Scotch court empowering a *curator bonis* to advance part of the capital (*Re Findlay*, 32 Ch. D. 221). In the last-mentioned case, the Bank of England objecting on the ground that there was no jurisdiction to declare the infant a trustee or make a vesting order, the order was abandoned by the parties, and the income was ordered to be paid to the guardian of the infant pursuant to 11 Geo. 4 & 1 Will. 4, c. 65, s. 32 (32 Ch. D. 641; see *Re Westwood*, 6 N. R. 61, 316). In *Gardner* v. *Cowles* and *Sanders* v. *Homer*, *sup.*, the stock was ordered to be transferred into court.

Infant solely entitled.

Where consols are standing in the name of an infant, powers of accumulation at the request of the guardian are given by sect. 3 of the National Debt (Stockholders Relief) Act, 1892.

Infant jointly entitled with other person.

Where stock to which an infant was beneficially entitled was standing in the joint names of himself and another person, it was vested by an order in that other person (*Re Harwood*, 20 Ch. D. 536; *Re Barnett*, 1889, W. N. 216). Where a father under a mistake transferred stock into the joint names of himself, his wife, and an infant child, the court declared the infant a trustee for the father (*Devoy* v. *Devoy*, 3 Sm. & Giff. 403; followed in *Stone* v. *Stone*, 3 Jur. N. S. 708). Where stock was standing in the names of three trustees and an infant, and two trustees were dead, and the third was out of the jurisdiction, the court appointed a guardian and allowed maintenance, and vested the right to receive the dividends in the guardian during the minority (*Re Morgan*, Seton, 6th ed. 1219).

For forms of orders, see Seton, 6th ed. 1238, 1243.

Sub-sect. (ii.) (b) (c). Out of the jurisdiction, &c.

(z) Before this act the case of a trustee out of the jurisdiction, &c. was dealt with by sects. 22 and 25 of the Trustee Act, 1850. Under sect. 22 it was held that where a lunatic trustee was also out of the jurisdiction, the Chancery Division might alone make a vesting order (*Re Gardner*, 10 Ch. D. 29; see *Re M.*, 1899, 1 Ch. 79. See, however, *Cramer* v. *Cramer*, 5 D. & Sm. 312; and see *Re Smith*, I. R. 4 Eq. 180).

Where a trustee of stock was absent from England in command of a vessel on a voyage to India, he was not out of the jurisdiction within 11 Geo. 4 & 1 Will. 4, c. 60 (*Hutchison* v. *Stephens*, 5 Sim. 498). A debtor in India mortgaged shares in an English company to a creditor in England; upon sale by the mortgagee the debtor was a trustee of the shares for the purchaser (*Re Angelo*, 5 De G. & Sm. 278).

Bank stock was standing in the names of four trustees, of whom one was abroad, but the parties were unwilling to remove him. Under the circumstances (and notwithstanding an objection by the Bank that the title to the dividends and the corpus of the stock would be severed), the court vested the right to receive past and future dividends in the three other trustees during their joint lives (*Re Peyton*, 25 Beav. 317; 2 De G. & J. 290).

Where one out of four trustees absconded, the trust choses in action were vested in the other three, no new trustee being required (*Re Lees*, 1896, 2 Ch. 508; see the note *ante*, p. 767). Where one of two trustees was abroad, and a new trustee had been appointed in his place, the right to transfer was vested in the continuing and new trustees (*Re Blaine*, 1886, W. N. 203; *Re Keeley*, 53 L. T. 487). The new trustee should be co-petitioner (*Re Keeley*, *sup.*). It should appear on the face of the order that the trustee is out of the jurisdiction (*Re Mainwaring*, 26 Beav. 172).

The case of a "personal representative" being out of the jurisdiction or impossible to find was specifically dealt with by sect. 25 of the Trustee Act, 1850, under which orders applicable to such a case were made in *Re Dickson* (1872, W. N. 223); *Re Crowe* (14 Ch. D. 304, 610); *Re Price* (1883, W. N. 202); *Re Trubee* (1892, 3 Ch. 55).

56 & 57 Vict. c. 53, s. 35.

Under the present sub-section a vesting order was made in *Re Price* (1894, W. N. 169). See the forms, Seton, 6th ed. 1238 *et seq.*

Sub-sect. (ii.) (d). Neglect to transfer after request.

(*a*) The case of neglect to transfer after request by beneficiary was dealt with by sects. 23, 24, and 25 of the Trustee Act, 1850; under which it was held that new trustees properly appointed were persons "absolutely entitled" (*Ex p. Russell*, 1 Sim. N. S. 404; *Re Ellis*, 24 Beav. 426; *Re Baxter*, 2 Sm. & Giff. App. 5; see *Re Stroud*, 1874, W. N. 180); but not one of such trustees, nor a tenant for life (*Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338). Where two executors of a surviving trustee refused to transfer to persons absolutely entitled, and the third executor was lunatic, a vesting order was made in Lunacy and Chancery (*Re White*, 5 Ch. 698; *Re Wacher*, 22 Ch. Div. 535). The right to dividends accrued before his request was vested in the beneficiary; but it was held that the court had no authority to make an order as to dividends accrued subsequent to the request (*Re Hartnall*, 5 De G. & Sm. 111).

The case of a "personal representative" refusing to transfer, &c. was specifically dealt with by sect. 25 of the Trustee Act, 1850, under which orders applicable to such a case were made in *Re Ellis* (24 Beav. 426); *Re Stroud* (1874, W. N. 180); *Re Trubee* (1892, 3 Ch. 55).

Under the present sub-section it has been held that the jurisdiction to make a vesting order does not arise before the twenty-eight days have expired (*Re Knox*, 1895, 1 Ch. 538; 2 Ch. 483). Under sects. 23 and 24 of the Trustee Act, 1850, service on the recusant trustee was not required (*Re Baxter*, 2 Sm. & Giff. App. v.; *Ex p. Armstrong*, 16 Sim. 296; see *Re Mount*, 24 L. T. 290). In a case under the present act, where the recusant trustee was served, he was ordered to pay costs (*Re Knox*, 1895, 2 Ch. 483; see sect. 38, *post*). See the forms, Seton, 6th ed. 1240 *et seq.*

Sub-sect. (ii.) (e). Neglect to transfer after service of an order.

(*b*) Before this act the case of neglect to transfer after service of an order was dealt with by sects. 4 and 5 of the Trustee Act, 1852; under which it was held that the vesting order must not deal with a larger subject-matter than the previous order which it proposes to enforce (*Skynner* v. *Pelichet*, 9 W. R. 191).

As to whether service of such previous order on the trustee personally is necessary, see *Coles* v. *Benbow* (1873, W. N. 60).

An order was made upon motion (*Re Holbrook*, 8 W. R. 3).

Applications under this sub-section should be in chambers (R. S. C. Ord. 55, r. 13a (c)).

For forms of order, see Seton, 6th ed., 1244.

Sub-sect. (iii.). Uncertainty as to death of trustee.

(*c*) Before this act, uncertainty as to whether a trustee was alive or dead was dealt with by sect. 22 of the Trustee Act, 1850. Where stock was standing in the names of A. and B. as trustees, and it was believed that A. had died previously, but strict proof could not be furnished, an order was made upon B.'s subsequent death appointing the bank's officer to concur with B.'s executor in transferring the stock into court (*Re Bourke*, 2 De G. J. & Sm. 426).

Sub-sects. (2)—(5). General note as to orders vesting stock, &c.

(*d*) The effect of a vesting order is to transfer to the new trustees of a will the rights and powers of the old trustees, so that administration with the will annexed will be granted to them (*Woodfall* v. *Arbuthnot*, L. R. 3 P. & M. 108).

Form of order.

Where a vesting order is made by the Chancery Division in relation to trust stock or shares fully paid up, the order should vest in the person named the right to transfer the stock or shares. [The forms in Seton, 6th ed., 1212—1214, omit the words "to call for a transfer" as unnecessary.] As a rule, the order should go on to direct those persons to transfer the stock into their own names (*Re Gregson*, 1893, 3 Ch. 233; *Re Joliffe*, 1893, W. N. 84; *Re Price*, 1894, W. N. 169; Seton, 6th ed., 1214; compare the order made by the Court of Lunacy, *Re C. M. G.*, 1898, 2 Ch. 324). But under special circumstances (as in the case of shares not fully paid) this direction may be omitted (*Re New Zealand Trust Co.*, 1893, 1 Ch. 403; *Re Gregson, sup.*). The order may, under special circumstances, vest in the trustees a right to transfer the stock or shares to themselves "or any purchaser" (*Re Peacock*, 14 Ch. Div. 212; *Re New Zealand Trust Co.*, 1893, 1 Ch. 411; Seton, 6th ed., 1212).

Sub-sect. (5) replaces sect. 31 of the Trustee Act, 1850, under which it was held that the court might order the person, in whom the right to transfer stock was vested, to transfer it into court (*Re Pitt*, 1 Jur. N. S. 1155; *Re Dawson*, 3 N. R. 397), *e.g.*, under the Trustee Relief Act (*Re Draper*, 9 W. R. 805; *Re Thornton*, 9 W. R. 475; see *Re Mais*, 21 L. J. Ch. 875). **56 & 57 Vict. c. 53, s. 35.**

As to form of application and service, see further the notes to sects. 25 and 26, *sup.* Practice.

The Bank of England are bound to comply with a vesting order in proper form, but are entitled to require that the order shall show that the statutory requirements have been satisfied (*Re Tweedy*, 28 Ch. Div. 529; see *Re Ellis*, 24 Beav. 426; *Re Gregson*, 1893, 3 Ch. 233; *Re C. M. G.*, 1898, 2 Ch. 324; *Re Mainwaring*, 26 Beav. 172). Sect. 49 (*post*) provides an indemnity for the Bank and others acting under an order. Where a vesting order had been made in chambers, the Bank of England refused to act on it (*Re Griffith*, 1889, W. N. 171); and a vesting order was subsequently made on motion (*Ib.*; see *Re Jones*, 1889, W. N. 196; 61 L. T. 554). Where the Bank's officer is appointed to join in making a transfer, he can only transfer for the person divested by the order. Any person jointly entitled must join (*Wade* v. *Hopkinson*, Seton, 6th ed., 1254). **Bank of England.**

As regards vesting the right to transfer stock in *cestui que trusts* absolutely entitled, orders of this nature were made under sect. 22 of the Trustee Act, 1850 (*Exp. Bradshaw*, 2 D. M. & G. 900; *Re Ryan*, 9 W. R. 137; see *Re White*, 5 Ch. 698; *Re Barber*, 58 L. T. 303; see *contra*, *Re Brass*, 4 W. R. 764). Similar orders were made where the persons absolutely entitled were appointed new trustees (*Re Dickson*, 21 W. R. 220; *Re Price*, 1883, W. N. 202). The right to transfer stock was vested in a trustee who was beneficially interested, but only for the purpose of a transfer into court (*Frodsham* v. *Frodsham*, 15 Ch. D. 317). **Vesting stock in beneficiaries absolutely entitled.**

36.—(1.) An order under this act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof. **Persons entitled to apply for orders.**

(2.) An order under this act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

This section replaces sect. 37 of the Trustee Act, 1850, under which act the following cases were decided:—

Where executors and trustees of a naturalized British subject renounced probate and declined to act, the court, on the petition of the administrator and the persons who would (if not aliens) have been co-heirs, appointed new trustees and vested the real estate in them (*Re Martinez*, 22 L. T. 403). A person who has a contingent interest in real estate may apply for the appointment of new trustees (*Re Sheppard*, 4 D. F. & J. 423; *Re Harden Chapel*, 1 W. R. 212). Where there are infants *cestuis que trusts*, it is not sufficient that the adult *cestuis que trusts* should be petitioners; the infants (by their next friend) should join (*Re Fellows*, 2 Jur. N. S. 62). A lunatic *cestui que trust* should apply by his next friend; an order will not be made on the application of the committee alone (*Re Bourke*, 2 D. J. & S. 426). In the case of a lunatic mortgagee, the application should be made by the committee (*Re Wheeler*, 1 D. M. & G. 434; see, however, *Re Sparkes*, 6 Ch. Div. 361). A married **Infants.** **Lunatics.** **Married women.**

56 & 57 Vict. c. 53, s. 36.

woman since 1882 can apply without her husband (*Re Outwin*, 48 L. T. 410).

New trustee.

In a petition for a vesting order a new trustee recently appointed by deed was required to be joined as co-petitioner (*Re Keeley*, 53 L. T. 487).

Creditors who have obtained decree.

Creditors who have obtained a decree for the administration of the estate of their debtor, under which a contract for sale of his real estate has been entered into, may apply for a vesting order (*Re Wragg*, 1 D. J. & S. 356). And where a decree for sale had been made, it was held that a petition was properly presented by a purchaser whose money was in court (*Ayles* v. *Cox*, 17 Beav. 584; *Gough* v. *Bage*, 25 L. T. 738). Three purchasers of different lots were allowed to join in one petition (*Rowley* v. *Adams*, 14 Beav. 130).

Purchasers under decree.

In general, proceedings under the Trustee Act, 1893, are regulated by Rules of Court. See R. S. C. Ord. 54 b, Ord. 55, r. 13a, which will be found in the Annual Practice.

Powers of new trustee appointed by court.

37. Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

This section replaces sect. 33 of the Trustee Act, 1850, and sect. 33 of the Conv. Act, 1881. Before these sections trustees appointed by the court could not appoint others in their place (*Holder* v. *Durbin*, 11 Beav. 594), or exercise discretionary powers (*Newman* v. *Warner*, 1 Sim. N. S. 457).

Power to charge costs on trust estate.

38. The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just.

This section replaces sect. 51 of the Trustee Act, 1850.

Mode of raising costs.

Costs may be charged on the inheritance (*Ex p. Davies*, 16 Jur. 882; Seton, 6th ed. 1217), or may be ordered to be raised by mortgage (*Re Crabtree*, 14 W. R. 497), or to be paid out of the corpus of the fund (Seton, 6th ed. 1245). In the case of two trust funds the costs may be apportioned (*Re Grant*, 2 J. & H. 754; see *Re Allen*, 1889, W. N. 132). The amount of the trust fund was not alone a sufficient reason for directing costs on the higher scale (*Re Spettigue*, 32 W. R. 385).

Costs, by whom payable.

The costs of appointing new trustees will in general be paid out of corpus (*Carter* v. *Sebright*, 26 Beav. 376). As to what these costs properly include, see *Harvey* v. *Olliver* (57 L. T. 239). But where the application is solely for the benefit of a life tenant (Seton, 6th ed. 1258), or of a reversioner (*Re Brackenbury*, 10 Eq. 45), the costs will be paid by the applicant.

As to the costs of two petitions presented on the same day, see *Re Pring* (28 L. T. 467). Where a bill was filed instead of a petition under the Trustee Act, 1850, the plaintiff paid all costs (*Thomas* v. *Walker*, 18 Beav. 521).

Respondents.

On petitions under the Trustee Act, 1850, there was no jurisdiction

to order respondents to pay costs (*Re Primrose*, 23 Beav. 590; see *Re Knight*, 26 Ch. D. 82, 91; *Re Mills*, 34 Ch. Div. 33). The present section, however, gives such jurisdiction (*Re Knox*, 1895, 1 Ch. 538; 2 Ch. 483). A respondent had to pay the costs of unnecessary charges in his affidavit (*Re Willis*, 12 W. R. 97); and a trustee improperly opposing a petition paid his own costs of opposition, and from his remaining costs were deducted the costs of other parties in respect of the opposition (*Re Wiseman*, 18 W. R. 574). A trustee may lose his right to costs by misconduct (*Re Knight*, 26 Ch. Div. 82). 56 & 57 Vict. c. 53, s. 38.

A lord of the manor appearing to consent pays his own costs (*Ayles* v. *Cox*, 17 Beav. 584). A tenant for life in remainder appearing in his own interest pays his own costs (*Re Thornton*, 9 W. R. 475). If a respondent is improperly served, no costs will be allowed (R. S. C. Ord. 65, r. 27 (23); *Day* v. *Croft*, 19 Beav. 518). As to whether if he is properly served he loses his costs by having notice not to appear, see *Turner* v. *Mullineux* (9 W. R. 252). As to tender of costs on service, see R. S. C. Ord. 65, r. 27 (19).

As between vendor and purchaser, the costs of proceedings under this act should be paid by the vendor (*Bradley* v. *Munton*, 16 Beav. 294; *Ayles* v. *Cox*, 17 Beav. 584); but a railway company purchasing paid such costs (*Re Nash*, 4 W. R. 111). Between vendor and purchaser.

As to the costs of proceedings occasioned by the lunacy of a trustee, or of a mortgagee or his heir, see the note to sect. 142 of the Lunacy Act, 1890 (*post*, p. 802).

39. The powers conferred by this act as to vesting orders may be exercised for vesting any land, stock, or chose in action in any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction. Trustees of charities.

This section replaces sect. 45 of the Trustee Act, 1850, under which an order was made in *Re Davenport* (4 D. M. & G. 839); see *Re Lincoln Chapel* (1 Jur. N. S. 1011). New trustees of charities can be appointed (1) by the parties either under an express power, or under sect. 10 of the present act (*Re Coates to Parsons*, 34 Ch. D. 370; Trustees Appointment Act, 1890, s. 3); or (2) by a judge in chambers under the Charitable Trusts Act, 1853, s. 28 (see R. S. C. Ord. 55, r. 13); or (3) by the Charity Commissioners under the Charitable Trusts Act, 1860, s. 2. Enactments providing that upon the appointment of new trustees of charities the land shall vest in the new trustees without conveyance, are contained in the Trustees Appointment Acts, 1850, 1869 and 1890.

As to vesting orders where a charity trustee is a lunatic, see the Lunacy Act, 1890, s. 138, *post*, p. 801.

40. Where a vesting order is made as to any land under this act or under the Lunacy Act, 1890, or under any act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an Orders made upon certain allegations to be conclusive evidence. 53 & 54 Vict. c. 5.

56 & 57 Vict. c. 53, s. 40.

allegation that any trustee or mortgagee has died intestate without an heir or has died and it is not known who is his heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained.

This section replaces sect. 44 of the Trustee Act, 1850.

Application of vesting order to land out of England.

41. The powers of the High Court in England to make vesting orders under this act shall extend to all land and personal estate in Her Majesty's dominions, except Scotland.

This section replaces sect. 54 of the Trustee Act, 1850; under which vesting orders were made by the English Court of Chancery as to lands in Ireland (*Re Hewitt*, 6 W. R. 537; *Re Taitt*, 1870, W. N. 25), and in Canada (*Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T. 336). As to the jurisdiction in lunacy over lands and personal estate in Scotland and Ireland, see now Lunacy Act, 1890, s. 110 (*post*, p. 796). Before the repeal by the last-mentioned act of sect. 56 of Trustee Act, 1850, it was held that there was no jurisdiction in lunacy over Irish lands (*Re Davies*, 3 Mac. & G. 278) or Irish railway stock (*Re Hodgson, Kenlis* v. *Hodgson*, 11 Ch. Div. 888); but that the L.JJ. as additional judges of the Chancery Division for the purposes of lunacy applications had such jurisdiction (*Re Lamotte*, 4 Ch. Div. 325; *Re Smyth*, 55 L. T. 37); and that the petition should be entitled in lunacy and in Chancery (*Ib.*).

The provisions of the former Trustee Acts were extended to the private property of the sovereign in England and Ireland (25 & 26 Vict. c. 37, s. 10). See now sect. 38 of the Interpretation Act, 1889.

By the Trustee, &c. Act, 1894, s. 2 (*post*, p. 795), the powers conferred by sect. 41 of the present act were also given to the High Court in Ireland.

Payment into Court by Trustees.

Payment into court by trustees.

42.—(1.) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of court, be dealt with according to the orders of the High Court.

(2.) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.

(3.) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the court may order payment or delivery of the moneys or securities to the majority of trustees for the purpose of payment into court, and

every transfer, payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered. 56 & 57 Vict. c. 53, s. 42.

This section replaces the Trustee Relief Acts, 1847 and 1849, which are repealed by sect. 51, *post*. Under those acts it was held that where a difficulty affecting trust funds in the hands of trustees could be dealt with by means of a summons under R. S. C. Ord. 55, r. 3, the funds should not be paid into court, but a summons should be issued (*Re Giles*, 55 L. T. 51; 55 L. J. Ch. 695; see *Re Birkett*, 9 Ch. D. 576; *Re Parker*, 39 Ch. D. 303). Payment into court was held to deprive trustees of their discretion as to application of the fund (*Re Murphy*, 1900, 1 Ir. R. 145). Where the money is paid into court, the course pointed out in R. S. C. Ord. 54B, r. 4, and S. C. Funds Rules, 1894, r. 41 (see Annual Practice), should be followed. The general practice under the acts is stated, Seton, 6th ed. 1191, *et seq.*

Miscellaneous.

43. Where in any action the High Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the court, and that he cannot be found, the court may hear and determine the action and give judgment therein against that person in his character of a trustee, as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character. Power to give judgment in absence of a trustee.

This section replaces sect. 49 of the Trustee Act, 1850.

Under the old practice a cause might be certified as fit to be set down, where a defendant trustee who had not entered an appearance could not be found (*Westhead* v. *Sale*, 6 W. R. 52; *Burrell* v. *Maxwell*, 25 L. T. 655). For the present practice, where a defendant does not appear, see R. S. C. Ord. 13, r. 12; and as to the cases in which one trustee can be sued in the absence of his co-trustee, see notes to R. S. C. Ord. 16, rr. 6 and 8 in the Annual Practice.

44.—(1.) Where a trustee [*or other person*] is for the time being authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land. Power to sanction sale of land or minerals separately.

(2.) Any such trustee [*or other person*], with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the court, so dispose of any such land or minerals.

(3.) Nothing in this section shall derogate from any power

56 & 57 Vict. c. 53, s. 41.

which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise.

The words in brackets were added by the Trustee Act, 1894, s. 3 (*post*, p. 795).

This section replaces sect. 2 of 25 & 26 Vict. c. 108; which act was passed in consequence of the decisions in *Buckley* v. *Howell* (29 Beav. 546); *Cholmley* v. *Paxton* (3 Bing. 207). Under the section referred to most of the following cases were decided.

The court will sanction a sale of land reserving the minerals, or of the minerals apart from the land without reference to any particular sale (*Re Willway*, 32 L. J. Ch. 226; *Re Wynn*, 28 L. T. 615; 21 W. R. 695).

Practice. The application may be by the trustees (R. S. C. Ord. 54B, r. 3), or by the mortgagees (*Re Wilkinson*, 13 Eq. 634). A petition by mortgagees must be served on the mortgagor (*Re Hirst*, 45 Ch. D. 263); but not on subsequent incumbrancers (*Re Beaumont*, 12 Eq. 86). Where a petition is presented for the sanction of the court to a sale of the land apart from the minerals, the beneficiaries should be served or be made parties to the application (*Re Brown*, 11 W. R. 19; *Re Palmer*, 13 Eq. 408). Where trustees, with a power of sale exercisable with the consent of the tenant for life, presented a petition for leave to sell the land and minerals separately, service on beneficiaries entitled in remainder was held unnecessary (*Re Pryse*, 10 Eq. 531; *Re Nagle*, 6 Ch. D. 104; see *Re Wynn*, *sup.*; *Re Wadsworth*, 63 L. T. 217; *Re Skinner*, 1896, W. N. 68). But service on the remaindermen was required in *Re Hardstaff* (1899, W. N. 256).

Forms. For form of petition, see Dan. Ch. Forms, and for form of orders, see Seton, 6th ed. 1748.

As to leases of land and minerals separately under the S. L. Acts, see *Re Gladstone*, *Gladstone* v. *Gladstone* (1900, 2 Ch. 101); and under a special power, see *Re Rutland*, *Rutland* v. *Bristol* (1900, 2 Ch. 206).

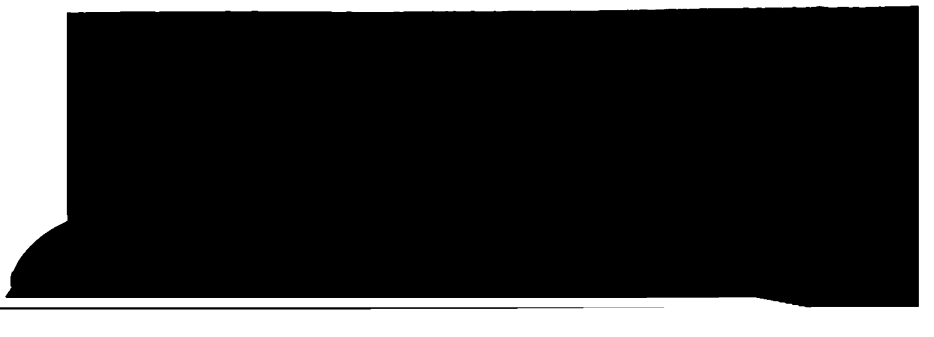
Power to make beneficiary indemnify for breach of trust.

45.—(1.) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing (*i*) of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him (*k*).

(2.) This section shall apply to breaches of trust committed as well before as after the passing of this act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the 24th day of December, 1888, and is pending at the commencement of this act.

This section replaces sect. 6 of the Trustee Act, 1888, the language of which is supposed to have been taken from *Raby* v. *Ridehalgh* (7 D. M. & G. 104); see *Re Somerset*, *Somerset* v. *Poulett* (1894, 1 Ch. 262). The power of impounding is not a new power but had been exercised by the court before 1888 (see *Raby* v. *Ridehalgh*, *sup.*; *Sawyer* v. *Sawyer*, 28 Ch. D. 595; *Re Somerset*, 1894, 1 Ch. 275). The earlier cases are collected in Lewin, 10th ed. 1119. The section has invested the court with a judicial discretion which it seems will be exercised on the same principles as were adopted before the statute (*Bolton* v. *Curre*, 1895, 1 Ch. 549; see *Re Somerset*, 1894, 1 Ch. 275).

It has been said that the section does not operate to curtail the



previously existing rights and remedies of trustees or to alter the law except by giving greater power to the court (*Bolton* v. *Curre*, 1895, 1 Ch. 549). It has been also said that the section is addressed to describe the case in which the court may impound the interest of the beneficiary, and also to provide that for the purposes of the section the beneficiary's consent must be given in writing (*Chillingworth* v. *Chambers*, 1896, 1 Ch. 707). 56 & 57 Vict. c. 53, s. 45.

(*i*) The words "in writing" govern only the word "consent," not the words "instigation or request" (*Griffith* v. *Hughes*, 1892, 3 Ch. 105; *Re Somerset, Somerset* v. *Poulett*, 1894, 1 Ch. 265).

(*k*) "In order to bring a case within this section the *cestui que trust* must instigate, or request, or consent in writing to, some act or omission which is itself a breach of trust, and not some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees" (*Re Somerset*, 1894, 1 Ch. 265). The beneficiary must know the facts which rendered what he was instigating, requesting, or consenting to in writing, a breach of trust (*Ib.* 270, 274; see *Mara* v. *Browne*, 1895, 2 Ch. 69). Constructive notice of such facts is not sufficient (*Re Somerset*, 1894, 1 Ch. 267).

The liability of the interest of the beneficiary in the trust estate to be impounded is not limited by the amount of the benefit, if any, which he may have derived from the breach of trust, but extends to the whole interest. It exists even where the beneficiary derives no such benefit (*Chillingworth* v. *Chambers*, 1896, 1 Ch. 699, 700). The liability is not affected by the fact that the beneficiary is one of several trustees who has participated in the breach, and as such trustee would otherwise be entitled to contribution from the co-trustees. Thus where two trustees were equally to blame for a breach and after the breach one acquired a beneficial interest greater than the loss resulting from the breach, the whole loss was made good out of such interest, and a claim to make the co-trustee contribute was refused (*Chillingworth* v. *Chambers*, 1896, 1 Ch. 685).

In the case of a married woman restrained from anticipation, trustees have a duty to protect her, and the court will be slow to impound her interest to recoup them when they knowingly commit a breach of trust (*Bolton* v. *Curre*, 1895, 1 Ch. 544; see *Sawyer* v. *Sawyer*, 28 Ch. D. 595; *Ricketts* v. *Ricketts*, 64 L. T. 263; *Mara* v. *Browne*, 1895, 2 Ch. 69; in all of which cases impounding was refused). Such an interest was impounded in *Griffith* v. *Hughes* (1892, 3 Ch. 105).

The equity of a trustee to have the interest of a *cestui que trust* impounded will affect that interest in the hands of an assignee who purchased subsequently to the breach of trust (*Bolton* v. *Curre*, 1895, 1 Ch. 544). The refusal by the trustee at the time of the breach of trust of an express charge on the interest of the *c. q. t.* is not a waiver of this equity (*Ib.*).

In an action by beneficiaries against the tenant for life and the trustees for a breach of trust, the trustees claimed to impound the interest of the tenant for life, but gave no notice under Ord. 16, r. 55. At the trial leave was given to the trustees to apply in chambers with reference to enforcing their right to impound (*Re Holt, Holt* v. *Holt*, 1897, 2 Ch. 525; see *Molyneux* v. *Fletcher*, 1898, 1 Q. B. 656).

46. The provisions of this act with respect to the High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this act in palatine courts and county courts shall be in accordance with the acts and rules regulating the procedure of those courts. Jurisdiction of palatine and county courts.

56 & 57 Vict. c. 53, s. 47.

PART IV.

Miscellaneous and Supplemental.

Application to trustees under Settled Land Acts of provisions as to appointment of trustees.

47.—(1.) All the powers and provisions contained in this act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the court or by the settlement, or under provisions contained in the settlement.

(2.) This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this act.

(3.) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this act, otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881.

44 & 45 Vict. c. 41.

This section replaces sect. 17 of the S. L. Act, 1890.

Trust estates not affected by trustee becoming a convict.

33 & 34 Vict. c. 23.

48. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

Compare sects. 46 and 47 of the Trustee Act, 1850.

By the Forfeiture Act, 1870, s. 1, it is enacted, that from and after the 4th July, 1870, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat, but nothing in the act is to affect the law of forfeiture consequent on outlawry. The Crown is empowered to appoint an administrator, in whom the convict's property vests (sects. 9, 10), and provision is made as to the mode in which the property is to be applied (sects. 12—18).

Power is given by sect. 25 (1) (*ante*, p. 763) to the court to appoint new trustees in lieu of any trustee who has been convicted of felony.

Indemnity.

49. This act, and every order purporting to be made under this act, shall be a complete indemnity to the Banks of England and Ireland, and to all persons for any acts done pursuant thereto; and it shall not be necessary for the bank or for any person to inquire concerning the propriety of the order, or whether the court by which it was made had jurisdiction to make the same.

Definitions.

50. In this act, unless the context otherwise requires,—

The expression "bankrupt" includes, in Ireland, insolvent:

The expression "contingent right," as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent: 56 & 57 Vict. c. 53, s. 50.

The expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of the acts for abolition of fines and recoveries in England and Ireland respectively (*l*), and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land (*m*):

The expression "devisee" includes the heir of a devisee and the devisee of an heir, and any person who may claim right by devolution of title of a similar description:

The expression "instrument" includes Act of Parliament:

The expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land (*n*):

The expressions "mortgage" and "mortgagee" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee (*o*):

The expressions "pay" and "payment" as applied in relation to stocks and securities, and in connexion with the expression "into court" include the deposit or transfer of the same in or into court:

The expression "possessed" applies to receipt of income of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in, any land:

The expression "property" includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not:

The expression "rights" includes estates and interests:

The expression "securities" includes stocks, funds, and shares; and so far as relates to payments into court has

56 & 57 Vict. c. 53, s. 50.

35 & 36 Vict. c. 44.

the same meaning as in the Court of Chancery (Funds) Act, 1872:

The expression "stock" includes fully paid up shares; and, so far as relates to vesting orders made by the court under this act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein (*p*):

The expression "transfer," in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee:

The expression "trust" does not include the duties incident to an estate conveyed by way of mortgage (*q*); but with this exception the expressions "trust" and "trustee" include implied and constructive trusts (*r*), and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person (*s*).

(*l*) A vesting order under this act will, if consented to by the protector of the settlement, bar all estates in remainder, and not pass a base fee only under 3 & 4 Will. 4, c. 74, s. 34 (*Powell* v. *Matthews*, 1 Jur. N. S. 973; *Re Montagu, Faber* v. *Montagu*, 1896, 1 Ch. 549).

(*m*) As to copyholds, see *Rowley* v. *Adams* (14 Beav. 130).

(*n*) Rent-charges were held to be included in the somewhat similar definition of "lands" in the Trustee Act, 1850 (*Re Harrison*, Seton, 6th ed. 1218).

(*o*) As to the meaning of "mortgage," see *Re Underwood* (3 K. & J. 475); *Lawrence* v. *Galsworthy* (3 Jur. N. S. 1049).

(*p*) "Stock" in the Trustee Act, 1850, was held to include shares in a limited company, whether fully paid up or not (*Re New Zealand Trust & Loan Co.*, 1893, 1 Ch. 403; see *Re Angelo*, 5 De G. & S. 278), and annuities from a life office (*Re Tweedy*, 28 Ch. D. 529).

As to registered shares in ships, see sect. 35 (6), *ante*, p. 780.

(*q*) A declaration of trust in an equitable mortgage by the mortgagor of the legal estate, is a trust within the act (*London and County Bank* v. *Goddard*, 1897, 1 Ch. 642).

It was held under the Trustee Act, 1850, that the court had no authority to convey the estate of a mortgagee who had been paid off (*Re Osborn*, 12 Eq. 392); but had authority to transfer the mortgage where the mortgagees were trustees, and one was out of the jurisdiction (*Re Walker*, 3 Ch. D. 209; see *Re Nicholson*, 34 Ch. Div. 663; *Re Underwood*, 3 K. & J. 745).

Constructive trustees.

(*r*) As to constructive trustees in the case of a sale of stock, see *Re Angelo* (5 De G. & Sm. 278); *Re Davis* (12 Eq. 214).

In the case of a sale of land, the general doctrine of equity is that after contract the vendor is a constructive trustee of the land for the purchaser (*Shaw* v. *Foster*, L. R. 5 H. L. 333; see *Lysaght* v. *Edwards*, 2 Ch. D. 506, 510). For the purposes of the Trustee Act, 1850, however, the following distinctions were taken. Where the contract was executed by payment of the purchase-money, the vendor was a trustee (*Re Cuming*, 5 Ch. 72; *Re Colling*, 32 Ch. Div. 336; *Re Wilkinson*, 12 W. R. 522); but not where the contract was unexecuted (*Re Carpenter*, Kay, 418; *Re Faulder*, 1866, W. N. 83; see, however, *Re Badcock*, 2 W. R. 386; *Re Taylor*, 1866, W. N. 5), except in the case of a compulsory sale (*Re Russell*, 35 L. J. Ch. 461; *Re Lowry*, 15 Eq. 78; doubted, *Re Colling*, 32 Ch. Div. 336). Where only part of the purchase-money had been paid but posses-

sion had been given and the vendor was found lunatic, a vesting order was made which was not, however, to be dated until after the payment of the balance (*Re Pagani*, 1892, 1 Ch. 236; *Re Beaufort*, 1898, W. N. 148). Where there is a doubt as to the trusteeship by reason of the title being complicated, an action should be brought (*Re Martin*, 34 Ch. D. 619). In the case of freeholds, where there is a contract binding the heir or devisee, the personal representative can now convey (Conv. Act, 1881, s. 4, *post*, p. 557). 56 & 57 Vict. c. 53, s. 50.

The following persons amongst others were also held to be constructive trustees for the purpose of the Trustee Act, 1850. An assignee of a bankrupt's estate (*Re Joyce*, 2 Eq. 576). An infant beneficially entitled to stock standing in his own name subject to trusts for maintenance (*Gardner* v. *Cowles*, 3 Ch. D. 304; *Re Findlay*, 32 Ch. D. 221). Infant devisees of land as to which the testator had made an agreement of compromise (*Re Taylor*, 1866, W. N. 5). The husband of a *feme covert* trustee (*Re Wood*, 3 D. F. & J. 125; *Ex parte Bradshaw*, 2 D. M. & G. 900). The heir of a person who covenanted in a marriage settlement followed by marriage (*Re Bradley*, 34 W. R. 148). A mortgagor who had covenanted to surrender copyholds (*Re Crowe*, 13 Eq. 26). The heir of an equitable mortgagor who had agreed to execute a legal mortgage (*Re Jones & Co.*, 1888, W. N. 217). An heir who had elected to take on the trusts of a will (*Dewar* v. *Maitland*, 2 Eq. 834). An executor where a legacy was bequeathed to persons in succession (*Re Davis*, 12 Eq. 214).

(*s*) As to appointing under this act a trustee to perform the duties of a personal representative, see *Re Moore, McAlpine* v. *Moore* (21 Ch. D. 778); *Re Willey* (1890, W. N. 1); *Eaton* v. *Daimes* (1894, W. N. 32). Under the Judicial Trustee Act, 1896, s. 1 (*post*, p. 806), the court can now appoint a person to perform such duties, either in place of or in addition to an existing representative (see *Re Ratcliffe*, 1898, 2 Ch. 352).

51. The acts mentioned in the schedule to this act are hereby repealed except as to Scotland to the extent mentioned in the third column of that schedule. Repeal.

52. This act does not extend to Scotland. Extent of act.

53. This act may be cited as the Trustee Act, 1893. Short title.

54. This act shall come into operation on the 1st day of January, 1894. Commencement.

[SCHEDULE.

56 & 57 Vict. c. 53, Sched.

Section 51.

SCHEDULE.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. 3, c. 52.	The Legacy Duty Act, 1796.	Section thirty-two.
9 & 10 Vict. c. 101.	The Public Money Drainage Act, 1846.	Section thirty-seven.
10 & 11 Vict. c. 32.	The Landed Property Improvement (Ireland) Act, 1847.	Section fifty-three.
10 & 11 Vict. c. 96.	An act for better securing trust funds, and for the relief of trustees.	The whole act.
11 & 12 Vict. c. 68.	An act for extending to Ireland an act passed in the last session of Parliament, entitled "An act for better securing trust funds, and for the relief of trustees."	The whole act.
12 & 13 Vict. c. 74.	An act for the further relief of trustees.	The whole act.
13 & 14 Vict. c. 60.	The Trustee Act, 1850	Sections seven to nineteen, twenty-two to twenty-five, twenty-nine, thirty-two to thirty-six, forty-six, forty-seven, forty-nine, fifty-four and fifty-five; also the residue of the act except so far as relates to the court exercising jurisdiction in lunacy in Ireland.
15 & 16 Vict. c. 55.	The Trustee Act, 1852	Sections one to five, eight, and nine; also the residue of the act except so far as relates to the court exercising jurisdiction in lunacy in Ireland.
17 & 18 Vict. c. 82.	The Court of Chancery of Lancaster Act, 1854.	Section eleven.
18 & 19 Vict. c. 91.	The Merchant Shipping Act Amendment Act, 1855.	Section ten, except so far as relates to the court exercising jurisdiction in lunacy in Ireland.
20 & 21 Vict. c. 60.	The Irish Bankrupt and Insolvent Act, 1857.	Section three hundred and twenty-two.
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Sections twenty-six, thirty and thirty-one.
23 & 24 Vict. c. 38.	The Law of Property Amendment Act, 1860.	Section nine.
25 & 26 Vict. c. 108.	An act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	The whole act.
26 & 27 Vict. c. 73.	An act to give further facilities to the holders of Indian stock.	Section four.
27 & 28 Vict. c. 114.	The Improvement of Land Act, 1864.	Section sixty so far as it relates to trustees; and section sixty-one.
28 & 29 Vict. c. 78.	The Mortgage Debenture Act, 1865.	Section forty.
31 & 32 Vict. c. 40.	The Partition Act, 1868	Section seven.
33 & 34 Vict. c. 71.	The National Debt Act, 1870	Section twenty-nine.
34 & 35 Vict. c. 27.	The Debenture Stock Act, 1871.	The whole act.

56 & 57 Vict. c. 53, Sched.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
37 & 38 Vict. c. 78.	The Vendor and Purchaser Act, 1874.	Sections three and six.
38 & 39 Vict. c. 83.	The Local Loans Act, 1875 ..	Sections twenty-one and twenty-seven.
40 & 41 Vict. c. 59.	The Colonial Stock Act, 1877	Section twelve.
43 & 44 Vict. c. 8.	The Isle of Man Loans Act, 1880.	Section seven, so far as it relates to trustees.
44 & 45 Vict. c. 41.	The Conveyancing and Law of Property Act, 1881.	Sections thirty-one to thirty-eight.
45 & 46 Vict. c. 39.	The Conveyancing Act, 1882	Section five.
46 & 47 Vict. c. 52.	The Bankruptcy Act, 1883 ...	Section one hundred and forty-seven.
51 & 52 Vict. c. 59.	The Trustee Act, 1888	The whole act, except sections one and eight.
52 & 53 Vict. c. 32.	The Trust Investment Act, 1889.	The whole act, except sections one and seven.
52 & 53 Vict. c. 47.	The Palatine Court of Durham Act, 1889.	Section eight.
53 & 54 Vict. c. 5.	The Lunacy Act, 1890	Section one hundred and forty.
53 & 54 Vict. c. 69.	The Settled Land Act, 1890..	Section seventeen.
55 & 56 Vict. c. 13.	The Conveyancing and Law of Property Act, 1892.	Section six.

II.—The Trustee Act, 1893, Amendment Act, 1894.

57 & 58 Vict. c. 10.

57 & 58 Vict. c. 10, s. 1. Amendment of 56 & 57 Vict. c. 53, s. 30.

1. In section thirty of the Trustee Act, 1893, the words "as heir, or under the will of a deceased person, for payment of whose debts the judgment was given or order made" shall be repealed.

Extension to Ireland of 56 & 57 Vict. c. 53, s. 41.

2. The powers conferred on the High Court in England by section forty-one of the Trustee Act, 1893, to make vesting orders as to all land and personal estate in Her Majesty's dominions except Scotland, are hereby also given to and may be exercised by the High Court in Ireland.

Amendment of 56 & 57 Vict. c. 53, s. 41.

3. In section forty-four of the Trustee Act, 1893, after the word "trustee" in the first two places where it occurs shall be inserted the words "or other person."

Liability of trustee in case of change of character of investment.

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law.

This section is not retrospective so as to protect a trustee in the case of

57 & 58 Vict. c. 10, s. 4.

his having improperly retained an investment prior to the passing of the act (*Re Chapman, Cocks* v. *Chapman*, 1896, 1 Ch. 323). As to the duties of trustees in regard to retaining securities, especially mortgage securities, see *S. C.*, 1896, 2 Ch. 763.

Short title.

5. This act may be cited as the Trustee Act, 1893, Amendment Act, 1894.

III.—The Lunacy Act, 1890.

53 Vict. c. 5, ss. 110, 128, 129, 135—143, 341.

53 Vict. c. 5.

Jurisdiction in lunacy, in whom vested.

The jurisdiction in lunacy in regard to trustees and mortgagees (as to which see formerly Jud. Act, 1873, s. 17, sub-s. 3; Jud. Act, 1875, s. 7), is now, under sect. 108 (1) of the Lunacy Act, 1890, exerciseable by the Lord Chancellor entrusted by sign manual with the care, and commitment of the custody, of the persons and estates of lunatics, alone or jointly with other judges of the Supreme Court entrusted as aforesaid, or any one or more of such judges. The Lord Chancellor is *ex officio* one of the judges of the Chancery Division of the High Court (Jud. Act, 1873, s. 5), and he has, under sect. 51 of the Jud. Act, 1873, requested the Lords Justices to act as additional judges of the Chancery Division, for the purpose of making orders both in Chancery and lunacy (*Re Platt*, 36 Ch. Div. 410); but this jurisdiction will only be exercised in aid of their jurisdiction in lunacy (*Re Barber*, 39 Ch. Div. 187).

Power of masters.

Under sect. 27 (1) of the Lunacy Act, 1891, the jurisdiction of the judge in lunacy as regards administration and management may be exercised by the masters. By virtue of this sub-section a master may, under sect. 128 of the Lunacy Act, 1890, appoint a person to exercise a power of appointing new trustees vested in a lunatic; and also, under sect. 129, make a vesting order of the trust property (*Re Fuller*, 1900, 2 Ch. 551). But sect. 27 (1) of the 1891 Act does not enable a master to make a vesting order under sect. 136 of the 1890 Act (*Re Langdale*, 1901, 1 Ch. 3).

Powers to extend to British possessions.

110. The powers and authorities given by this act to the judge in lunacy shall extend to property within any British possession.

Committee may exercise power vested in lunatic in character of trustee or guardian.

128. Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs.

A power to appoint new trustees has been held to be a fiduciary power vested in the lunatic "in the character of trustee" (*Re Shortridge*, 1895, 1 Ch. 278; see *Re Skeats*, 42 Ch. D. 522). Where the court authorizes the committee to appoint, it can by the same order vest the trust property in the new trustees when appointed (*Re Fuller*, 1900, 2 Ch. 551; *Re Short-*

ridge, sup.). The form of an order is given in *Re Bowmer* (3 De G. & J. 658). Where the donee of a power to appoint new trustees is a lunatic, the Court of Lunacy does not itself appoint, but acts under this section (*Re Garrod*, 31 Ch. Div. 164). The Chancery Division can appoint (*Ib.*; *Re Heaphy*, 18 W. R. 1070; *Re Sparrow*, 5 Ch. 662). It is better that an appointment should be made under this section, even when it might be made under sect. 10 of the Trustee Act, 1893 (*Re Blake*, 1887, W. N. 173).

53 Vict. c. 5, s. 128.

The exercise by a person appointed under sect. 116 of the Lunacy Act, 1890, of a power of sale vested by settlement in a tenant for life was authorized (*Re X.*, 1894, 2 Ch. 415). It has been held, however, that the power of sale vested by the S. L. Acts in a tenant for life is not a fiduciary power within this section (*Re Bagge*, 1894, 2 Ch. 416, n.). As to his statutory power of leasing, see *Re Salt*, 1896, 1 Ch. 117).

Appointment of new trustees under power to have effect of appointments by High Court, and like orders may be made as under Trustee Act, 1850.

129. Where under this act the committee of the estate, under order of the judge, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may in any such case, where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust which might have been made in the same case under the Trustee Act, 1850, or any act amending the same, on the appointment thereunder of a new trustee or new trustees.

Where the donee of a power of appointing new trustees was lunatic, and the committee under the authority of the court appointed new trustees, the new trustees were under this section appointed to call for a transfer of consols subject to the trust (*Re Shortridge*, 1895, 1 Ch. 278). In a similar case a vesting order was made as to freeholds (*Re Fuller*, 1900, 2 Ch. 551).

Power to vest lands and release contingent right of lunatic trustee or mortgagee.

135.—(1.) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage the judge in lunacy may by order vest such land in such person or persons for such estate, and in such manner, as he directs.

(2.) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs.

(3.) An order under sub-sections (1) and (2) shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right.

(4.) In all cases where an order can be made under this section the judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-sections (1) and (2).

53 Vict. c. 5, s. 135.

(5.) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

(6.) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord or lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things.

This section replaces (as to England) sects. 3 and 4 and parts of sects. 20 and 28 of the Trustee Act, 1850. Where one of four trustees became a lunatic, the trust property was, under sub-sect. (1) of the present section, vested in the other three trustees (*Re Leon*, 1892, 1 Ch. 348). Compare the similar orders made in Chancery under sects. 26 and 35 of the Trustee Act, 1893 (*ante*, pp. 767, 771, 781). When a person who had contracted to sell leaseholds went abroad and was found lunatic there, an order was made under this section vesting the land in the purchaser, the order, however, not to be dated until after payment of the purchase-money (*Re Pagani*, 1892, 1 Ch. 236; see *Re Beaufort*, 1898, W. N. 148).

Cases under Trustee Act, 1850, s. 3.

Under the Trustee Act, 1850, it was held that sect. 3 applied where, on an order for sale instead of partition, one part owner was a lunatic, and a person was appointed to convey for him (*Re Watson*, 58 L. T. 509). In the case of a lease, the legal term could be vested, but not the benefit of a covenant for quiet enjoyment (*Cowper* v. *Harmer*, 57 L. T. 714). A mere power of sale could be vested (*Re Boyce*, 4 D. J. & S. 205). Where a lunatic held land in trust for A. absolutely, the court refused to vest the land in A., but appointed a new trustee and vested the land in him (*Re Holland*, 16 Ch. Div. 672). A mortgage vested in a lunatic mortgagee could be transferred under sect. 3 (*Re Nicholson*, 34 Ch. Div. 663; *contra*, *Re Brown*, 50 L. T. 373).

Whether application should be made in Chancery or lunacy.

Under the Trustee Acts, 1850 and 1852, questions frequently arose whether a vesting order should be made in lunacy, or in Chancery and lunacy, or in Chancery. It was held that, where a trustee or mortgagee was lunatic or of unsound mind, not so found, the vesting order could not be made in Chancery only (*Jeffryes* v. *Drysdale*, 9 W. R. 428; *Re Mason*, 10 Ch. 273; *Re Nicholl*, 18 W. R. 443; *Re Martin*, 34 Ch. D. 618); and, where it dealt exclusively with the estate of a lunatic trustee, should be made in lunacy only (*Re Watson*, 58 L. T. 509; see *Re Watson*, 19 Ch. D. 384; *Re Jones*, 33 Ch. Div. 414; *Re Chauncey*, 14 W. R. 849, where the fund was to come into court; see *Re Dawson*, 6 N. R. 346). Where interests of sane as well as lunatic trustees were dealt with, the order was made in both Chancery and lunacy (*Re Pearson*, 5 Ch. Div. 982; *Re Druce*, 46 L. T. 669; *Re Chell*, 49 L. T. 196; *Re Davidson*, 20 L. J. Ch. 644; *Re Batho*, 39 Ch. Div. 189). So also where part of the trust property was land in Ireland, as to which the Court of Lunacy had formerly no jurisdiction (*Re Lamotte*, 4 Ch. Div. 325; *Re Smyth*, 55 L. T. 37; see now Lunacy Act, 1890, s. 110). A vesting order might be made in Chancery only, where there had been an order for a sale (*Herring* v. *Clark*, 4 Ch. 167; *Stamper* v. *Stamper*, 46 L. T. 372); or where the lunatic trustee was out of the jurisdiction (*Re Gardner*, 10 Ch. D. 29), or was an infant (*Re Arrowsmith*, 4 Jur. N. S. 1123; 6 W. R. 642).

Many of the above decisions were considered in a case since the Trustee Act, 1893, where, on an application in Chancery alone, the court refused

to make a vesting order as regards property vested in a sole trustee who was a lunatic not so found. The older cases appear to be still applicable (*Re M.*, 1899, 1 Ch. 79). 53 Vict. c. 5, s. 135.

Where the fact of the lunacy was disputed, it was held under the Trustee Acts, 1850 and 1852, that the court had no jurisdiction (*Re Walker*, Cr. & Ph. 147; *Re Campbell*, 18 L. T. 202; see *Re Combs*, 51 L. T. 45).

As to the mode and form of application, see Rules in Lunacy, *post*. For the form of a petition by committee of lunatic mortgagor, on payment off of mortgage, see Elmer, Pr. Lun. 240, 5th ed. Where the mortgagee was of unsound mind, and the mortgagor wished to pay off, it was said he should pay the money into court, and would then be entitled to a vesting order (*Re Sparks*, 6 Ch. Div. 361). See *Re Wheeler* (1 D. M. & G. 434), where it was said that in the case of a mortgagee found lunatic, the committee should petition. Where of three trustees, A., B., and C., B. was lunatic, and C. was a new trustee appointed under a power, and it was desired to vest in A. and C.; A. was appointed to convey the estate of himself and B. to himself and C. (*Re Vicat*, 33 Ch. Div. 103). For vesting order in the case of a lunatic tenant in tail, see *Re Mason*, *Mason* v. *Mason* (7 Ch. Div. 707). For form of vesting order, and of order appointing person to convey estates vested in lunatic, see Elmer, 318, 7th ed. See further, as to the form of orders vesting real estate, the note to sect. 26 of the Trustee Act, 1893, *ante*, p. 772. Practice.

A petition for an order, vesting in new trustees property, a trustee of which has been found lunatic, ought to be served on his committee (*Re Saumarez*, 8 D. M. & G. 390; and see *Re Parker*, 32 Beav. 580; *Re Wylde*, 5 D. M. & G. 25); but where the trustee is a person of unsound mind not found lunatic, he need not be served (*Re East*, 8 Ch. 735; *Re Green*, 10 Ch. 272; *Re Weston*, 1898, W. N. 151). Service.

Where a mortgagee became of unsound mind, it was said that the mortgagor should bring the money into court and would then be entitled to a vesting order. The mortgagor would have to pay the costs of the necessary petition, but would not be ordered to pay any costs to the mortgagee (*Re Sparks*, 6 Ch. D. 361). Where the mortgagee had been found lunatic and the committee petitioned, the petitioner's costs came out of the lunatic's estate (*Re Wheeler*, 1 D. M. & G. 434). But in such a case the mortgagor should not be served (*Re Rowley*, 1 D. J. & S. 417); and in no case can have costs out of the lunatic's estate (*Re Phillips*, 4 Ch. 629). The stamp on the vesting order must in any case be paid by the mortgagor (*Re Thomas*, 22 L. J. Ch. 858; *Re Biddle*, 23 L. J. Ch. 23). Where the heir of a mortgagee was a lunatic the mortgagor petitioning paid all costs (*Re Stuart*, 4 De G. & J. 319; *Re Jones*, 2 D. F. & J. 554). Where the lunatic mortgagee was a trustee, the trust appearing on the face of the mortgage, the mortgagor petitioning paid all costs (*Re Lewis*, 1 Mac. & G. 23); but where the trust did not appear, the costs of a petition by the committee and the co-trustees of the lunatic were paid out of the trust estate (*Re Jones*, 2 Ch. Div. 70; see *Re Townsend*, 1 Mac. & G. 686). Costs, where mortgagee or his heir is a lunatic,

Where a trustee becomes lunatic, and an application in lunacy is made for a transfer of the trust funds, no order will be made as to costs (*Re Garden*, 6 N. R. 347). As to the practice under former acts, see *Ex p. Pearce* (T. & R. 325). where trustee a lunatic.

Sub-sect. 4 provides for the appointment of a person to convey, replacing part of sect. 20 of the Trustee Act, 1850, under which persons were appointed to convey on behalf of lunatics in the following cases. Where one of several trustees was a lunatic and a new trustee had been appointed (*Re Jones, Zincraft's Will*, 33 Ch. Div. 414; see *Re Mason*, 10 Ch. 273); in such a case the person appointed may be a continuing trustee (*Re Vicat*, 33 Ch. Div. 103); where the customary heir of a vendor who had covenanted to surrender copyholds was lunatic (*Re Cuming*, 5 Ch. 72); in a partition action when one part owner was lunatic (*Re Nicholson*, 34 Ch. Div. 663); and where after a decree for sale in a partnership action one partner was of unsound mind (*Herring* v. *Clarke*, 4 Ch. 167). Appointing a person to convey.

53 Vict. c. 5, s. 135.

But it was held that a conveyance under that section could not contain any contract binding the lunatic or his estate, such as (in the case of a lease) a covenant for quiet enjoyment (*Cowper* v. *Harmer*, 57 L. T. 714).

Power to vest right to transfer stock and sue for chose in action.

136.—(1.) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

(2.) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons.

(3.) When any stock is standing in the name of a deceased person, whose personal representative is a lunatic, or when a chose in action is vested in a lunatic as the personal representative of a deceased person, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint.

(4.) In all cases where an order can be made under this section, the judge may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(5.) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the Bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor.

(6.) After notice in writing of an order under this section, it shall not be lawful for the Bank or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

As to the meaning of "stock" and "transfer" in this section, see sect. 341, *post*, p. 803.

The jurisdiction under this section cannot be exercised by a master under sect. 27 (1) of the Lunacy Act, 1891 (*Re Langdale*, 1901, 1 Ch. 3).

The section replaces (as to England) sects. 5, 6, and parts of sects. 20, 26, 27 and 31 of the Trustee Act, 1850, and part of sect. 6 of the Trustee Act, 1852. The following cases were decided under those acts.

The wife of a lunatic was sole surviving trustee of stock. An order was made, appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustees the right to transfer the stock (*Re Wood*, 3 D. F. & J. 125). The sole surviving trustee of stock being of unsound mind, the beneficiaries were appointed trustees and the stock vested in them (*Re Currie*, 10 Ch. Div. 93).

The executors of an executor, one of whom was lunatic, were held to be "entitled" within the Trustee Act, 1850, when the stock was standing in the name of the original testator (*Re Wacher*, 22 Ch. Div. 535). Where

one of the three executors of a surviving trustee of shares was of unsound mind, and the other two refused to act, an order was made vesting the right to transfer the shares in the beneficiaries (*Re White*, 5 Ch. 698). 53 Vict. c. 5, s. 136.

Where one of several trustees was lunatic the court vested the right to transfer stock in the remaining trustees (*Re Watson*, 19 Ch. Div. 384); and made such an order as to the whole fund when it was immediately divisible (*Re Martyn*, 26 Ch. Div. 745; see *Re Wacher*, 22 Ch. Div. 535); and as to a part which was immediately payable (*Re Hodgson*, *Kenlis* v. *Hodgson*, 11 Ch. Div. 888). But where there was a continuing trust it was said that a new trustee must be appointed (*Re Nash*, 16 Ch. Div. 503; *Re Aston*, 23 Ch. Div. 217; *Re Ray*, 47 L. T. 500; *Re Hodgson*, *sup.*; see *Re Lamb*, 28 Ch. Div. 77; *Re Gardiner*, 33 Ch. Div. 590; *Re Peacock*, 14 Ch. Div. 212; and the note, *ante*, p. 767). See now *Re Leon*, 1892, 1 Ch. 348, *ante*, p. 798. Where a lunatic was entitled jointly with a person out of the jurisdiction, and it was desired to vest in two new trustees already appointed, the stock was vested in the person out of the jurisdiction and then in the new trustees (*Re Batho*, 39 Ch. Div. 189; see *Re Druce*, 46 L. T. 669; *Re Rolls Hoare*, 1888, W. N. 94).

Where two trustees transferred trust stock into the names of strangers, and one of the trustees subsequently became lunatic, the court would not, under the Trustee Act, 1850, make an order as to the retransfer of the stock (*Re Stewart*, 8 W. R. 297).

Where a person of unsound mind was entitled to a sum of stock, as to part as trustee, and as to the residue beneficially, an order was made enabling new trustees to receive the arrears of dividends on the whole sum of stock, upon an undertaking to invest in the name of the old trustee the dividends to which he was entitled beneficially (*Re Stewart*, 2 D. F. & J. 1; as to the indivisibility of dividends, see also *Skynner* v. *Pelichet*, 9 W. R. 191). As to the form of an order vesting the right to transfer stock, see further *Re Gregson*, 1893, 3 Ch. 233; *Re C. M. G. Spinster*, 1898, 2 Ch. 324; and the rules given in the note to sect. 35 of the Trustee Act, 1893, *ante*, p. 782. Vesting orders as to stock.

As to the mode and form of application, see Rules in Lunacy, *post*.

Sub-sect. 4 replaces part of sect. 20 of the Trustee Act, 1850. As to its operation, see sect. 137; *Re C. M. G. Spinster*, 1898, 2 Ch. 324.

137. Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the Bank, or the company or society whose stock is to be transferred. Person to be appointed to transfer.

This section applies, so far as sect. 136 is concerned, only to sub-sect. 4 thereof (*Re C. M. G. Spinster*, 1898, 2 Ch. 324).

138. The powers conferred by this act as to vesting orders may be exercised for vesting any land, stock, or chose in action in the trustee or trustees of any charity or society over which the High Court would have jurisdiction upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power or by the High Court under its general or statutory jurisdiction. Charity trustees.

See sect. 39 of the Trustee Act, 1893, *ante*, p. 785.

139. The judge in lunacy may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act is to be exercised. Declarations and directions.

53 Vict. c. 5, s. 140.

Order to be conclusive evidence of allegation on which it is founded.

140. The fact that an order for conveying any land or releasing any contingent right has been founded upon an allegation of the personal incapacity of a trustee or mortgagee shall be conclusive evidence of the fact alleged in any court upon any question as to the validity of the order, but this section shall not prevent a judge of the High Court from directing a re-conveyance of any lands or contingent right dealt with by the order, or from directing any party to any proceeding concerning such land or right to pay any costs occasioned by the order when the same appears to have been improperly obtained.

Power to appoint new trustees.

141. In every case in which the judge in lunacy has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing a new trustee or new trustees.

This section replaces sect. 10 of the Trustee Act, 1852. In cases decided under the Trustee Acts, 1850 and 1852, and before the Lunacy Act, 1890, it was held that an order might be made in lunacy alone appointing new trustees in the place of former trustees, of whom some were dead and one a person of unsound mind not so found (*Re Owen*, 4 Ch. 782; *Re Rolls Hoare*, 1888, W. N. 94; see *Re Green*, 10 Ch. 272; *Re Ormerod*, 3 De G. & J. 249); and it was also held that an order might be made in Chancery alone appointing a new trustee in the place of a person of unsound mind not so found (*Re Vickers*, 3 Ch. D. 112; *Re Martin*, 34 Ch. D. 618). In a case decided since the Trustee Act, 1893, an order has been made in Chancery alone appointing a new trustee in a similar case (*Re M.*, 1899, 1 Ch. 79).

As to the consent of the new trustee to act, see r. 92 and Form 12, *post*, pp. 804, 805.

Costs.

142. The judge in lunacy may order the costs of and incident to obtaining an order under the provisions of this act as to vesting orders and carrying the same into effect to be paid out of the land or personal estate or the income thereof in respect of which the order is made, or in such manner as the judge may think fit.

See rules under this act, No. 110 (*post*, p. 804), and the note to sect. 38 of the Trustee Act, 1893, *ante*, p. 784.

As to ordering payment of costs by the Bank of England, see *Re Shortridge*, 1895, 1 Ch. 278; *Re C. M. G. Spinster*, 1898, 2 Ch. 324.

Saving of power of High Court.

143. The provisions of this act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant.

See sects. 26 and 35 of the Trustee Act, 1893 (*ante*, pp. 769, 779), and *Re Arrowsmith* (6 W. R. 642); and the remarks of Stirling, J., *Re M.* (1899, 1 Ch. 84).

Definitions.

341. In this act, if not inconsistent with the context—

"The Bank" means the Governor and Company of the Bank of England:

"Contingent right," as applied to lands, includes a con-

tingent and executory interest, a possibility coupled with an interest whether the object of the gift or limitation of such interest, or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent: 53 Vict. c. 5, s. 341.

"Convey" and "conveyance" include the performance of all formalities required to the validity of conveyances by married women and tenants in tail under the "Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," and also surrenders and other acts which a tenant of copyhold lands can perform preparatory to or in aid of a complete assurance of such copyhold lands: 3 & 4 Will. 4, c. 74.

"Dividends" includes interest and other annual produce:

"Land" includes an undivided share of land:

"Lunatic" means an idiot or person of unsound mind:

"Mortgage" includes every estate, interest, or property in real or personal estate, which is a security for money or money's worth:

"Stock" includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854: 17 & 18 Vict. c. 104.

"Transfer" includes assignment, payment, and other disposition, and the execution, and performance, of every assurance and act to complete a transfer:

"Trust" and "trustee" include implied and constructive trusts, and cases where the trustee has some beneficial interest, and also the duties incident to the office of personal representative of a deceased person, but not the duties incident to an estate conveyed by way of mortgage.

As to constructive trustees, see note (*r*), *ante*, p. 792.

The Rules in Lunacy, 1892.

Lunacy Rules, 1892.

Mode of Application.

After Rule 16, which provides for applications for an order for an inquisition by petition, the subsequent rules are as follows:—

17.—(a) Applications for a traverse and for a supersedeas shall be made by petition.

(b) Applications under that portion of the Lunacy Act, 1890, which relates to "vesting orders" shall be made by summons, unless the judge in lunacy or a master directs a petition to be presented.

This rule was substituted for the old rule in October, 1900.

Lunacy Rules, 1892.

19. All other applications under the Lunacy Acts, 1890 and 1891, or under those acts and also in the Chancery Division, shall, unless the judge or masters shall in any particular case otherwise direct, be made by summons at chambers before the masters.

20. In all cases in which the judge has, under the Lands Clauses Acts, the Settled Estates Act, 1877, the Settled Land Acts, 1882 to 1890, or any other enactment, jurisdiction to make an order upon petition affecting the property of a lunatic, the application for the order shall, unless the judge or master in any particular case otherwise directs, be made by summons at chambers before the masters.

21. If in any case in which the application is not by these rules or by the judge or masters directed to be made by petition, a petition is presented without the direction of the judge or masters, no further costs shall be allowed than would be allowed upon a summons.

23, All matters which require to be brought before the judge, shall be brought before him out of court. The judge may make an order upon any summons or petition without the attendance of counsel, solicitors, or parties, or after such attendance, or may adjourn the summons or petition into court, or refer the same to the masters for inquiry, or further inquiry, upon any matter. Any matter may be adjourned from court for consideration by the judge out of court,

24. The judge and masters respectively may direct any person to be served with notice of any application, and may dispense with service on any person.

Vesting Orders.

57. Applications under that portion of the Lunacy Act, 1890, which relates to "vesting orders" may be made—

(a) Where the application is for the appointment of new trustees, or relates to property subject to a trust, by any person beneficially interested in the property, whether under disability or not, or by any duly appointed trustee thereof.

(b) Where the application relates to any property subject to a mortgage, by any person beneficially interested in the equity of redemption or in the mortgage money, whether under disability or not.

58. The application shall be intituled in the matter of the trust or mortgage, and of the particular lunacy, and in the matter of the Lunacy Act, 1890.

59. The applicant shall serve any such application upon the person or persons who, according to the practice of the Chancery Division of the High Court, would be required or entitled to be served in similar cases.

When the next of kin of a lunatic ought to be served but are unknown, the Attorney-General should be served (*Re Bourke*, 2 De G. J. & S. 426).

Evidence.

92. The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by a solicitor.

Costs.

110. The rules of the Supreme Court as to costs for the time being in force shall, subject to these rules, apply to the costs of proceedings under the Lunacy Acts, 1890 and 1891, taken after the commencement of these rules in any matter.

FORMS *in* SCHEDULE TO RULES *to be used "with such variations as the circumstances require." R.* 9.

Form 1.—Title of Proceedings.

(a) *Application as to Alleged Lunatic.*

In Lunacy.

In the matter of A. B., a person alleged to be of unsound mind.

(b) *Application as to Lunatic so found by Inquisition.*

In Lunacy.

In the matter of A. B., a person of unsound mind.

(c) *Application as to Lunatic not so found by Inquisition.*

In Lunacy.

In the matter of A. B., a person of unsound mind not so found by inquisition.

(d) *Application in Lunacy and in the Chancery Division.*

In Lunacy

and

In the High Court of Justice,

Chancery Division.

In the matter of A. B., a person of unsound mind [*or as the case may be*].

(f) *Application for Vesting Orders.*

In Lunacy.

In the matter of the trusts of an indenture dated , and made between .

and

In the matter of A. B., a person of unsound mind [*or as the case may be*].

and

In the matter of the Lunacy Acts, 1890 and 1891.

Form 12.—Consent to Act.

I, A. B., , of , hereby consent to act as trustee of the [*describe the instrument*].

Dated the day of . (Signed) A. B.

I, C. D., of , solicitor, hereby certify that the above-written signature is the signature of A. B., the person mentioned in the above-written consent.

Dated the day of . (Signed) C. D.

Form 13.—Summons before the Masters.

(*For Title, see Form* 1.)

Let all parties concerned attend the Master in Lunacy in Chambers [*or, in the case of a person through mental infirmity arising from disease or age incapable of managing his affairs*, the Master in Chambers at Room No.], at the Royal Courts of Justice, London, on day, the day of , at o'clock in the noon, on the hearing of an application on the part of [*here state on whose behalf the application is made and its object*].

Dated the day of , 19 .

This summons was taken out by , of , solicitor for .

To .

IV.—The Judicial Trustees Act, 1896.

59 & 60 Vict. c. 35.

59 & 60 Vict. c. 35, s. 1.

Power of court on application to appoint judicial trustee.

1.—(1.) Where application is made to the court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the court may, in its discretion, appoint a person (in this act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees (*a*).

(2.) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this act (*b*).

(3.) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the court is not satisfied of the fitness of a person so nominated an official of the court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the court as an officer thereof (*c*).

(4.) The court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the administration thereof (*d*).

(5.) There may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits, as the court may assign in each case, subject to any rules under this act respecting the application of such remuneration where the judicial trustee is an official of the court, and the remuneration so assigned to any judicial trustee shall, save as the court may for special reasons otherwise order, cover all his work and personal outlay (*e*).

(6.) Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited, and a report thereon made to the court by the prescribed persons, and, in any case where the court shall so direct, an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in the prescribed manner.

Appointment of trustees.

As to the appointment of trustees generally, see the Trustee Act, 1893, s. 10 (*ante*, p. 753), dealing with appointments by the parties, and sect. 25 (*ante*, p. 763), dealing with appointments by the court.

Cases under sub-sect. (1).

(*a*) Upon an application under the present sub-section, where a testator appointed his wife sole executrix, and gave her a life interest in his estate, but appointed no trustees, the court refused at the request of the residuary legatee, to appoint a judicial trustee, but appointed an ordinary trustee under the Trustee Act, 1893 (*Re Ratcliff*, 1898, 2 Ch. 352).

In *Re Martin* (1900, W. N. 129) it was said that the union of a judicial trustee and an ordinary trustee was not desirable; and having regard to the opposition of the majority of the beneficiaries the appointment of a judicial trustee to act with a sole executor and trustee was refused, but an ordinary trustee was appointed.

Sect. 4 of this act gives power to make rules regulating the practice

under the act. This power has been exercised, and the rules are stated at length in the Annual Practice, Vol. II., and also in the current indexes to the Law Reports, 1897 and 1899. See also Seton, 6th ed. 1279.

Rules 2—4 provide for applications to the court; and under r. 6 the court may upon an appointment make vesting orders.

As to the removal and suspension, resignation, &c. of judicial trustees, see rr. 7 (2), (4), 20—24.

Sub-sect. (2).

(*b*) Having regard to this sub-section the court can remove an executor and appoint a judicial trustee in his place (*Re Ratcliff*, 1898, 2 Ch. 352). See also r. 25. Compare the cases under the Trustee Acts, *ante*, p. 793.

Sub-sect. (3).

(*c*) When the court is not satisfied of the fitness of the person nominated by the applicant, it is not necessary to appoint an official of the court, but any fit person may be appointed (*Douglas* v. *Bolan*, 1900, 2 Ch. 749). The court may appoint as judicial trustee a beneficiary or relative of a beneficiary, a solicitor or other person connected with the trust, a married woman, or a person already trustee (see rules under the act, r. 5). Rules 7 and 26 provide for appointing officials of the court, and r. 26 provides for appointing judicial trustees in connection with companies or clubs, or to carry on trades.

Sub-sect. (4).

(*d*) Rules 8—16 provide for the administration of a trust by a judicial trustee. Except where a summons is required by the rules the communication between a judicial trustee and the court is made by letter (r .28).

Sub-sects. (5) and (6).

(*e*) Rules 17—19 provide for remuneration, and r. 14—16 provide for accounts.

Court to exercise jurisdiction.

2. The jurisdiction of the court under this act may be exercised by the High Court, and as respects trusts within its jurisdiction by a palatine court, and (subject to the prescribed definition of the jurisdiction) by any county court judge to whom such jurisdiction may be assigned under this act.

The jurisdiction under the act may be exercised by a master of the High Court or by a registrar of a district registry, or of a palatine or county court (rr. 27, 33; see *Re Martin*, 1901, W. N. 129).

See also as to district registries, and palatine and county courts, rr. 29, 30 and 31.

Jurisdiction of court in cases of breach of trust.

3.—(1.) If it appears to the court that a trustee, whether appointed under this act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve the trustee either wholly or partly from personal liability for the same.

(2.) This section shall come into operation at the passing of this act.

Practice under section.

It is not necessary to plead the act, but *semble* it is better to do so (*Singlehurst* v. *Tapscott Co.*, 1899, W. N. 133). Where inquiries are ordered in an administration action, the trustee should see that such directions are inserted as will insure that proper evidence on any question intended to be raised under the act shall be before the court (*Re Stuart, Smith* v. *Stuart*, 1897, 2 Ch. 588). In the last case the question of relieving the trustee was considered, though only raised for the first time on further consideration.

59 & 60 Vict. c. 35, s. 3.

The words "or may be liable" appear to point to doubtful questions of construction (*Re Grindey, Clews* v. *Grindey*, 1898, 2 Ch. 598).

"May be liable."

Cases on section generally.

As regards the section generally, a narrow construction ought not to be adopted (*Re Grindey, Clews* v. *Grindey*, 1898, 2 Ch. 601; *Re Kay, Mosley* v. *Kay*, 1897, 2 Ch. 524); and it should be carefully but not grudgingly construed in favour of trustees (*Re Roberts, Knight* v. *Roberts*, 76 L. T. 485). In view of the fact that a trustee cannot now as of course procure a trust to be executed by the court, the act was passed to enable the court in a proper case to remedy the hardship of the previous law (*Perrins* v. *Bellamy*, 1899, 1 Ch. 800, 802; *Re Roberts, Knight* v. *Roberts*, 76 L. T. 484). The fact that the trustee does not apply to the court for directions is important (*Re Kay, Mosley* v. *Kay*, 1897, 2 Ch. 523). But in a proper case he may be excused for omitting to apply (*Re Grindey, Clews* v. *Grindey*, 1898, 2 Ch. 593; see *Perrins* v. *Bellamy*, 1899, 1 Ch. 802).

"Honestly."

To obtain relief the trustee must have acted "honestly and reasonably." It was said by *Kekewich*, J., in one case, that a trustee who does nothing and accepts without explanation what is said by his co-trustee, is dishonest (*2nd Dulwich, &c. Society*, 68 L. J. Ch. 198; see *Re Smith, Hands* v. *Andrews*, 1893, 2 Ch. 11). But this seems inconsistent with the ruling of the C. A. in the last-mentioned case (1893, 2 Ch. 18).

"Reasonably."

"Reasonably" means reasonably as trustees (*Re Grindey, Clews* v. *Grindey*, 1898, 2 Ch. 601). In some cases a test, apparently applied to ascertain whether a trustee has acted reasonably, has been to see whether he would have so dealt with his own money (*Re Stuart, Smith* v. *Stuart*, 1897, 2 Ch. 590; *Re Turner, Barker* v. *Ivimey*, 1897, 1 Ch. 542). It has been said, however, that it is not enough to show this, though it would be a point in his favour (*Re Barker, Ravenshaw* v. *Barker*, 77 L. T. 714). It was said in another case that this would not be material except as to *bona fides* (*Re De Clifford, De Clifford* v. *Quilter*, 1900, 2 Ch. 716; compare *Rae* v. *Meek*, 14 App. Cas. 569, 570.) In the case of investments on mortgage, the requirements of sect. 8 of the Trustee Act, 1893, constitute a standard by which reasonable conduct is to be judged; though non-compliance with them is not necessarily fatal to an application for relief (*Re Stuart, Smith* v. *Stuart*, 1897, 2 Ch. 591, 592; see *Waite* v. *Parkinson*, 85 L. T. 456). The conduct of a trustee in investing on mortgage was held not reasonable (*Chapman* v. *Browne*, 1902, 1 Ch. 805).

Instances in which relief has been granted.

Relief has been granted under the section in the following cases:—Where an executor had paid legatees, and the assets subsequently proved insufficient for the debts, the relief being given as to some only of the payments (*Re Kay, Mosley* v. *Kay*, 1897, 2 Ch. 518); where a testator directed his trustees to maintain his estate in the investments existing at his death, and they did not call in a promissory note (*Re Grindey, Clews* v. *Grindey*, 1898, 2 Ch. 593); where trustees having no power of sale sold leaseholds on the advice of their solicitor that they had such a power (*Perrins* v. *Bellamy*, 1899, 1 Ch. 797); where executors paid money to their solicitors in reliance on their statements that it was required for the purposes of administration (*Re De Clifford, De Clifford* v. *Quilter*, 1900, 2 Ch. 707); where an executor abstained on reasonable grounds from attempting to recover a debt due to the estate (*Re Roberts, Knight* v. *Roberts*, 76 L. T. 479).

Relief refused.

Relief has been refused where, after a writ had been issued against him, a trustee continued to make payments to a tenant for life without applying to the court for directions (*Re Kay, Mosley* v. *Kay*, 1897, 2 Ch. 518); also in the case of a trustee who was party to an investment on mortgage held to be improper from the nature and value of the property, though he acted in reliance on his co-trustee who was solicitor to the trust (*Re Turner, Barker* v. *Ivimey*, 1897, 1 Ch. 536; see *Re Stuart, Smith* v. *Stuart*, 1897, 2 Ch. 583; and also *Waite* v. *Parkinson*, 85 L. T. 456, where no costs were given against the trustee; *Chapman* v. *Brown*, 1902, 1 Ch. 785); where a trustee allowed his co-trustee, a member of the firm of solicitors acting for the trust, to receive trust funds which were paid in to the account of the firm (*Wynne* v. *Tempest*, 1897, W. N. 43, where the

trustee was not charged with interest); where trustees for the purpose of investment allowed trust money to be under the control of their solicitor who misappropriated it (*Evans Williams* v. *Byron*, 18 T. L. R. 172; see *Wyman* v. *Paterson*, 1900, A. C. 280); where a sole executrix postponed for fourteen years the sale of investments which ought to have been sold within a year from the death, the executrix not being allowed to set off against the loss suffered on some investments the gain on others (*Re Barker, Ravenshaw* v. *Barker*, 77 L. T. 712). 59 & 60 Vict. c. 35, s. 3.

[*Sect.* 4 *gives power to make rules for carrying into effect this act. Rules were made in* 1897, *which will be found in the Annual Practice, Vol.* 2; *also in the current indexes to the Law Reports for* 1897 *and* 1899; *and see Seton, 6th ed.* 1279.]

5. In this act—

The expression "official of the court" means the holder of such paid office in or connected with the court as may be prescribed. Definitions.

The expression "prescribed" means prescribed by rules under this act.

6.—(1.) This act may be cited as the Judicial Trustees Act, 1896. Short title, extent, and commencement of act.

(2.) This act shall not extend to any charity, whether subject to or exempted from the Charitable Trusts Acts, 1853 to 1894.

(3.) This act shall not extend to Scotland or Ireland.

(4.) This act, except as by this act otherwise provided, shall come into operation on the 1st day of May, 1897.

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